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ING Bank to Pay $619 Million Fine in Largest Ever US Economic Sanctions Penalty

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On June 12, 2012, ING Bank, N.V. (ING Bank), a Netherlands-based financial institution, agreed to forfeit $619 million to settle criminal charges brought by the United States and the State of New York and civil claims raised by the US Department of the Treasury, Office of Foreign Assets Control (OFAC). ING Bank was charged with conspiring to violate US economic sanctions and with violating New York state laws by illegally moving billions of dollars through the US financial system on behalf of Cuban and Iranian entities. The $619 million fine is the largest ever against a financial institution in connection with an investigation into US sanctions violations and related offenses.

The forfeited $619 million will be split evenly between the US Government and the State of New York ($309.5 million each). ING Bank waived indictment on a single charge of conspiracy to violate the Trading With the Enemy Act (TWEA), 50 U.S.C. App., § 1 et seq, and the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701-1706, and entered into separate Deferred Prosecution Agreements with the US Department of Justice (DoJ) and New the New York County District Attorney's Office (DANY).

In addition to these Deferred Prosecution Agreements, OFAC simultaneously settled civil claims against ING Bank involving apparent violations of the Cuban Assets Control Regulations, 31 C.F.R. part 515, the Iranian Transactions Regulations, 31 C.F.R. part 560; the Burmese Sanctions Regulations, 31 C.F.R. part 537; the Sudanese Sanctions Regulations, 31 C.F.R. part 538; and the now-repealed version of the Libyan Sanctions Regulations, 31 C.F.R. part 550, which was in effect until 2004. OFAC agreed to settle its claims against ING Bank with the obligation deemed satisfied by the payment to the United States and New York. ING Bank did not admit or deny any allegation made or implied by OFAC's Settlement Agreement.

The ING Bank settlement is the largest of a series of recent US settlements with foreign financial institutions involving violations of US sanctions. The magnitude of these settlements combined with the growing level of cooperation between varying US government and state agencies involved in investigating and prosecuting sanctions violations indicate that foreign persons, including financial institutions, doing business with Iran, Cuba, and other countries sanctioned by the United States face ever-increasing risks of enforcement in the United States.

Alleged Violations

According to the information supplied in the DoJ Deferred Prosecution Agreement and the OFAC settlement agreement, ING Bank knowingly and willfully violated US and New York State laws, starting in the early 1990s and continuing until 2007, by moving billions of dollars illegally through the US financial system on behalf of Cuban and Iranian entities subject to US economic sanctions. Among other things, ING Bank reportedly engaged in a pattern of conduct as follows:

- ING Bank processed over 20,000 US dollar payments on behalf of Cuban customers through its branches in Curaçao, France, Belgium and the Netherlands. Neither ING Bank's insurance nor its banking operations in the United States were the subjects of investigation.

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- ING Bank also maintained correspondent accounts for Iranian entities and processed payments on behalf of Iranian interests, including payments related to the purchase of US-origin aircraft parts for Iranian clients.
- ING Bank branches advised clients in sanctioned countries on how to conceal their involvement in US dollar transactions, allowed clients to use shell companies to conceal transactions with Specially Designated Nationals (SDNs), and used misused ING Bank internal suspense accounts to process payments from US sanctioned countries and entities.
- ING Bank's senior management in France authorized, and ultimately provided, fraudulent endorsement stamps for use by Cuban financial institutions in processing travelers check transactions, which disguised the involvement of Cuban banks in these transactions when they were processed through the United States.
- ING Bank employees systematically stripped references to Cuba and Iran from SWIFT payment messages to the United States to prevent US financial institutions from identifying and blocking prohibited transactions, and ING branches routed payments made on behalf of Cuban clients through other corporate clients to obscure the Cuban clients' identities.
- ING Bank instructed its employees to strip references to Cuba from transactions, instituted written procedures for processing payments involving Cuba, and threatened to reprimand employees who failed to follow these procedures.
- On occasions where US financial institutions blocked payments involving sanctioned countries or entities because originator information was mistakenly included, employees of ING Bank branches made intentional misrepresentations to US financial institutions to recover lost funds.
- ING Bank ignored compliance warnings about the ramifications of ING Bank's business with US sanctioned countries. Over the years, several ING Bank employees raised concerns to management about ING Bank possibly violating US, economic sanctions. However, ING Bank took no action to address such concerns.

An internal whistleblower report to the Central Bank of the Netherlands (DNB) resulted in inquiries from DNB prompting ING Bank to initiate two internal investigations. OFAC independently initiated an investigation into ING Bank's conduct. DoJ initiated a criminal investigation into ING Bank's activities in part in response to a referral from OFAC and in part due to ongoing investigations into the illegal export of goods from the United States to sanctioned countries, including Iran. DANY later opened its own investigation into ING Bank's conduct.

