

Reproduced with permission from BNA's Banking Report, 99 BBR 730, 10/30/12, 10/30/2012. Copyright © 2012 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

INTERNATIONAL TRADE

The Perilous Sanctions Regime: Understanding ING Bank's \$619M Settlement With OFAC



BY ZACHARY S. BREZ AND MICHAEL S. CASEY

I. Background

On June 12, 2012, the U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") announced that ING Bank N.V. ("ING Bank") had agreed to pay \$619 million to resolve its civil and crimi-

Zachary S. Brez is a partner in Ropes & Gray's New York office. He works with clients to investigate, mitigate, and advise about their most pressing enforcement, regulatory, and litigation matters. His enforcement and regulatory work focuses on two primary areas: (1) securities and commodities, before the DOJ, SEC, and CFTC, as well as FINRA, the CME, and others; and (2) economic sanctions and export control, primarily before OFAC and BIS. He can be reached at zachary.brez@ropesgray.com. Michael S. Casey is a government enforcement associate in the firm's Washington, D.C. office. He represents companies in internal and government-initiated investigations related to potential violations of laws and regulations administered by BIS and OFAC. He can be reached at michael.casey@ropesgray.com.

nal liability in connection with conduct that potentially violated a host of sanctions regulations promulgated pursuant to the Trading with the Enemy Act (50 U.S.C. § 1) and the International Emergency Economic Powers Act (50 U.S.C. § 1701), as well as New York state laws.

The ING Bank settlement is the latest in a series of high profile agreements that OFAC has reached with major financial institutions to settle allegations of sanctions violations. As stated above, the ING Bank settlement is the largest settlement to date, but in the previous three years, JPMorgan, Barclays, and Credit Suisse agreed to pay \$88 million, \$176 million, and \$536 million, respectively, to settle claims that they violated OFAC's sanctions regulations. These settlements are representative of OFAC's increasingly aggressive approach to investigating individuals and entities for committing violations of the sanctions regulations.

In light of the increased enforcement environment, companies engaging in international business should be aware of the scope of the sanctions regulations and implement compliance programs to reduce the likelihood that they will engage in prohibited conduct. ING Bank's actions that gave rise to the settlement are a cautionary tale of the liability a company may face if it does not take sufficient steps to comply with the sanctions regime. In this article, we will explain the conduct at issue in the ING Bank case, and will then discuss some of the lessons that companies can learn to reduce their potential OFAC liability.

II. ING Bank Factual Summary

OFAC first became aware of problematic conduct by ING Bank in 2004 when an unaffiliated U.S. bank disclosed to the agency suspicious activity by ING Bank related to a letter of credit involving an Iranian bank. Settlement Agreement between U.S. Dep't of Treasury's Office of Foreign Assets Control and ING Bank, N.V. ("OFAC Settlement Agreement") ¶ 13 (2012). In the transaction at issue, Bank Tejerat issued a letter of credit on behalf of Iran Air to finance the purchase of a U.S.-origin aircraft engine from a Romanian trading company. Factual Statement ¶¶ 63-64, *United States v.*

ING Bank, N.V., No. 12cr00136 (D.D.C. June 12, 2012) (ECF No. 2-2). The Romanian trading company contacted ING Bank's Wholesale Banking branch in Romania ("ING Romania") and inquired about transferring the letter of credit to the trading company's "USA Partner." *Id.* To ensure that the letter of credit could be transferred to a U.S. supplier and would not be blocked by a U.S. financial institution, ING Romania and Bank Tejerat removed all references to Iran in the letter of credit. *Id.* ¶ 64. Despite these alterations, an unaffiliated U.S. bank identified a discrepancy in the letter of credit and eventually discovered that Bank Tejerat issued the letter of credit. OFAC Settlement Agreement ¶ 13. After learning this information, the unaffiliated U.S. bank notified OFAC of ING Romania's potential violation of the sanctions violations. *Id.*

Following this incident, ING Bank initiated a comprehensive internal investigation to analyze whether the company had violated OFAC sanctions regulations. *Id.* ¶ 68. As part of the investigation, ING Bank reviewed millions of documents and conducted 775 interviews. *Id.* The investigation illustrated that ING Bank engaged in four major categories of violations, as well as additional minor violations, between 2002 and 2007:

