



FBME v. FinCEN*

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A recent case, *FBME Bank v. Lew*,¹ involving FinCEN raises interesting questions under the Administrative Procedure Act (APA).

FBME is a Tanzanian chartered bank owned by a Cayman Island holding company. It operates a commercial banking business mainly out of a branch in Cyprus. On July 29, 2015, FinCEN promulgated a final rule after notice and comment under section 311 of the Patriot Act to impose the fifth special measure authorized to be imposed on a bank that it finds to be a primary money laundering concern. The statute requires a promulgation of a rule when the fifth special measure is imposed. Such a rule would prohibit, or impose conditions upon, the opening or maintaining of a correspondent account in the United States by any domestic financial institution or domestic financial agency for, or on behalf of, FBME bank.

FBME filed suit against FinCEN for a preliminary injunction halting enforcement of the rule until its lawsuit for a permanent injunction was heard. It based its appeal mainly upon violations by FinCEN under the APA. The U.S. District Court for the District of Columbia granted that injunction on August 27, 2015.

APA Provisions at Issue

The two provisions of the APA that the Court found supported the claims of FBME were sections 553(b) and (c), and 706(2)(A). The relevant parts of those provisions are below:

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¹*FBME Bank LTD v. Lew*, Case No. 15-cv-01270 (D.D.C. 2015).

sec. 553 Rule Making

(b) General notice of proposed rule making shall be published in the Federal Register . . . The notice shall include —

- (1) a statement of the time, place, and nature of public rule making proceedings;
- (2) reference to the legal authority under which the rule is proposed; and
- (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

...

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. . .

sec. 706 Scope of Review The reviewing court shall —

...

- (2) hold unlawful and set aside agency action, findings, and conclusions found to be —
- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . .

Opinion

In its opinion, the court concluded that it will not second guess FinCEN on its finding that FBME poses a primary money laundering concern, or its resulting imposition of the fifth special measure. “The Court therefore finds that FBME has not established a likelihood of success on the merits of its claim that FinCEN’s ultimate finding is arbitrary and capricious under the APA.”²

Nevertheless, the Court further concluded that such a finding does not relieve the agency of its obligation to adhere to the APA’s procedural requirements in at least two respects: (1) it did not provide FBME with the notice and thereafter all the public information available to FinCEN; and (2) it did not explain why other less drastic remedies were not chosen.

Failure to provide all non-classified, not protected information

With respect to the first argument by FBME, the court conceded that FinCEN provided significant information and finds that the agency is under no obligation to provide the information that is classified or otherwise statutorily protected. It did find, however, that notwithstanding that large

² FBME Bank LTD v. Lew p 3.

amount of information provided, there was more that the agency had used in its deliberation that was not shared. As for classified information, it is clear Congress contemplated the agency using such information and not sharing it, and with respect to statutorily protected information (mainly SARs), not only was the obligation to keep that confidential required under the statute, but the bank was not taken by surprise that SARs might be used to provide evidence for FinCEN.

As for the other public information not disclosed (such things as blog posts, magazine articles, etc.), the agency argued that FBME had not asked for such information and that, in any case, its weight was not significant when compared with all the additional information. The court, however, found that the evidence provided did not contain some of the information contained in the non-disclosed information (e.g., suspicious activity involving Italian politicians and the bank processing payments for online scams), and that the bank, therefore, did not have the opportunity to question such additional information prior to the decision by the agency. It is unclear where such questioning might have led. The court concluded that FinCEN considered and relied upon such information, and, therefore, to provide the notice required under the APA, it must disclose them. The bank should not be tasked with asking the correct questions to surface the information.

Especially in light of the fact that FBME was not and could not have been privy to the classified and statutorily protected material on which FinCEN relied, it was entitled at a minimum, it would seem, to view and comment on all of the non-classified, non-protected material on which FinCEN relied.³

FinCEN properly withheld the large amounts of classified and protected information in the record. But by simultaneously withholding from FBME and the public the unclassified record on which it relied and which provided part of the evidentiary basis for its rule, FinCEN appears to have failed to comply fully with the APA's notice-and-comment requirements.⁴

The court concluded that it need not articulate what remedy it would order if it ultimately finds for FBME on the merits of this claim.

Agency acting arbitrarily and capriciously

The Court concluded that FinCEN acted appropriately in selecting the fifth special measure as a remedy under the statute. However, the agency failed to explain why it didn't choose one of the available alternatives under the fifth special measure short of prohibitions (i.e., it could have imposed conditions of one or more types), and failing to do so, the agency acted in an arbitrary and capricious fashion.

³ FBME Bank LTD v. Lew p 15.

⁴FBME Bank LTD v. Lew p 17.

While it is implicit in the Final Rule why the first four special measures were not viable alternatives, nowhere in the record does the agency explain why conditions on the opening or maintaining of such accounts for FBME could not protect the U.S. financial system against the risks posed by FBME. And given how rarely the fifth special measure is imposed, as well as the unusual procedural character of the agency action Section 311 calls for, it was incumbent upon the agency, in the Court's view, to consider alternative forms the fifth special measure might take.⁵

Irreparable harm to FBME

The Court accepted a declaration provided at the injunction hearing from an expert witness for FBME that the bank would suffer irreparable harm if the rule were to take effect. That satisfied the Court on irreparable harm to the bank.

Balancing equity and the public interest

The Court concluded that the publication of the rule has effectively eliminated most transactions involving FBME that would cause a danger to the U.S. and its financial system, and therefore, no harm would be suffered by the U.S. in granting this preliminary injunction.

By arguing that a preliminary injunction will have essentially no effect on FBME's operations or access to U.S. correspondent accounts, the Government has effectively conceded that the Court's granting a preliminary injunction will have little or no marginal effect on the exposure of U.S. banks to FBME's transactions pending a final decision on the merits.⁶

Some Implications

It is possible that other federal courts may find the case persuasive in situations in which the government has a statutorily-created information imbalance vis-a-vis the party affected by the rule, and has undisclosed public information that is not protected from discovery by statute but has simply not been sought through appropriate questions directed to the government or, when sought, not revealed by the government.

A couple of possibilities come to mind. The stress tests under section 165 of the Dodd-Frank Act are subjects of rulemaking. The administration of the tests has been questioned and the government has not yet been forthcoming with information that reveals significant information to parties subject to those tests. Separately, the proposed designation of an institution as a SIFI

⁵ FBME Bank LTD v. Lew p 21.

⁶ FBME Bank LTD v. Lew p 27.

must include an explanation of the basis of the proposed determination by the Financial Stability Oversight Council (FSOC) under section 113 of the Dodd-Frank Act. Some of the institutions that have been designated as SIFIs question that all the relevant facts have been considered. These are two situations in which there is clearly lack of symmetry between the parties and the government with respect to knowledge of significant facts about the relevant question, and while asymmetry can be tolerated to an extent under deference, the court in FBME concludes that “the deference owed to the agency is not unlimited: A reviewing court must consider whether the agency provided a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”⁷

Summary

This is an unusual case, since seldom does FinCEN attempt to apply the fifth special measure, and the statute provides clear authority to the government to withhold some information from all parties. The court addressed that at the end of its opinion when it says, “holding the agency to its full procedural obligations — even where the present record suggests that its ultimate decision was a proper exercise of its discretion — is critically important in a quasi-adjudicative rulemaking grounded largely on classified evidence.”⁸ This is only a ruling on a preliminary injunction, and the case will be closely watched as it proceeds.

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⁷ FBME Bank LTD v. Lew p 19 (citations omitted).

⁸ FBME Bank LTD v. Lew p 28.