

Expert Analysis

Record-Breaking Fines in ING Bank Sanctions Case Show Hazards Of Doing Business with Iran, Cuba And Other Sanctioned Countries

*By F. Amanda DeBusk, Esq., and Lynn G. Kamarck, Esq.
Hughes Hubbard & Reed*

On June 12 ING Bank NV, a Netherlands-based financial institution, agreed to forfeit \$619 million to settle the largest sanctions case to date. The case shows the tremendous focus being put on tightening sanctions against Iran and other parties outside the United States. Spin-off cases are likely to be forthcoming, targeting the underlying deals for which ING Bank made the financial arrangements.

ING is accused of intentional manipulation and deletion of information about U.S.-sanctioned parties and countries in more than 20,000 financial and trade transactions routed through banks in the United States between 2002 and 2007. The \$619 million settles civil claims by the Treasury Department's Office of Foreign Assets Control, or OFAC,¹ and criminal charges by the U.S. government and the New York County district attorney.² The \$619 million will be split evenly (\$309.5 million apiece) between the U.S. Department of Justice and the district attorney's office. ING Bank entered into deferred prosecution agreements with the Justice Department and the DA. The settlement with OFAC is deemed satisfied by the payments to Justice Department and DA.

According to the government, ING told sanctioned clients how to conceal their involvement in U.S. dollar transactions and also threatened to punish employees for failing to remove references to sanctioned individuals/countries in payment messages.

This intentional manipulation and deletion of information caused unaffiliated U.S. financial institutions to process transactions that otherwise should have been rejected, blocked or stopped for investigation under OFAC regulations. The transactions, valued at more than \$2 billion, were in apparent violation of the sanctions involving not only Iran, but also Cuba, Myanmar, Sudan, and Libya. All of these countries were subject to U.S. sanctions at the time the acts occurred.



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NATURE OF VIOLATIONS

The violations alleged included “stripping,” whereby ING systematically removed references to sanctioned parties from wire-transfer payment messages. Government documents alleged that the bank used a number of additional procedures as well to avoid references to U.S.-sanctioned parties/countries. These included using shell or front companies to accept funds transfers on behalf of Cuban entities and using a false endorsement stamp for Cuba-related travelers checks.

In addition, in instances where U.S. financial institutions blocked payments involving sanctioned countries or entities because identifying information had not been stripped, ING employees allegedly made intentional misrepresentations to U.S. financial institutions to recover lost funds.

The criminal information and settlement agreement indicate that the fraudulent activity was undertaken with the knowledge, approval and encouragement of senior corporate managers and the bank’s legal and compliance departments. There also were a number of instances over the years where several ING employees raised concerns to management about the bank’s sanctions violations, but no action was taken, according to the court documents.

The settlement agreement singles out a specific email that ING’s legal department sent to an ING employee who had raised concerns about the legality of ING’s practices used to permit U.S. dollar transactions with sanctioned countries. That email stated:

[W]e 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.³

SIMULTANEOUS SETTLEMENTS WITH MULTIPLE AGENCIES

Consistent with recent trends, multiple government agencies were involved in the investigation of ING Bank: the Office of Foreign Assets Control, the U.S. attorney’s office for the District of Columbia, the Justice Department’s National Security Division and Asset Forfeiture and Money Laundering Section, and the New York County district attorney’s office. The FBI, Internal Revenue Service, and Commerce Department’s Bureau of Industry and Security also participated in the investigation.

While the agencies reached agreement on a single settlement amount, they didn’t rely on precisely the same facts. The OFAC settlement agreement focused on a five-year period from 2002 to 2007 and on the money allegedly routed through the United States in contravention of sanctions on Cuba, Iran, Myanmar, Sudan and Libya.

The deferred prosecution agreements cover a longer period beginning in the early 1990s and focused only on Iranian and Cuban transactions. The New York DA was focused on violations of New York’s records provisions.⁴

INCREASED ENFORCEMENT AGAINST NON-U.S. ENTITIES

ING Bank’s insurance and banking operations in the United States were not subjects of this investigation. The violations arose from policies in place at multiple overseas offices of ING’s Wholesale Banking Division. ING’s conduct

allegedly caused unaffiliated U.S. financial institutions to process transactions that otherwise should have been rejected, blocked or stopped for investigation.

This case illustrates the U.S. government's increasing willingness to aggressively enforce U.S. sanctions provisions against non-U.S. companies if there is some U.S. nexus in connection with the transaction.

The Justice Department focused on the criminal removal of references to sanctioned parties/countries rather than on violations of OFAC regulations. For example, the criminal information states, "Although payments *may have complied with exceptions in the [OFAC regulations] then in effect*, ING Bank employees removed all references of Iran in payment messages sent to the United States to ensure that unaffiliated correspondent U.S. financial institutions could not identify the Iranian origin of the transactions, without making any determination as to whether the underlying transactions were legal or illegal."⁵

While not the basis for this case, new legislation provides OFAC with enhanced authority to address extraterritorial actions with respect to foreign banks.⁶ In addition, a new executive order gives the Treasury Department the authority to impose sanctions on foreign persons who have facilitated deceptive transactions for or on behalf of persons subject to U.S. sanctions.⁷

This provision, known as the "foreign sanctions evaders" executive order, applies to any foreign person or foreign entity and would address the type of intentional manipulation and deletion of information at the center of the ING case. Foreign persons found to have violated such provisions are cut off from the U.S. commercial and financial systems.