■ **"Stripping" References to Sanctioned Countries:** ING Bank had an ownership interest in two banks in Cuba: Netherlands Caribbean Bank N.V. ("NCB") and ING Bank's representative office in Havana ("ING Havana"). Factual Statement ¶¶ 17-19. NCB "held U.S. dollar bank accounts, and issued U.S. dollar loans and letters of credit for commercial clients." *Id.* ¶ 18. ING Havana "provided trade and commodity finance to Cuban ministries and international clients." *Id.* ¶ 19. ING Bank's Curacao branch ("ING Curacao") processed U.S. dollar payments for both NCB and ING Havana. OFAC Settlement Agreement ¶ 4. Senior management at ING Curacao instructed employees "to avoid Cuba references in payments instructions" so that unaffiliated U.S. financial institutions would not block transactions that involved those offices. *Id.* As a result, ING Curacao personnel "stripped" references to Cuba on payment instructions and utilized "coded references" to refer to Cuba-related information. *Id.* ¶ 5. Furthermore, the Curacao branch utilized payment methods designed to disguise the fact that Cuban parties were involved with the transactions. *Id.* ¶ 6. Similarly, NCB expressly instructed customers making U.S. dollar payments to their NCB accounts not to reference Cuba. *Id.* ¶ 4. At one point an ING Bank employee raised concerns about these practices to ING Group's Legal Department. *Id.* ¶ 7. In response, an attorney in the Legal Department responded that "we have been dealing with Cuba . . . for a lot of years now and I'm pretty sure that we know what we are doing in avoiding any fines So don't worry and direct any future concerns to me so that we can discuss before stirring up the whole business." *Id.*

■ **Improper Traveler Check Endorsement Services:** ING Bank's Wholesale Banking branch in France ("ING France") assisted Cuban banks with transactions involving travelers checks denominated in U.S. dollars. OFAC Settlement Agreement ¶ 8. More specifically, ING France agreed to endorse traveler's checks sent from a Cuban Bank using an ING France endorsement stamp. *Id.* ING France's endorsement of the travelers checks made it appear as though there was no Cuban involvement in the transactions. *Id.* Later, ING France

created an endorsement stamp for a Cuban bank that allowed the Cuban Bank to endorse traveler's checks such that it appeared that ING France endorsed the checks. *Id.* ING France subsequently created a similar endorsement stamp for another Cuban Bank. *Id.*

■ **Cover Payments To Remove References To OFAC-Sanctioned Countries:** ING Bank's Wholesale Banking branch in Belgium ("ING Belgium") used "cover payments" for various clients to "ensure that there was no reference to OFAC-sanctioned countries in payment messages sent to the United States." OFAC Settlement Agreement ¶ 9. Senior employees in ING Belgium were familiar with this practice, which the branch office had engaged in for approximately 40 years. *Id.*

■ **Use Of Shell Companies To Disguise The Involvement Of Sanctioned Parties:** ING Bank's Trade and Commodity Finance department in Rotterdam ("TCF Rotterdam") used shell companies to assist Specially Designated Nationals obtain U.S. dollar trade financing and allow them complete various transactions through the U.S. financial system. Factual Statement ¶ 34. TCF Rotterdam use of shell companies was designed to disguise the involvement of the sanctioned entities in U.S. dollar transactions, and to prevent U.S. entities from blocking the transactions. OFAC Settlement Agreement ¶ 10.

During the relevant time period (2002 through 2007), ING Bank engaged in approximately 20,541 transactions that violated the OFAC sanctions regulations, including the Cuban Asset Control Regulations (31 C.F.R. § 515), Burmese Sanctions Regulations (31 C.F.R. § 537), Sudanese Sanctions Regulations (31 C.F.R. § 538), the now-repealed Libyan Sanctions Regulations (31 C.F.R. § 550), and the Iran Transactions Regulations (31 C.F.R. § 560). OFAC Settlement Agreement ¶ 15. The aggregate value of these transactions totaled roughly \$1.7 billion. *Id.*

ING Bank agreed to pay \$619M to resolve its potential civil and criminal liability.¹ OFAC Settlement Agreement ¶ 27. This amount represents the largest OFAC settlement in history. Pursuant to the OFAC settlement agreement, ING Bank also agreed to undertake an OFAC-based audit one year from the date of settlement. The audit is designed to ensure that ING Bank's "OFAC compliance program is functioning effectively to detect, correct, and report OFAC-sanctioned transactions when they occur." *Id.* ¶ 26. ING Bank further agreed to submit the results of the audit to OFAC. *Id.*

Additionally, ING Bank entered into deferred prosecution agreements with the Department of Justice and the New York District Attorney's office. Pursuant to these agreements, ING Bank is required to implement various procedures designed to ensure that it is complying with various export control and anti-money laundering laws. Deferred Prosecution Agreement, at 5-6, *United States v. ING Bank, N.V.*, No. 12cr00136 (D.D.C. June 12, 2012) (ECF No. 2-3). If the ING Bank fulfills its obligations under the deferred prosecution agreement for a period of 18 months, then the criminal charges will be dismissed. *Id.* at 4.

