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Playing Sanctions Roulette – United States Ups the Ante on Sanctions Violations

In a development that signals an escalation in U.S. enforcement of its sanctions programs, the U.S. Government and the State of New York may be near an agreement on the BNP Paribas (BNPP) case. Sources involved in the negotiations have reported to media outlets that BNP Paribas has agreed to plead guilty to violating U.S. sanctions against Sudan, Iran and Cuba, and to pay a fine reported to be over $8 billion dollars to end the long-standing investigation. Additionally, according to news reports, the bank will fire culpable personnel and, most significantly, agree to a suspension of several months on providing dollar clearing. This proposed settlement structure, in particular the new restriction on dollar clearing, raises the stakes significantly for banks that have provided, or are contemplating providing, services to entities in sanctioned countries.

In enforcing its sanctions programs, the U.S. has long faced the problem that the lucrative business of sanctions avoidance tempts some banks to play "sanctions roulette," defying U.S. law in order to reap the higher profits available if they are willing to process illicit transactions. Relying on the increasing volume of international transactions and more sophisticated schemes to conceal the true parties to their transactions, such banks gamble on being able to hide their illegal transactions in the vast ocean of dollar clearing that goes through U.S. banking centers daily. Enforcement can't be everywhere, and some banks simply take the risk that they will be caught, viewing the potential fine – even a potential fine in the hundreds of millions of dollars – as a cost of doing business.

The reports of the imminent BNPP settlement, if correct, suggest that the U.S. Government and the State of New York have decided to "up the ante" on these risk-tolerant banks. In the BNPP negotiations, the U.S. placed a new penalty on the table – a suspension of BNPP's dollar clearing – which would bar BNPP for some specific period of time from directly clearing dollars in the U.S. It is not yet clear how long the suspension would last, but indications are that it could last for several months. As its been reported, the new penalty would not preclude BNPP from all business in dollars, because the bank would not be barred from using a correspondent bank to clear dollar transactions. It would, however, preclude BNPP from any direct clearing for itself, its branches and its customers. BNPP is a member of CHIPS, the principal New York clearing house for banks. Its own materials state that it ranks in CHIPS' top ten banks for clearing volume – business it will not be able to service during its time in the dollar clearing "sin bin."

The allegations against BNPP are serious. The U.S. Government and the State of New York assert that BNPP deliberately schemed to conceal the source and destination of transactions in order to permit the bank, over at least five years, to process billions of dollars in transactions that would otherwise have been blocked or rejected by the software that monitors compliance with U.S. sanctions. In doing so, BNPP would have also made other banks unwitting tools of its deception by assisting in processing these disguised transactions, a situation that New York

State, in particular, has previously penalized. BNPP is alleged to have used a web of smaller foreign banks to route approximately $30 billion in transactions over a period of more than five years, principally in violation of the U.S. sanctions involving Sudan and its government.

The U.S. approach to the negotiations with BNPP clearly signals a toughening of the U.S. stance against sanctions violations and a greater willingness on the part of the U.S. to consider penalties that could threaten the vitality, if not the viability, of major global institutions. Although prior settlements with wrong-doing banks have imposed fines, they were much smaller: from $100 million paid by the Royal Bank of Scotland in 2013 to $667 million paid by Standard Chartered in 2012. But even factoring in variables like the volume and value of illegal transactions at issue, the proposed fine to be paid by BNPP is a different order of magnitude, which must be causing considerable concern for other major banks that are presently under investigation for similar violations, including Germany's Deutsche Bank, France's Credit Agricole, and Italy's UniCredit. Add the new suspension on dollar clearing, which in some circumstances could have a catastrophic impact on a bank's business, and those concerns will quickly rise to critical levels.

French President Francois Hollande has already publicly suggested that the high fine combined with the proposal to bar BNPP from dollar clearing risks not just economic harm to the bank but destabilization of the entire eurozone. Hyperbole aside, President Hollande's statement highlights the potential impact of the U.S.'s new sanctions approach. Prudent banks should carefully consider the implications of being "sin binned" in evaluating their compliance with U.S. sanctions programs.

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