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## LIFE UNDER AN ENFORCEMENT ORDER: THE P.R. CHALLENGE

More about "Life Under An Order": Handling the public relations impact

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This is a follow-up to Jeff's earlier series, "Life Under An Order." To read the original series, start [here](#). To suggest further installments, email Jeff at [jgerrish@gerrish.com](mailto:jgerrish@gerrish.com)

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I have received numerous inquiries lately about publication of enforcement actions. One aspect of "Life under an Order" involves dealing with communication issues with your bank's various constituencies, including shareholders, regulators, the press, and the community.

You've got (or will have) company

The good news with respect to enforcement orders is that there are lots of them out there. At last count, there were approximately 1,200 formal/public enforcement actions against banks, and an equal number of informal/nonpublic actions. The informal/nonpublic actions are no big deal, unless you are an SEC reporting company, at which point most conservative securities counsel will require you to disclose even an informal action.

A formal action under Section 8 of the Federal Deposit Insurance Act (all the federal agencies issue their orders under Section 8) is required by statute to be disclosed. As you might imagine, each of the regulatory agencies discloses their Order in a different way (Why should there be any uniformity even though each Order emanates from the same authority?).

In addition, if you are a public bank holding company whose subsidiary bank, under either FDIC or OCC, is subject to an Order, under the Securities and Exchange Commission rules, the bank or holding company is required to file an 8-K virtually immediately, so there is little "lag time" when no one knows about the Order as there would be if the company was not an SEC reporting company.

How and when agencies publish Orders

In a nutshell, here is what happens regarding the disclosure of an Order. Once the Board consents to whatever proposed action the agency is contemplating (a Consent Order for the FDIC, a formal agreement or Cease and Desist Order for the OCC, a Written Agreement for the Fed, and a Cease and Desist Order for the OTS), then the agency is required to disclose that Order. In the normal course, the disclosure comes as follows:

FDIC-The last Friday of the month following the effective date of the Order, e.g. sign an Order on Jan. 3, 2011, it will be disclosed on the last Friday of February 2011.

OCC-Generally disclosed also in a "batch" like the FDIC, mid-month of each month for Orders issued the prior month.

Federal Reserve-The Written Agreement is generally disclosed within two or three days (once it is cleared by the Fed PR folks) of the effective date of the Written Agreement-on a one-off basis.

OTS-Also disclosed very close to the time the Order is issued.

Each of the agencies also makes special exceptions in special circumstances.

For example, if the bank is so unfortunate as to be subject to an unfair and deceptive practices settlement evidenced by an Order, that will normally be the subject of a separate press release. (Of course, the agency wants the world to know immediately that they are out doing good things as it relates to consumers.)

Getting ready before the world gets word

So, what does the bank do in preparation for the enforcement action being made public?

As I said, the good news these days is there are a lot of Orders and, theoretically, the public has become somewhat desensitized to them. I had one banker tell me that he wants to get a bumper sticker, "Honk if Your Bank is Under an Order."

The bad news is there are still some constituencies, including the press in various geographic areas, who do not understand what the Order means.

Several of my clients over the last two or three years, when faced with an Order, determined to be proactive and take their story to the local paper, the local business journal, or the local television station. Generally, this appears to have

been quite effective.

There are some exceptions, however.

Such as the TV station whose camera appeared at the bank during lunchtime when the CEO was out. The crew wanted to discuss the Order and announced over the television broadcast that evening that the CEO refused to come out of the bank. He was not in the bank, actually. He was at lunch. That didn't get reported.

Some of the smaller market media still makes a big deal about Orders. Our firm generally prepares a series of Frequently Asked Questions for the front-line employees to utilize when they receive questions from shareholders or bank customers related to the Order. Your bank should also prepare staff for questions.

Orders, disclosure, and regulatory help

Board members might think the regulators care what kind of PR the bank puts out with respect to an Order.

They don't.

Will the regulators help the bank with the PR?

They will not.

One major concern the board often wrestles with when an Order becomes public is that the condition of the bank at the time the Order becomes public is not anywhere close to the condition of the bank as reflected by the corrective program set forth in the Order.

For example, a bank may have an examination in March, the Examination Report not received until August, the Order not consented to until November, and not announced until December. The Order is based in that example on nine-month-old

bank examination data.

It is very difficult for the bank to try to convince the press or the public that things have improved dramatically when they are faced with an Order based on six- to twelve-month- old data. The issue then is how to convince the skeptical public that the bank's condition has improved, or certainly not grown worse.

If your bank is faced with an enforcement action, make sure your board understands the issues associated with the enforceability of the Order, the potential for civil money penalties, and the disclosure concerns.

I am still spending a good bit of time "getting directors off the ledge."

#### About the Author

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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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