¹ Pursuant to the settlement agreement, ING Bank paid \$309.5 million to the New York District Attorney's Office and \$309.5M to the United States. Press Release, New York District Attorney's Office, District Attorney Vance Announces \$619 Million Settlement With ING Bank (June 12, 2012).

III. Lessons From The ING Bank Settlement

The ING Bank settlement illustrates a series of important issues facing U.S. individuals and entities subject to OFAC's jurisdiction.

A. *OFAC Is Increasingly Aggressive In Seeking Penalties And Asserting Jurisdiction For Violations Of The Sanctions Regulations*

The ING Bank settlement was the largest OFAC settlement to date, but the company could have been subjected to far greater liability. Based on the OFAC Enforcement Guidelines, if ING Bank's conduct resulted in "egregious" violations and ING Bank did not voluntarily self-disclose those violations, it would have been subject to a penalty of the "applicable statutory maximum." The applicable statutory maximum is \$65,000 per violation of the Cuban Asset Control Regulations and \$250,000 per violation for the other relevant sanctions regulations. Consequently, in light of the fact that ING Bank committed approximately 20,000 violations, the company easily could have faced billions of dollars in penalties.

The OFAC settlement agreement also illustrates OFAC's expansive approach to jurisdiction. The ING Bank entities that conducted the improper conduct were not U.S. companies, but rather were foreign offices organized under foreign law. Accordingly, a case could be made that these branch officers were not "U.S. Persons" within the meaning of the OFAC sanctions regulations and thus not subject to OFAC's jurisdiction. Nevertheless, OFAC pressed forward with its investigation and compelled ING Bank to settle the case. OFAC's aggressive approach to jurisdiction here is consistent with the agency's enforcement conduct over the last several years. Any company doing international business should be aware of the scope and nature of the OFAC sanctions regulations.

B. *Multiple Government Agencies' Involvement In Investigations Stemming Out Of Sanctions Violations*

The ING Bank settlement was also representative of another trend: the involvement of multiple government agencies in investigations related to sanctions violations. This article primarily focuses on the settlement agreement that ING Bank reached with OFAC, but several other federal and state agencies investigated ING Bank's activities as well, including the Department of Justice, the New York District Attorney's Office, the United States Attorney's Office for the District of Columbia, the Internal Revenue Service, and the Federal Bureau of Investigation. Indeed, ING Bank eventually entered into deferred prosecution agreements with the Department of Justice and New York State. Through the OFAC settlement agreement and these deferred prosecution agreements, ING Bank ultimately reached a "global" settlement to resolve all potential civil and criminal liability arising out of the conduct at issue. But the involvement of other government agencies illustrates that a limited civil OFAC investigation can quickly transform into a comprehensive criminal investigation.²

² Standard Chartered Bank's ("SCB") recent settlement is another example of problems that arise when multiple agencies investigate a company. SCB recently agreed to \$340 million settlement with the New York State Department of Financial Services for allegedly violating a host of New York state laws, including failing to maintain accurate books and records for transactions involving Iran, offering false instruments for

A related point is that the target of an OFAC investigation usually faces a wider array of charges when other agencies become involved. For example, the OFAC investigation focused on ING Bank's conduct that ran afoul of the sanctions regulations between 2002 through 2007. By contrast, the New York District Attorney's office investigation reviewed ING Bank's actions from the early 1990s through 2007. Moreover, the subject of the OFAC investigation and the New York District Attorney's office investigation were not exactly the same either. The OFAC investigation centered on ING Bank's violations of the sanctions regulations, while the state investigation examined ING Bank's potential violations of New York state record provision laws. Accordingly, when a company violates OFAC sanctions regulations it may be well-served to settle the issue quickly with OFAC before other agencies become involved and other conduct violating different aspect of the law comes to light.

C. *OFAC Enforces Violations Of Any And All Sanctions Regimes*

Over the last few years, most of OFAC's major investigations have targeted companies and individuals that violated the Iranian Transaction Regulations and Sudanese Sanctions Regulations. This trend is not surprising in light of the broader political context: Iran is the United States' most public enemy and Sudan has long been an international pariah whose positions are at odds with America's foreign policy. As OFAC's enforcement of these two particular sanctions regimes has increased, some have posited that the agency has deemphasized investigating violations of the other sanctions regulations. OFAC's actions in this case show that such speculation is misplaced. The overwhelming majority of ING Bank's potential violations involved conduct that violated the Cuban Asset Control Regulations. With this settlement, OFAC has sent a clear message that it will investigate and impose significant liability for serious violations of any of the sanctions regulations.

