
LIFE UNDER AN ENFORCEMENT ORDER, PART THREE: FIVE COMMON QUESTIONS

Final installment (for now) answers most common queries from bankers

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Part 1 and Part 2 of this blog series about enforcement actions have raised some very basic questions that I thought might be appropriate to put in this final blog (for now, anyway) on Consent Orders. Set forth below are the five most common questions bankers ask about a Consent Order:

1. Do I have to sign it?

Answer: No.

It is called a "Consent Order" because the only way the regulators get one is if the Board consents. The Board has the option to either consent, or not to consent. If the Board elects not to consent, the regulator's only option is to go through a lengthy administrative process. This involves the appointment of an Administrative Law Judge to hear the case; the issuance of a Notice of Charges (similar to a complaint in a civil action); the filing of an Answer by the bank; discovery by both the bank and the regulator; a trial before the Administrative Law Judge; a recommended decision of the Administrative Law Judge to the agency; and then the agency's final decision.

The Board does not have to consent. Most Boards do consent unless they believe it is impossible to comply, and they do not want to be in violation of the Order the day they sign it.

2. If my Board consents to the Order, and it is issued and we fail to comply, will they close my bank?

Answer: No, not from the failure to comply with an Order alone.

Regulators may close your bank if you have a liquidity crisis. If that is the case, it really does not matter what your capital

ratio is. If the bank cannot meet the demands of its depositors, it will be closed no matter what its capital. It will also be closed if asset quality continues to deteriorate and there is an equity insolvency.

There has only been one exception to this general rule that I know of, which occurred last summer in California when the Commissioner closed a bank based on the bank being in an "unsafe and unsound condition" notwithstanding its Tier 1 capital level north of 4%.

3. If the Board consents to the Order and cannot comply, I understand they will not close my bank for that alone. But will they assess civil money penalties against the bank's directors?

Answer: Who knows? They can. But do not worry, because the maximum penalty is only somewhere in the neighborhood of \$1.2 million a day per violation.

Historically, the regulators have not assessed penalties for failure to comply with an Order if the bank has acted in good faith, attempting to comply. Unfortunately, as indicated in prior blogs, when the bank attempts to get the "good faith" assurance in the Order itself, the regulators are unwavering in their unwillingness to give that written assurance.

The regulator's failure to assess civil penalties for a violation of the Order when the bank has acted in good faith has been the historical practice. What will happen in this environment is impossible to tell. The regulators have a long time in which they can decide whether to bring civil money penalties. We recently had a client (not involving a Consent Order) where the regulator decided to bring a civil penalty and a removal from banking action involving allegations related to matters that occurred four years ago.

Will there be more civil money penalties in the future because there are more Consent Orders? Probably so.

4. What if my Board consents to a Consent Order and later needs a modification of it?

Answer: The Order will generally provide that it is what it is, unless it is modified by the regulator.

Some modifications or exceptions are fairly routinely granted, for example, additional time where circumstances have changed and it makes sense. Others are routinely rejected, such as eliminating the dividend restriction or changing the minimum capital requirement. If the Board needs a modification of the Order, go to the contact at the regulatory agency (the Case Manager, Relationship Manager, etc.), and ask.

5. Now that the bank has consented to an Order, how and when does it ever get terminated?

Answer: There are two ways to get a Consent Order terminated.

One way is for the bank to fail. The regulatory agency then on its own will terminate the Consent Order. (Not recommended.)

The other way is to work through all of the issues that caused the Consent Order to be proposed as a corrective program to begin with. That will generally take at least two exam cycles, but possibly more.

We have had at least one client bank which has operated under a Consent Order for over six years.

Those are some common questions that have come out of the previous blogs. If any of you blog readers have any others, please send them on to jgerrish@gerrish.com and I will try to address them in the future.

Editor's Note: We invite bankers, board members, examiners, and anyone else who has had involvement in the examination or regulatory order processes to share their thoughts and experiences here. If you have questions of a general nature—;not regarding specific banks or events—;please email them to scocheo@sbpub.com for consideration for answering in future blogs.

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.

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

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