The US Government filed criminal information in the District of Colombia charging ING Bank with conspiracy to violate TWEA through a conspiracy to violate the Cuban Asset Control Regulations and with conspiracy to violate IEEPA through a conspiracy to violate Iranian Transaction Regulations. In addition to the violation of US sanctions, DANY alleged that ING Bank's conduct violated New York law by falsifying the records of New York financial institutions.

While the criminal charging documents were limited to violations of Cuban and Iranian sanctions, the OFAC settlement agreement indicates that ING Bank conducted financial transactions in apparent violation of the Burmese, Sudanese, and Libyan sanctions programs. Specifically, OFAC alleged that ING Bank processed 41 funds transfers in apparent violation of prohibitions against "the exportation or re-exportation of financial services to Burma" from the US and/or dealing in property and interests in

property that "come within" the US. OFAC also alleged that ING Bank processed 44 transactions through the US to the benefit of the Government of Sudan, as well as 3 transactions to the benefit of the Government of Libya, which were blocked under US law. The Burmese, Sudanese, and now-repealed version of the Libyan sanctions differ substantially from the Cuban and Iranian sanctions in the breadth of their prohibitions. However, the OFAC settlement does not provide sufficient detail regarding ING Bank's conduct in Burma, Sudan or Libya to analyze the application of those sanctions regimes to ING Bank.

The ING Bank enforcement action is notable in several respects:

Magnitude of the Penalty and Comparison to Recent Settlements Involving Foreign Financial Institutions

The $619 million forfeiture marks the largest fine ever imposed for violations of US sanctions laws and regulations. The fine exceeds earlier penalties imposed against foreign financial institutions in settlements with the DoJ including ABN AMRO Bank N.V., now known as the Royal Bank of Scotland (RBS)($500 million, 2010), Barclays Bank ($298 million, 2010) Credit Suisse ($536 million, 2009, see Steptoe's earlier advisory) and Lloyds TSB Bank ($350 million, 2009 see Steptoe's earlier advisory).

OFAC also entered settlements with each of the above-named financial institutions. In its settlements with Barclays and Credit Suisse, OFAC deemed its penalties satisfied by the forfeiture of the same or greater amount required by the DoJ agreement. Lloyds TSB by contrast paid a $217 million penalty to OFAC after and in addition to the $350 million DOJ settlement, for a total penalty of $567 million. OFAC had previously entered a settlement with ABN AMRO Bank N.V., ($40 million, 2006). In addition, OFAC has entered a settlement agreement with the Australian and New Zealand Banking Group ($5.75 million, 2009).

Each of the settlements mentioned above involved similar conduct, including intentionally stripping identifying information regarding sanctioned entities before processing transactions through US financial institutions, providing advice to sanctioned entities seeking to evade US sanctions, and manipulating SWIFT messages. The Barclays, Credit Suisse, and Lloyds TSB settlements each involved cooperation and sharing of penalties between the US Government and the State of New York.

The criminal counts raised in the charging documents for the ING Bank case differ from those in the Barclays, Lloyds TSB and Credit Suisse settlements. ING is charged with knowingly and willfully conspiring to violate IEEPA and TWEA. RBS was also charged with conspiracy to violate IEEPA and TWEA, as well as conspiracy to defraud the United States. By contrast, the Lloyds TSB and Credit Suisse defendants were charged with violating and attempting to violate regulations issued under IEEPA, specifically the prohibition against exporting a service to Iran without authorization, and the prohibition of any transaction within the United States that evades or avoids, or has the purpose of evading or avoiding, Iranian sanctions. The information against Barclays alleged simply that Barclays knowingly and willfully violated regulations issued under TWEA and IEEPA. Given the similarity of the conduct, it is not clear why the charges differed between these cases.

A comparison of the settlements reached with these foreign banks suggests that the magnitude of the penalty assessed against each bank was not directly proportionate to either the amount of money involved in the investigated transactions or the number of prohibited transactions. For example, OFAC's settlement with Barclays alleged fewer than 1500 separate financial transactions in violation of US

regulations, while the ING Settlement alleged over 20,000 prohibited transactions. Similarly, DoJ's Deferred Prosecution Agreement with Barclays suggested that the total value of reviewed prohibited transactions entered into by Barclays was $500 million, while the summary of facts involving ING Bank found a total value of prohibited transactions exceeding $2 billion.

