CRS Reports & Analysis

Legal Sidebar

Another Foreign Bank Claims FinCEN's "Death Sentence" Requires Better Procedures

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On October 6, 2015, shareholders of Banca Privada d'Andorra (BPA) filed suit against the Treasury Secretary and the Financial Crimes Enforcement Network (FinCEN), claiming that FinCEN acted unlawfully in proposing to bar the Andorran bank from the U.S. financial system. According to the complaint filed in the U. S. District Court for the District of Columbia, FinCEN acted arbitrarily and capriciously in violation of the procedures required under the Administrative Procedure Act and under the Fifth Amendment to the U.S.Constitution.

The case, *Cierco v. Lew, et al.,* Civ. No. 15-cv-1641 (D.D.C.), began on March 13, 2015, when FinCEN, using authority under Section 311 of the USA PATRIOT Act (Section 311), published a finding that BPA is a "Financial Institution of Primary Money Laundering Concern." Among the specific bases for its finding, FinCEN cited three instances in which high level BPA managers took bribes or otherwise corruptly provided banking services in aid of criminals, organized crime, public corruption, human trafficking, or fraud. According to the FinCEN finding, BPA bank officials facilitated loans from a Spanish bank to Russians associated with international criminal organizations; BPA officials helped to set up shell organizations to hide criminal sources of funds funneled through BPA accounts; and BPA personnel aided criminals to move $4.2 billion in proceeds of public corruption offenses committed in violation of Venezuelan laws.

At the same time as it issued its findings, FinCEN issued a proposed regulation that would prohibit all U.S. financial institutions from opening or maintaining accounts for BPA and require them to exercise due diligence to prevent accounts held for other foreign banks (foreign correspondent accounts) from being used to process BPA transactions. The complaint of the BPA shareholders does not deny the basic underpinnings of the proposed regulation. Instead, the BPA shareholders claim that the specific instances cited by FinCEN had been reported by BPA and that efforts had been underway to correct deficiencies in the bank's anti-money laundering/anti-terrorist financing programs. Nonetheless, according to the complaint, the publication of the proposed regulation resulted in a rapid death spiral for BPA and its subsidiaries. The four U.S. banks holding accounts for BPA closed them, and BPA's regulators in Andorra, Panama, and Spain seized BPA and began liquidation proceedings for BPA and its subsidiaries.

The BPA complaint comes on the heels of a similar case, described in an earlier Legal Sidebar post, in which Judge Christopher R. Cooper of the U.S. District Court for the District of Columbia issued a preliminary injunction on August 27, 2015, restraining FinCEN from implementing a rule that would cut off a Tanzanian Bank, FBME Bank Ltd. (FBME), from the U.S. financial system. The allegations in the BPA case echo those in the earlier case. This may indicate that the BPA shareholders believe that weaknesses in FinCEN's procedures similar to those identified in the FBME case are egregious enough to convince a court to require FinCEN to set aside the order against BPA. Both cases involve institutions slated by FinCEN for imposition of the strictest enforcement action, or "Special Measure," that may be imposed under Section 311—cutting off an institution from the U.S. financial system. Both claim that FinCEN's process was defective, that alternatives to the imposition of the strictest Special Measure were not adequately evaluated, that there was insufficient evidence to sustain the action, and that FinCEN did not provide all the evidence that constitutional Due Process requires. The BPA case, however, includes an additional claim—that FinCEN's action against BPA was not only not supported by the evidence, but that it was motivated by FinCEN's discontent with the Andorran government's implementation of anti-money laundering/anti-terrorist financing controls. In the complaint, the BPA shareholders allege:

> FinCEN did not hold a hearing before a neutral arbiter or even inform BPA that it was under investigation. So, rather than being a reasoned fact finding based on evidence presented in an adversarial proceeding, the ... [finding] and resulting ... [proposed regulation] are based on incomplete and inaccurate evidence and apparently derive from FinCEN's frustration with the Andorran government. The international investigative process had a Keystone Kops quality, with FinCEN initially demanding reforms of the Andorran system, the Andorran regulators failing to answer requests and refusing to make requested systemic changes, and FinCEN issuing the ... [finding] and ... [proposed regulation] to send a message to the Andorran government about the need for reform. BPA was simply a convenient scapegoat, which FinCEN punished for conduct which BPA had already detected and reported just as it was supposed to do. Indeed, the U.S. Government has effectively conceded that BPA was merely a pawn to be sacrificed in an international regulatory chess game.

The PBA case has not been assigned to the judge who is handling the FBME case. Rulings by one district court judge are not binding on other judges of the same court. To the extent that there are distinctions in the facts and circumstances presented in the two cases, there may be different results. However, if there is a decision against FinCEN on the merits in either of these cases, Congress may wish to review FinCEN's authority.

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