D. *Importance Of Implementing Export Control and OFAC Compliance Programs*

This case shows the benefits of U.S. companies having export control and OFAC compliance programs. In light of OFAC's enforcement activities, companies should design and implement meaningful compliance programs. Effective programs will typically include the adoption of corporate policies and procedures related to OFAC and the export control regime, employee training on these topics, and regular audits or monitoring to confirm that no improper transactions are occurring. Another useful tool is interdiction software that allows companies to check their employees, vendors, customers, and other relevant parties against OFAC's Specially Designated National List and other restricted party lists.

Compliance programs benefit companies in two distinct ways. First, they minimize the probability that a company will run afoul of the OFAC sanctions regulations otherwise violate the export control regime. Second, if a company does commit a violation, the presence of a compliance program will be a mitigating factor that OFAC takes into account when assessing the size of an

filing, falsifying business records, and obstructing governmental administration. Federal agencies, including OFAC, are still investigating SCB's conduct and may bring additional charges against the company.

appropriate penalty. Based on the OFAC settlement agreement, it appears that ING Bank did not have these types of compliance programs in place until after it learned of the potential violations. While OFAC did not highlight the fact that ING Bank lacked a compliance program when the potential violations occurred, it has found the absence of such a program to be an aggravating factor in other cases.³

E. **Voluntary Self-Disclosure Considerations**

ING Bank voluntarily disclosed to OFAC all but one of the approximately 20,000 potential violations at issue. The company's voluntary self-disclosure appeared to be a significant mitigating factor that OFAC considered when assessing the company's potential liability. Indeed, apart from the voluntary self-disclosure, the only stated mitigating factors were ING Bank's remedial actions after learning of the potential violations, its voluntary self-disclosure, its cooperation with OFAC, and the fact that it had not been penalized by OFAC in the previous five years.⁴ ING Banks' voluntary disclo-

³ The settlement agreement also illustrates the benefits of a company taking comprehensive remedial steps after learning of a potential violation. OFAC credited ING Bank for taking "prompt and thorough remedial action" that included "adopting a consolidated sanctioned countries policy for all ING Bank business units and an export compliance program," "broad-based training sessions on sanctions policy," the implementation of interdiction software, and closing its representative office in Cuba. OFAC Settlement Agreement ¶ 22. Even though the violations had already occurred, ING Bank was still able to mitigate its potential liability by taking aggressive steps after the fact.

⁴ The OFAC settlement agreement described ING Bank's cooperation inconsistently. On one hand, the settlement agreement stated that "ING Bank cooperated with OFAC by conducting an historical review to identify weaknesses in its compliance program and providing substantial and well-organized information regarding the apparent violations for OFAC's assessment." OFAC Settlement Agreement ¶ 23. On the other hand, the settlement agreement states that "ING Bank did not

sure therefore appeared to be a key factor in OFAC agreeing to reduce its potential liability.

For all practical purposes, ING Bank had little choice but to voluntarily self-disclose the potential violations. In 2004, OFAC was on notice that ING Bank may have committed one significant violation, and ING Bank knew that if OFAC was not satisfied with ING Bank's internal investigation it could have subpoenaed documents and/or launched its own investigation. In other situations, the decision to voluntarily self-disclose potential violations may not be so straightforward. When analyzing whether voluntary self-disclose is the best course of action, a company must consider a host of factors, including the seriousness of the violations, its views on jurisdiction, its potential liability, and the likelihood that OFAC would learn of the conduct absent the company disclosing the conduct.

IV. Conclusion In light of the enforcement environment, companies subject to OFAC's jurisdiction would be well-served to review their compliance program to ensure that adequate processes are in place to prevent violations of the sanctions regime.

consistently cooperate with OFAC with regard to explicit requests for information." *Id.* ¶ 23.

Note to Readers

The editors of Bloomberg BNA's *Banking Report* invite the submission for publication of articles of interest to subscribers.

Prospective authors should contact the Assistant Managing Editor, *BNA's Banking Report*, 1801 S. Bell St. Arlington, Va. 22202-4501; telephone (703) 341-5820; or e-mail to jtinkelman@bna.com.