As in the RBS, Barclays, Lloyds TSB and Credit Suisse cases, the magnitude of the ING Bank fine demonstrates the US Government's ability to impose substantial penalties for such violations. The case also demonstrates that persons need to be aware of US state laws that apply to international financial transactions and can lead to significant enforcement liability if violated.

The Implications of Causing a Violation in the United States

Based on the facts of this case and other recent settlement agreements, foreign entities engaged in a wide variety of financial services, including but not limited to banking, money remittance, insurance, reinsurance, investment, foreign exchange, mortgage, and secured transaction/letter of credit services, should recognize the inherent US enforcement risk with respect to concealing or intentionally omitting information from offshore transactions involving a US sanctioned country, person, or business if the transaction has some nexus to the United States or US persons. Specifically, the IEEPA Enhancement Act of October 2007 increased fines for any person who intentionally commits or helps others commit violations of certain US sanctions laws. These amendments now make it unlawful "for *a person* to violate, attempt to violate, conspire to violate, or *cause a violation* of [US sanctions]" (emphasis added). Furthermore, a criminal penalty can be imposed against "[a] person who willfully commits, willfully attempts to commit, or willfully *conspires to commit, or aids or abets in the commission of*, an unlawful act …" (emphasis added). These amendments provide legal authority for increased civil and criminal penalties against both US persons and non-US persons for conduct occurring abroad, if such activity causes, conspires to cause, aids, or abets others to violate US sanctions laws and regulations. DoJ apparently did not rely on these provisions to penalize conduct in this case. Although these amendments and concomitant increased penalties did not apply as a matter of law to conduct before October 2007, i.e., when the information and settlement agreement alleges that ING Bank's conduct occurred, these amendments now can be used to enforce cases against foreign persons in a more aggressive manner.

DoJ formally charged ING Bank with only one count of conspiring to violate US sanctions, and the Criminal Information filed did not explicitly charge ING Bank with causing a violation of US Sanctions. However, the allegation that ING Bank caused US entities to violate US sanctions appears to be central to DoJ's legal theory. For example, the factual statement emphasized that ING Bank's conduct "caused unaffiliated US financial institutions to process transactions that otherwise should have been rejected, blocked or stopped for investigation."

Notably, the conspiracy charge itself seems to rely on ING Bank's causing of violations in the United States. Specifically, the criminal charging documents allege that ING Bank and co-conspirators "committed and caused to be committed, in the District of Columbia and elsewhere" certain overt acts. The overt acts listed include the conduct described above, but the DoJ did not allege any overt act by any individual physically located in the United States.

New York law also provides a basis for criminalizing behavior that results in causing a violation by a US entity. Specifically, the New York Penal Law referenced in the DoJ agreement criminalizes "mak[ing] or

caus[ing] a false entry in the business records of an enterprise. . . ."

Regardless of whether the government relied explicitly on the enhanced IEEPA prohibition against causing a violation of US Sanctions in the United States, the ING Bank settlement makes clear that the US government believes it has the authority to prosecute foreign financial institutions whose conduct evades, attempts to evade, or conspires to evade US sanctions. Notably, the DoJ Press Release on the issue quoted IRS Criminal Investigation Chief Richard Weber who stated, "In today's environment of increasingly sophisticated financial markets, it's critical that global institutions follow US law, including sanctions against other countries."

Investigation of Exports Violations Leading to Bank Charges

DoJ's investigation into ING Bank arose out of an earlier export control investigation. As part of an ongoing investigation into the export of US-origin goods to Iran, the Department of Commerce initiated a criminal investigation involving a Dutch aviation company, Aviation Services International B.V. (ASI), for exporting US-origin items, including aircraft parts, to Iran via the Netherlands and other countries. The Department of Commerce and the Department of Treasury ultimately entered into a joint settlement agreement with ASI. According to DoJ's factual statement, ING processed payments on behalf of ASI through the United States. The DoJ press release suggests that its investigation of ING Bank began when it became aware of ING Bank's involvement in the illegal export scheme.

This investigation demonstrates that foreign financial institutions should be aware of US export and sanctions regulations, because their involvement in processing illegal export transactions, including export transactions made by foreign customers, can attract the attention of US government agencies.

Inter-Agency Coordination in Investigation

The ING Bank enforcement action is part of a trend of cooperation among government agencies in the area of sanctions enforcement. The ING Bank enforcement action was a joint effort on the part of OFAC, the US Attorney's Office for the District of Columbia, the DoJ's National Security Division, the DoJ's Asset Forfeiture and Money Laundering Section and the New York County District Attorney's Office. Personnel from FBI's Washington Field Office, the Internal Revenue Service, and the Commerce Department's Bureau of Industry and Security also participated in the investigation.

