

ING, OFAC AND THE SMALL MATTER OF A \$619M PENALTY

Focusing exclusively on

- Governance
- Risk
- Compliance

for the financial services industry and regulators, globally.

On 12 June 2012 it was announced that ING Bank, the international Dutch bank accused of US sanctions breaches, had agreed to pay \$619m to avoid potential criminal and civil liability. The settlement brought to a close an eight year investigation by three US law enforcement agencies – the Office of Foreign Assets Control (“OFAC”), the Department of Justice (“DOJ”) and the New York County District Attorney’s Office (“DNAY”). In return for ING Bank’s payment, the DOJ and DNAY agreed not to pursue criminal charges and OFAC agreed not pursue the civil remedies otherwise available to it.

A record-breaking settlement such as this hammers home the importance of having a strong compliance department properly trained in the law concerning US sanctions. The case should also encourage international companies to have in place strategies so that they are ready should OFAC knock at the door.

ALLEGED CONDUCT

The investigation into ING Bank was prompted by a tip-off in 2004 which revealed ING Bank’s involvement in the sale, financed by an Iranian bank, of a US-made aircraft engine to Iran Air. Such a transaction was of course prohibited by US sanctions and so, if it were to happen at all, had to be disguised. Enter ING Bank, whose expert advice and contacts were sought to facilitate the sale. The alleged scam was fairly elaborate – a superficial disguise was provided by a Romanian trading company which acted as middleman in the transaction. Beyond this, the credit note issued by the Iranian bank was amended to remove any reference to Iran. Interestingly, correspondence which later surfaced during the investigation suggested that ING employees did not appreciate the potential gravity of the alleged conduct: they referred to the process of disguising Iran’s involvement as a ‘game’.

The revelation concerning the attempted sale of the aircraft engine prompted a multi-agency investigation. At the heart of the investigation was OFAC, an agency of the US Treasury with responsibility for the administration and enforcement of US trade sanctions. According to OFAC, ING Bank initially failed to co-operate fully with the investigation, but this stance later changed when the bank provided evidence voluntarily. The investigation revealed at least three different types of alleged conduct contrary to the various US sanctions regimes. First, ING had helped disguise US dollar transfers, routed through the US, on behalf of institutions located in jurisdictions subject to sanctions, notably Cuba, Burma, Sudan, Libya and Iran. The transactions concerning Cuba alone were said to total some \$1.6 billion. Secondly, ING France had

provided two Cuban banks with an ING France stamp which could be applied to US travellers’ cheques, thereby disguising their origin. Thirdly, parts of the ING business established a system of ‘front offices’ enabling Cuban companies to disguise their true origins and thereby circumvent strict rules on trade with US entities.

SETTLEMENT

Reaching a settlement offered a number of advantages for ING Bank. Most obviously, the settlement did not involve any admission of liability. Furthermore, paying the sum meant ING Bank avoided not only a criminal prosecution by the DOJ and the DNAY but also the potential civil liability claimed by OFAC. Moreover, according to OFAC, settlement of the various claims meant ING Bank avoided exposure to the maximum penalty available if the matter been litigated, an eye-watering \$1.6bn. The actual figure of \$619m was lower than it might have been as a result of a number of mitigating factors acknowledged in the settlement agreement. In particular, ING Bank had (eventually) fully co-operated with the investigation. Additionally, ING Bank was able to persuade OFAC that certain transactions were of a kind that might have been eligible for an OFAC license, had one been sought.

The other side of the bargain imposed requirements on ING Bank. In particular, the bank is required to terminate its alleged misconduct, establish procedures to prevent any repetition and submit a report to OFAC in a year’s time to show how its compliance programme is functioning.

SANCTIONS RISK: HOW TO PROTECT YOUR FIRM

As this case makes clear, US agencies are keen to be seen to be tough on those who breach US sanctions. It is sometimes forgotten that the effective reach of OFAC extends beyond businesses with a physical presence in the US: in addition to the financial penalties available, foreign transgressors may have their access to the dollar cut off by way of a ban on US correspondent banks trading with them. Individuals may be subject to jail sentences. British citizen Chris Tappin, extradited for alleged sanctions breaches, is a recent case in point, while the potential risk of arrest may create an effective US travel ban for individuals who have been involved in sanctions breaches.

The need for businesses to take particular care in this difficult area is clear, but the law concerning US sanctions is contained in a bewildering array of statutes and regulations and it can be difficult to be sure that your business is compliant. Five simple steps will help:

BRIEFING

1. Make all staff aware of the nature and existence of the US and other sanctions regimes, and of the potential implications of a breach for the business and the individual concerned
2. Set out the firm's position in relation to sanctions in a policy and procedure document, and ensure that all staff have access to a copy
3. Ensure that all relevant staff are properly trained in what to look for, and how to find it, including the use of 'partial match' search techniques
4. Risk-rate clients in relation to sanctions and AML/CFT at take on and during periodic reviews. Where a client presents a higher risk, ensure that enhanced due diligence is carried out, and specify in a policy and procedure document how this should be done
5. Screen for sanctions compliance during periodic random file reviews.

Following the above steps will ensure that the basic building blocks of sanctions compliance are in place within your firm. If an apparent breach of sanctions does come to light, early external advice is vital in order to determine whether a breach has taken place, how best to remediate the problem, and whether and how best to self-report.

Stephen Platt & Associates LLP specialises in international sanctions compliance advisory work including OFAC remediation projects. For further details please contact Stephen Platt or Tom Devlin.