

FDIC new enforcement actions

Since the beginning of time (at least since the beginning of FDIC enforcement actions over 30 years ago), FDIC has utilized an array of alternative enforcement actions. For informal, nonpublic matters, resolutions by the Board of Directors and memoranda of understanding have been the instruments of choice. For formal enforcement actions, until two weeks ago, when a major policy shift occurred, FDIC always utilized cease and desist orders—“C&Ds.”

Proposing a change to enforcement action emphasis

In March, I had a rare opportunity to discuss FDIC enforcement actions directly with FDIC Chairman Sheila Bair and Sandra Thompson, the head of FDIC Supervision. At that meeting, I recommended that it was time to change the content of FDIC’s formal enforcement actions to be more “user friendly” to the banks. As a practitioner in the field, it had been virtually impossible to get any of the FDIC regional offices to change the boilerplate that had been in the enforcement actions for over 30 years. The response at the regional level, whenever a change was requested, was generally, “No, we cannot change that. That language does not change. That is the way we have always done it.”

My suggestions were designed to reduce liquidity and reputational risks to community banks which result from the publication of C&Ds. Specific suggestions included changing the title of the C&D and that the structure of the C&D be revised so that it is far less inflammatory to the uninitiated public and even the press.

The structure of a standard C&D includes an entire section indicating what the bank will “cease and desist” from doing, including the standard boilerplate of operating with inadequate management and board of directors; engaging in hazardous and lax lending practices; policies; and the like. Pretty heavy stuff and totally unnecessary from a legal standpoint. The second part of the typical original C&D involves a corrective program which consists of affirmative actions the bank is to take to correct the problems.

In March of 2009, I suggested to Chairman Bair that most community banks would have no objection to the corrective program (as long as they could comply), but it seemed to be the cease and desist portion, which was never enforced by the FDIC anyway, that created an unnecessary liquidity and reputation risk to the banks.

At the request of Chairman Bair’s staff, I provided specific written recommendations and sample documents.

FDIC ceases to insist on cease and desist

Approximately six months later, FDIC changed its policy on formal enforcement actions. If the bank now consents to a formal enforcement action (instead of exercising its right to go to an administrative hearing), then the document resulting from that consent will no longer be titled an “Order to Cease and Desist ” but, instead, it will be designated a “Consent Order.” In addition, the new Consent Order format eliminates the entire “cease and desist” section with the inflammatory language that caused many community banks reputational and liquidity difficulties. The order still contains a corrective program that may run many paragraphs and pages.

I commend Chairman Bair for being proactive in this regard and causing a needed change to be made. Without Chairman Bair’s proactive approach from the top down at the agency, the change would not have occurred.

The new Consent Order, while still enforceable in federal court and with civil money penalties if necessary, should at least significantly mitigate the consenting banks' liquidity and reputational risks. Congratulations to the FDIC for making the change.

About the Author

Jeff Gerrish is chairman of the board of Gerrish McCreary Smith Consultants, LLC, and a member of the Memphis-based law firm of Gerrish McCreary Smith, PC, Attorneys. He is a frequent contributor to ABA Banking Journal and ABA Bank Directors Briefing, and frequently speaks at ABA events and telephone briefings.

Gerrish formerly served as Regional Counsel for the Memphis Regional Office of the FDIC, with responsibility for all legal matters, including cease-and-desist and other enforcement actions. Before coming to Memphis, Gerrish was with the FDIC Liquidation Division in Washington, D.C. where he had nationwide responsibility for litigation against directors of failed banks.

Gerrish can be reached at jgerrish@gerrish.com, and the firm's website, www.gerrish.com