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FinCEN Enforcement

When imposing penalties on an institution, banking regulators need to remember that the larger banking community will be reading the press release to see if the punishment fits the crime, attorney Ed Wilson writes. A June action by FinCEN illustrates why the industry audience needs the key facts—not just of the alleged violations—but also about related actions taken by other agencies, and about the violator's business context.

Regulators Need to Coordinate When Explaining How Punishment Fits 'Crime'

BY ED WILSON

Do you try to fit the penalty to the ''crime''? When I see a bank has paid a civil money penalty (CMP), I usually read a few paragraphs into the press release so I can get a feel for where the regulator assessing the CMP set the ''bar,'' that is, what did the financial institution do to deserve the penalty? This is a useful exercise. It gives me a sense of order and what to expect from the regulators.

Usually, like most of us, I suppose, I come away from a cursory read thinking that the offense and penalty are close enough; I am comfortable that the world is reasonably predictable. But, for the second time in recent memory, I found a major disconnect between the crime and penalty imposed by a federal regulator. The ''crime'' was failing to maintain an Anti-Money Laundering (AML) program in accordance with the Bank Secrecy Act (BSA), The punishment was a June 1 $1 million CMP imposed by the Financial Crimes Enforcement Network (FinCEN) against Pamrapo Savings Bank, a bank with over $550 million in assets[1].

Sending a Message

This article makes two points. The first is to suggest to the Department of Justice, the bank regulators, and FinCEN that coordination in enforcement matters would help the private sector understand the message an enforcement action is meant to convey. The second is to explain the crime and punishment disconnect in the Pamrapo case as a way to illustrate a path to better coordination.

Interestingly, Pamrapo is the reverse of the first such disconnect, AmSouth in 2004. In AmSouth, it was easy to get the impression that the penalty was too high. Pamrapo's penalty has seemed too low.

Lightning Rod Lessons

If you were involved in banking in 2004, you probably remember the AmSouth case. For those of you who were not, AmSouth became a lightning rod for criticizing AML enforcement and FinCEN. The implications of it rippled through the financial institutions world as banks and regulators exchanged harsh words and overreacted to what was, in the end, a reasonable decision by the Federal Reserve Board, the Department of Justice, and FinCEN.

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[1] In the Matter of: Pamrapo Savings Bank, S.L.A., *Assessment of Civil Money Penalty* (No. 2010-3, June 1, 2010)(FinCEN).

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At the time, AmSouth, headquartered in Birmingham, Ala., had assets of $45.6 billion. It entered into a Deferred Prosecution Agreement listing one count of failing to file Suspicious Activity Reports (SARs) in a ''timely, complete and accurate manner'' and paid fines of $50 million ($10 million to the FRB and FinCEN and $40 million to Justice).[2] The financial institution world was shocked. I heard many times bankers say, with anger, ''How could failing to file 'one' SAR be worth $50 million in penalties?'' (Note how the count changed in common discussion from failing to file SARs at all to failing to file ''one'' SAR.) The phrase frequently heard then was ''FinCEN is out of control.''

A bit of study, however, revealed that AmSouth was the organization out of control. One example illustrates the point. During the course of an investigation that, in the beginning, was not directed at AmSouth, the bank failed to respond, or failed to respond ''adequately,'' to eight (8) grand jury subpoenas. As one commentator said at the time, ''My palms sweat when a client of mine receives *one* grand jury subpoena, much less eight.''[3] In addition, the FinCEN CMP Assessment Order[4] and the FRB's C&D Order[5] detailed numerous, willful violations of the BSA over a substantial period of time, illustrating that AmSouth, like Pamrapo, did not give much, if any, weight to its AML obligations.

Regulators Fail to Improve

FinCEN's announcement of the Pamrapo CMP shows that the government failed to learn the lessons of AmSouth. Rather than increasing coordination after the AmSouth confusion, the various agencies involved in Pamrapo were even less synchronized than were the ones in AmSouth. On the private side, then, the lesson remains: Read all the penalizing documents before drawing any conclusions. The problem with this lesson, however, is that it takes a lot of time and effort—see the following discussion—to collect the various penalizing decisions and orders. Finding them should not be an electronic scavenger hunt.

At the end of 2009, Pamrapo had over $558 million in total assets, 10 branches in and around Bayonne, N.J., and managed two wholly-owned subsidiaries. It consented to pay a $1million CMP to FinCEN for ''violating requirements under the Bank Secrecy Act (BSA).''[6] The release's first paragraph, however, clearly points to very serious and substantive BSA violations. In addition, the closing line of the FinCEN press release caught my eye: ''FinCEN's assessment is in addition to forfeiture and civil money penalty actions by the DOJ and OTS, respectively, in March, 2010.''

Turning to FinCEN's CMP, I found the bank had violated every meaningful BSA regulation and directive. A list of just a few of the more egregious violations would include that it:

- failed to ''implement all four core elements of an adequate AML program'';
- did not ''assess its risk exposure within the context of products, services, customers, transaction types or geographical reach of the institution,'' while inaccurately stating that none of its branches were in High Intensity Drug Trafficking Areas and High Risk Money Laundering and Related Financial Crimes Areas; and
- for years, and with knowledge, ''routinely conducted cash transactions utilizing a particular transaction code which would not identify the transactor or affiliated account,'' giving the bank no way to determine which customer was conducting cash transactions and no way to track cash transaction activity (including structuring violations).

At this point, I wondered what message FinCEN was trying to send by such a relatively light penalty. Standing alone, the CMP Order was not a strong message concerning AML compliance.

