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BNP Paribas and Credit Suisse: Everything's Negotiable

From the Experts

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On Monday, France's largest bank, BNP Paribas S.A., agreed to plead guilty in state and federal court to charges brought by the U.S. Department of Justice for violations of the International Emergency Economic Powers Act, and by the New York County District Attorney's Office for related charges. As part of a settlement with multiple enforcement authorities, BNP has agreed to pay nearly $9 billion in penalties. In May, the DOJ secured a guilty plea from Credit Suisse AG to a tax fraud conspiracy charge as part of an agreement that includes $2.6 billion in monetary penalties. Some are quick to say that these resolutions open a new chapter in the government's enforcement efforts against criminally culpable institutions and signal the end of the deferred prosecution agreement era, while others say that it either demonstrates or refutes that banks are "too big to jail."

The real lesson to be learned, however, is that all aspects of an agreement—even the collateral consequences of a criminal conviction—are negotiable. While the popular conception has long been that a company's guilty plea was tantamount to a corporate death penalty, the BNP Paribas deal, which stemmed from examinations by authorities into whether BNP Paribas evaded U.S. sanctions relating primarily to Sudan between 2002 and 2009, indicates that neither BNP nor the government views a guilty plea to be fatal. Likewise, Credit Suisse has, as a result of a comprehensively negotiated resolution, apparently emerged from its tax scandal largely unscathed.

In other words, when an entity-level resolution of a criminal investigation is broken down into its constituent parts, often the name attached to it ("guilty plea") is less important than the certainty provided by a detailed resolution of other issues, particularly the collateral consequences.

United States v. Arthur Andersen: The Benefit of Certainty

Of course, discussions of criminal prosecution of business entities typically start with the prosecution of Arthur Andersen LLP. The facts are familiar: Andersen audited Enron Corp., and was implicated in Enron's accounting fraud—at the time the most breathtakingly massive corporate fraud in history. Looking back, the most striking aspect of Andersen was not the fact of its criminal conviction, but rather that the result was reached only following a contested indictment and trial, with all the months of uncertainty such a process entails.

As contemporary reports revealed, in its negotiations with DOJ, Andersen took the position that no action should be taken against it because any action would threaten its survival, and if its survival were threatened, thousands of innocent employees would suffer devastating consequences. Unsatisfied with this proposal, the federal government sought and obtained an indictment of Anderson for obstruction of justice, tried the firm on those charges a few months later and obtained a conviction. In the course of this process, the firm essentially went out of business, and the subsequent reversal of the conviction by the U.S. Supreme Court was meaningless to the defunct company.

What is the lesson of Andersen? A disputed criminal case is indeed extremely harmful to an entity, and likely fatal. In Andersen's case, neither clients nor personnel were willing to endure months or years of uncertainty while Anderson contested the charges. In other words, the conduct at issue (and the taint of being associated with Enron), together with

the uncertainty of the outcome, likely put Andersen out of business; the conviction was just another nail in the coffin. For that reason negotiated resolutions, regardless of their type, offer one tremendous improvement over a contested criminal case: They offer certainty.

In Negotiating a Resolution, Focus on its Elements More Than on its Name

Once an entity is considering a negotiated resolution, the question becomes how to negotiate it. One way is to focus on the type of resolution—a nonprosecution agreement, deferred prosecution agreement or guilty plea agreement—and press for the most favorable outcome.

A better place to start with such a negotiation is to break the agreement down into its elements, represented by the following questions:

1. What is the entity going to pay?
2. What is the entity going to say?
3. What is the entity going to do?
4. What will we call it?
5. What are the collateral consequences?

Although question No. 4 has been the focus of much media attention in such cases, it is often independent of (and arguably less important than) the other questions. Regardless of what the agreement is called—a nonprosecution agreement, a deferred prosecution agreement or a guilty plea agreement—the answers to the first three questions can be individually negotiated, and can be traded off against each other to reach a result that both sides can live with. For example, there may be public admissions (What is the entity going to say?) that an entity might make that would be valuable to the government—and offset the need, say, for a monitor or some other future remedial measures (What is the entity going to do?).

In addition, the resolution of the first three elements has no real necessary correlation with how the fourth element is resolved (What will we call it?). That is, an entity can make the same payment, make the same admissions and undertake the same remedial measures in the context of a nonprosecution agreement, a deferred prosecution agreement or a guilty plea agreement.