Whereas in the past a traditional US sanctions investigation originated at OFAC, and proceeded to the DoJ only where criminal liability was apparent, the ING Bank investigation involved the support and resources of a diverse range of federal and state agencies.

Use of Deferred Prosecution Agreement

The use of deferred prosecution agreements represents the continuation of a trend seen in US regulatory enforcement matters in economic sanctions, export controls, and in other contexts. Companies that cooperate with investigating authorities may avail themselves of the benefits of such agreements (including, in particular, the potential to avoid formal criminal indictment and to mitigate any financial penalties), but deferred prosecution agreements also involve ongoing responsibilities and risks. As part of its agreements with the DoJ and DANY, ING Bank agreed to implement a range of best practices compliance measures not just for economic sanctions compliance, but also the Anti-Money Laundering and Combating Financing of Terrorism best practices and the Wolfsberg Anti-Money

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Laundering Principles for Correspondent Banking.

DoJ's Deferred Prosecution Agreement provides that the US Government will recommend that prosecution of ING Bank on the criminal information be deferred for 18 months in consideration of ING Bank's remedial actions to date, its willingness to accept responsibility, its continued cooperation with the US Government, and its future compliance with US law. If ING Bank remains in compliance with all of its obligations under the Deferred Prosecution Agreement after 18 months, then DoJ shall seek dismissal of the criminal charges. If ING Bank breaches any provision of the agreement, it will be subject to continued prosecution.

As part of its Deferred Prosecution Agreement with DoJ, ING Bank agreed to implement compliance procedures and training covering US, U.N. and EU sanctions and trade control laws. OFAC's Settlement Agreement with ING Bank requires that the bank conduct a review of its policies and procedures and their implementation one year after the date of the agreement and submit the results of that review to OFAC.

Notably, ING Bank also agreed as part of the Deferred Prosecution Agreement to apply OFAC sanctions, to the same extent as any UN or EU sanctions, to transactions denominated in US dollars, the acceptance of customers, and all US dollar SWIFT messages.

Increased Effort at Enforcing US Sanctions against Non-US Entities

The US Government continues to aggressively enforce US economic sanctions laws and regulations against non-US companies, particularly foreign banks and other financial institutions, that have conducted or now conduct business with sanctioned countries, SDNs, or other blocked persons while also maintaining ties to the United States. This case highlights the significant risks to foreign persons and foreign financial services entities doing otherwise lawful business with restricted countries (particularly Cuba and Iran) and SDNs if some US nexus exists in connection with the transaction. Such a US nexus could include clearing financial transactions in US dollars for sanctioned countries and entities, furnishing related financial services to sanctioned countries through institutions in the United States, processing payments related to SDNs through foreign branches of U.S financial institutions, or knowingly relying on services provided by individual US persons, wherever located in the world, to facilitate, participate in, approve, or support transactions with sanctioned countries or SDNs.

The US Government's focus on employing the extraterritorial provisions of US law against non-US entities to restrict overseas business with sanctioned countries likely will continue. Indeed, recent developments in US sanctions regulations suggest that the US Government considers foreign financial institutions' evasion of US sanctions to be a significant enforcement priority. The ING Bank settlement follows other recent US sanctions activity specifically targeting foreign financial institutions that do business with Iran. For example in May, President Obama issued an Executive Order (see Steptoe's earlier advisory) authorizing the Secretary of the Treasury to prohibit transactions involving foreign persons (foreign sanctions evaders) who have contravened existing US sanctions against Iran and Syria, or have "facilitated deceptive transactions" with respect to such sanctions.

The ING Bank settlement, in conjunction with recent enforcement actions involving financial institutions, and changes to US sanctions targeting Iran, suggest that the US Government is increasingly targeting foreign financial and logistics service providers who contribute to any underlying cross-border export/re-export transaction involving Iran, Cuba, and other sanctioned countries, governments, or

persons. The US Government may find that it is more effective to target and deter banks and other financial service providers because they play such a central role in paying, financing, and shouldering risk in trade related transactions, as opposed to more targeting more diffuse parties, such as manufacturing, exporting, or importing. In that vein, insurers may face a similar future risk of being identified by DoJ as conspiring or aiding and abetting sanctions violations.

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We will continue to keep you apprised of sanctions and export control developments. If you have any questions, please feel free to contact Ed Krauland at 202.429.8083 Meredith Rathbone at 202.429.6437, or Jack Hayes at 202.429.6491 in our Washington office, Guy Soussan at +32 2 626 0535 in our Brussels office, or Maury Shenk at +44 20 7367 8000 in our London office.