DEFERRED PROSECUTION AGREEMENT

ING entered into a deferred prosecution agreement with the Justice Department and New York district attorney. DPAs have been used in many recent economic sanctions and export controls cases. This DPA allowed ING to avoid formal criminal indictment and to mitigate financial penalties, but it subjects the bank to future responsibilities and risks.

As part of the DPA, ING Bank agreed to implement procedures, including applying the OFAC sanctions list, United Nations or European Union sanctions or freeze lists to U.S. dollar transactions, the acceptance of customers, and all U.S. dollar cross-border Society for Worldwide Interbank Financial Telecommunications incoming and outgoing messages involving payment instructions or electronic transfer of funds. The DPA also requires that ING comply with anti-money-laundering best practices.

Under the terms of the Justice Department's DPA, if ING remains in compliance with all of its obligations under the DPA after 18 months, the government shall seek dismissal of the criminal charges. On the other hand, if Bank breaches any of the DPA provisions, it will be subject to continued prosecution.

POSSIBLE FOLLOW-UP ACTIONS

The Justice Department's investigation into ING Bank arose, in part, from an earlier export control investigation involving Aviation Services International B.V., a Dutch aviation company, that exported U.S.-origin items including aircraft parts to Iran through third countries. The Department of Commerce and

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OFAC ultimately entered into a joint settlement agreement with ASI.⁸ The ASI investigation led to the subsequent investigation of ING Bank when the Justice Department determined that ING processed payments on ASI's behalf through the United States.

This case illustrates that an export or sanctions investigation of one entity can lead to investigations of other companies as government officials learn of additional parties involved in the underlying transactions. As noted, the ING Bank case involved more than 20,000 financial and trade transactions that were at least questionable from a U.S. sanctions standpoint.

The government investigators have a gold mine of leads from the ING case. For example, if there was a transaction that involved Iran, government investigators will be looking at the deal that was the basis for the transactions and delving into whether any of the parties were involved in a U.S. sanctions violation. The government is very good at following the trail wherever it leads, and spin-off investigations are likely to be forthcoming for years to come.

In addition, it is possible that there may be follow-up charges against some of the individual ING Bank employees, since many recent sanctions/export violation cases have been brought against both the company and the culpable individuals. The Justice Department's DPA specifically provides for the possibility of such follow-up actions.⁹ Since all of the responsible ING Bank employees are most likely located abroad, however, it could be difficult to secure evidence and witnesses. Part of this complication is caused by European privacy laws, which may limit the ability to obtain necessary documents.

CONCLUSION

The ING Bank case illustrates the U.S. government's focus on vigorously pursuing violations of U.S. sanctions laws. It also illustrates the trend toward joint enforcement of these laws with the cooperation of several federal as well as state agencies. Spin-off investigations are likely to be forthcoming for many years as the government investigators delve into the underlying deals behind the 20,000 ING transactions involving sanctioned countries.

NOTES

- ¹ Settlement Agreement between U.S. Department of the Treasury's Office of Foreign Assets Control and ING Bank N.V., MUL-565595 (June 11, 2012), *available at* http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/06122012_ing_agreement.pdf.
- ² *United States v. ING Bank N.V.*, No. 12-CR-00136-PLF, *criminal information filed* (D.D.C. June 12, 2012).
- ³ Settlement Agreement at 2.
- ⁴ Specifically New York Penal Law Section 175.05 makes it a crime to, "with intent to defraud ... (i) make or cause a false entry in the business records of an enterprise ... or (iv) prevent the making of a true entry or cause the omission thereof in the business records of an enterprise." Under Section 175.10 "intent to defraud includes an intent to commit another crime or to aid or conceal the commission of a crime."
- ⁵ Criminal information at 10 (emphasis added).
- ⁶ Section 104 of the Comprehensive Iran Sanctions, Accountability and Divestment Act of 2010 and Section 1245 of the National Defense Authorization Act of 2012.
- ⁷ Executive Order 13608 (May 1, 2012).

- ⁸ Settlement Agreement Between Bureau of Industry and Security, Department of Commerce, the Office of Foreign Assets Control, U.S. Department of the Treasury and Aviation Services International B.V. (Mar. 9, 2010), *available at* http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Documents/asi_agreement.pdf.
- ⁹ The DPA provides that “[n]othing in this agreement restricts in any way the ability of the United States, any other federal department or agency, or any state or local government from proceeding criminally, civilly, or administratively, against any current or former directors, officers, employees or agents of ING Bank or against any other entities or individuals.”



F. Amanda DeBusk (L) is a partner at **Hughes Hubbard & Reed** in Washington, chair of the firm’s international trade department and member of the firm’s executive committee. She serves as a private-sector adviser to the State Department on sanctions policy. She previously served as U.S. Commerce Department assistant secretary for export administration. She can be reached at debusk@hugheshubbard.com. Ms. DeBusk is a member of the Westlaw Journal White-Collar Crime Editorial Board. **Lynn Kamarck** (R) is counsel at Hughes Hubbard & Reed, where she concentrates on export controls, sanctions and trade remedies matters. She previously served as senior counsel on anti-dumping and countervailing duty proceedings at the Commerce Department. She can be reached at kamarck@hugheshubbard.com.

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