In fact, it may be that a company under investigation can give the government more in terms of what the agreement is called—by agreeing to a "guilty plea" rather than a "deferred prosecution agreement"—and as a trade-off give less in terms of what the company has to do. For example, as recently reported by Lynnley Browning in Newsweek, despite the assessment of a record-setting fine, Credit Suisse was not forced to reveal the names of at least 22,000 of its "tax-dodging Americans hiding up to $12 billion offshore through the bank." Credit Suisse arguably did less than its counterpart, UBS AG, which in 2009 entered into a deferred prosecution agreement with the DOJ and paid a $780 million fine, but was forced to name the clients it had helped cheat on their taxes. In other words, Credit Suisse paid more and received a tougher sounding penalty than UBS, but perhaps did less by keeping the identities of its clients a secret, while facing no licensing or other regulatory repercussions.

Negotiating Collateral Consequences

This brings us to question No. 5 (What are the collateral consequences?) and the true lesson of BNP's and Credit Suisse's negotiations and guilty pleas. The government is not willing to accept the oft-repeated truism that "a criminal conviction is tantamount to the corporate death penalty," and instead will dig deeper and demand a more precise understanding of potential collateral consequences. Then, to the extent possible, regulators may work together to mitigate or eliminate those consequences as part of the negotiated plea. For BNP Paribas, this means that its settlement brought the DOJ, the N.Y. Department of Financial Services, the N.Y. County District Attorney's Office, the N.Y. Federal Reserve, and (as reported in the press) regulators in Hawaii and California to the table. Similarly, Kathryn Keneally, the former assistant attorney general in charge of the DOJ's Tax Division, acknowledged in a recent talk that the DOJ "worked closely with all of the bank's regulators to understand what each regulator's issues were with the bank's alleged wrongdoing." The ultimate goal for this process was that Credit Suisse would be able to absorb the penalty and guilty plea without serious threat to its existence. Keneally said: "Credit Suisse is still standing—an outcome the government intended."

Of course, prosecutors are not inherently well-equipped to determine potential collateral consequences, or whether or how they can be addressed. It thus falls to the entity's lawyers to engage in a rigorous and comprehensive analysis of collateral consequences, and to educate the government accordingly. Just as an entity's statements and admissions in a negotiated resolution may be valuable to the government, prosecutors can also include in the negotiated resolution an agreement from other regulators to ameliorate collateral consequences. For example, a negotiated resolution may provide that the entity is not barred from government contracts or that the entity's license or charter will not be revoked. Indeed, Benjamin Lawsky, the superintendent of the N.Y. Department of Financial Services, agreed as part of the Credit Suisse and BNP Paribas deals not to revoke the banks' charters.

On the other hand, there may be collateral consequences that flow directly and inexorably from some other element of a plea agreement—for example, some law, regulation, contract or indenture may provide that a conviction of a particular type of crime will require a particular collateral consequence. Or, a similar type of result might flow from admitting certain conduct. Where company counsel can identify examples of these mandatory consequences, counsel can bring those to the government's attention and present a much stronger argument against a particular proposed plea or admission than the one-size-fits-all claim that a conviction is corporate homicide. For example, media reports indicate that the resolution between the government and JPMorgan Chase (regarding the bank's failures relating to Bernie Madoff's fraud) was pushed away from a plea and toward a deferred prosecution agreement due to the comptroller of the currency's view that certain collateral consequences were mandatory.

The BNP and Credit Suisse cases show that regulators are willing to work with companies to manage known collateral consequences flowing from a negotiated resolution. It is critically important that the lawyers negotiating such a resolution ensure that the government is apprised in detail of all possible collateral consequences. That way all parties can ensure that the entity's survival is not threatened and that innocent shareholders and employees are not harmed. Indeed, as reported by The Economic Times, BNP Paribas' chief executive officer Jean-Laurent Bonnafé referred to the settlement as "good news for all teams and for our customers," as it "will help remove current uncertainties in our group [and] allow us to turn the page on these events." In other words, for BNP and Credit Suisse, a comprehensive settlement with prosecutors and regulators, even one called a "guilty plea," allows for the books to be closed on these investigations and provides what the market craves—certainty.

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