Checking the Backstory

For background, and a possible answer, I turned to the Sept. 26, 2008, Cease & Desist Order (C&D) entered against Pamrapo by OTS [7] and referenced in FinCEN's CMP Order. The September 2008 C&D focused mainly on Pamrapo's lack of an AML program at every level. The Order is a ''directive checklist'' of what an AML program should contain, how it should be staffed and managed, and the oversight necessary to ensure it serves its intended purpose. This showed that between Sept. 26, 2008, and June 1, 2010, the bank had ignored its obligations under the C&D, raising again the question of why the bank was only assessed $1 million.

Turning to the last sentence of FinCEN's June 1 press release (''actions by DOJ and OTS''), I tracked down Justice's actions. On June 3, 2010, the U.S. District Court for the District of New Jersey entered a Consent Judgment and Preliminary Order of Forfeiture in which Pamrapo pled guilty to violating the BSA and forfeited $5 million.[8] It was based on a March 29, 2010, plea agreement,[9] in which Pamrapo agreed that it conspired to violate federal law by:

''(1) failing to file Currency Transaction Reports with the . . . Treasury . . . contrary to Title 31, United States Code, Section 5313(a); (2) failing to file Suspicious Activity Reports . . . contrary to Title 31, United States Code, Section 5318(g)(1); and (3) failing to establish and implement an adequate anti-money laundering program, contrary to Title 31, United States Code, Section 5318(h)(1) . . . .''

On the same day as the plea, OTS entered a CMP Order.[10] It tracks the plea agreement and imposes a $5

[2] Some documents related to the AmSouth matter may be found at FinCEN's and the Federal Reserve Board's web sites. A complete collection, including the criminal plea agreement, is available, among other places, as attachments to an 8-K filed by AmSouth on October 12, 2004, and available on EDGAR.

[3] The Statement of Facts in the AmSouth case is available at http://www.justice.gov/usao/mss/documents/pressreleases/october2004/was15758841.pdf

[4] In the Matter of AmSouth Bank (No. 2004-2, FinCEN).

[5] In the Matter of AmSouth Bancorporation (No. 04-021-B-HC, FRB).

[6] Financial Crimes Enforcement Network Press Release, June 3, 2010, *$1 Million Penalty Assessed Against Pamrapo Savings for Bank Secrecy Act Violations.*

[7] In the Matter of Pamrapo Savings Bank, SLA, OTS Docket No. 05584, (Order No.: NE-08-12, Sept. 26, 2008) (OTS).

[8] U.S. v. Pamrapo Savings Bank, S.L.A. (Cr. No. 10-220, June 3, 2010) (USDC NJ).

[9] U.S. v. Pamrapo Savings Bank, S.L.A (Cr. No. 10-220, Mar. 29, 2010) (USDC NJ)

[10] In the Matter of Pamrapo Savings Bank, SLA, OTS Docket No. 05584, (Order No.: NE-10-09, Mar. 29, 2010) (OTS).

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million fine, but states that assessment of the penalty ''shall be satisfied in full by . . . payment to be remitted . . . to the Department of Justice.''

A Matter of Mergers

Still confused as to the thinking behind FinCEN's June 1 decision, I found a Jan. 21, 2010, OTS Order. (No. NE-10-02). It proved to be key. It states that if ''the sale or merger of the Association [Pamrapo] is not complete by March 31, 2010,'' the bank shall appoint three new qualified, independent directors, hire a ''qualified and experienced permanent Chief Executive Officer by March 31, 2010,'' and take specified remedial actions. These requirements followed the gravamen of the C&D; the bank was to stop operating ''with a board of directors that has failed to exercise proper oversight of the Association; and . . .without experienced managers.''

On June 30, 2009, Pamrapo announced it was being purchased by BCB Bancorp, Inc., also of Hudson County, N.J. The merger, however, has yet to close. According to BCB's 10-Q, filed on May 17 for the period ending March 31, 2010, the transaction recently received regulatory approval and is ''expected to close by the end of the second quarter of 2010, given the satisfaction of other customary closing conditions.'' In the meantime, it appears from Pamrapo press releases and officer's titles that neither the required independent directors nor the new CEO have joined that bank.

A Delicate Situation

The hanging merger of BCB and Pamrapo put the regulators in an interesting position. Absent a recently dismissed suit by Pamrapo's largest shareholder challenging the merger, the deal probably would have closed months before. This would have allowed the new owners to meet the requirements of the Jan. 21, 2010, C&D in a timely manner and to bring the bank back from the edge of the regulatory abyss. But the bank has yet to meet either the change in management requirements of the Jan. 21, 2010, OTS C&D, or the AML requirements of the Sept. 26, 2008, OTS C&D. In the absence of bank compliance—regardless of the reason—the regulators had to address Pamrapo's flagrant disregard for basic AML safety and soundness rules.

Had the federal banking regulators taken the time to coordinate press releases, or even cross-referenced each other's orders, it would have saved the regulated industry a great deal of time and, more importantly, allowed the regulators and the Department of Justice to send a tailored, specific message to the financial institutions. Although the $6 million dollars in fines and forfeitures imposed collectively by OTS, Justice, and FinCEN may fit the crime, if all one saw was FinCEN's CMP Order, the message would appear to be that BSA violations are not taken very seriously. The CMP order alone, without a lot of background information, does not fit the crime and sends the wrong message to the financial institution world concerning the seriousness with which the Department of Justice, regulators and FinCEN view BSA compliance. At the end of the day, however, as a percentage of assets, Pamrapo, despite the relatively low FinCEN fine, paid a much higher price than did AmSouth.[11]

[11] As a percentage of assets, the Pamrapo total (1.09%) is multiples of the total paid by AmSouth (0.109%).