

FDIC WEBSITE WILL STILL SHOW "CEASE AND DESIST" INSTEAD OF "CONSENT ORDER"

After approximately 35 years in this business, I have finally figured out how the regulatory agencies work.

In order to understand what I am talking about (I hope you do eventually), for those of you who have children, think of the conversations you have had with them at one time or another. The conversation typically goes like this. The child says, "I am going to do so and so." The parent says, "Why would you do that?" The child says, "because Jimmy is doing it." The parent says, "If Jimmy jumped off a bridge, would you jump off a bridge?"

I finally concluded that that is the way the regulatory agencies work as well. In this case, it is abundantly clear that if the Office of the Comptroller of the Currency (the regulator for national banks) jumped off a bridge, FDIC would soon follow. Let me share the insight with you as to how I came to this conclusion.

The "other shoe" on consent orders versus "Cease and Desist";

As many of you know, I had the opportunity to plant the seed with FDIC Chairman Sheila Bair to change the enforcement actions from "Cease and Desist Orders" to "Consent Orders." (Read an earlier column telling that story.)

I am pleased to have been the instigator of that. The new Consent Orders are much more user friendly. Once FDIC began using Consent Orders, it also occurred to me that while FDIC might not think of it, their website, which publishes the Consent Orders on the fourth Friday of every month, would probably need to have some modification to show that instead of issuing Cease and Desist Orders, they are now issuing Consent Orders. It could even have a different differentiation for where they actually issued Cease and Desist Orders (those issued after an administrative hearing) and where they issued Consent Orders (those orders issued by consent of the bank).

On behalf of community banks everywhere, I thought I would bring this matter to the attention of FDIC's General Counsel, Michael Bradfield. On Nov. 19, 2009, I sent Mr. Bradfield a letter explaining that it seemed to me it would be appropriate to make sure that FDIC's website was modified to reflect the new Consent Order. (I was not sure that they would not have thought of it, but I just wanted to make sure that they did.)

On Jan. 6, 2010 (approximately six weeks later—and I am still not sure why it took that many weeks to get a three-paragraph letter out), I was informed by General Counsel Bradfield that, in fact, FDIC would not make such a change to its website. As Mr. Bradfield correctly pointed out in his letter, both Cease and Desist Orders and Consent Orders are issued under the same section of the Federal Deposit Insurance Act (we all knew that).

Apparently, however, the real issue for FDIC, with respect to how they publish the new Consent Orders, was as follows, according to Mr. Bradfield: "In light of the OCC's publication practices, [not to differentiate] I believe it to be appropriate for FDIC to follow similar practices as we implement our policy with respect to Consent Orders."

Frankly, I was not expecting a letter back from FDIC saying, "Gee, Jeff, that is a good idea. Thanks for pointing that out to us." But I thought it made common sense that if they have changed the Order, they should change the name of it on the website. FDIC, however, at least Mr. Bradfield, did not think so and as a result, it will again take someone higher in the agency to bring a little bit of logic to the system, which I hope eventually happens.

So, the bottom line of all this is that if the OCC jumps off a bridge, FDIC would likely follow closely behind.

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.