

DRAMATIC CHANGES IN FDIC ENFORCEMENT ACTIONS DUE TO EFFORTS OF GERRISH MCCREARY SMITH

Since the beginning of time (at least since the beginning of the FDIC enforcement actions over 30 years ago), the 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 choice. For formal enforcement actions, until about the middle of October, the FDIC always utilized Cease and Desist Orders.

In March, Jeff Gerrish, Chairman of Gerrish McCreary Smith, had a rare opportunity to discuss FDIC enforcement actions directly with FDIC Chairman Bair and Sandra Thompson, the head of FDIC Supervision. At that meeting, he recommended that it seemed to him 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, when requesting a change, at the regional level was generally, "No, we cannot change that. That language does not change. That is the way we have always done it."

Our suggestions were designed to reduce liquidity and reputational risks to community banks which result from the publication of Cease and Desist Orders. Specific suggestions included the title of the Cease and Desist Order be changed and that the structure of the Cease and Desist Order be revised so that it is far less inflammatory to the uninitiated public or even the press. The structure of a standard Cease and Desist Order 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 Cease and Desist Order involves a corrective program which consists of affirmative actions the bank is to take to correct the problems.

In March of 2009, we 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, we provided specific written recommendations and sample documents.

Approximately six months later, the 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.

We commend Chairman Bair for being proactive in this regard and causing a needed change to occur. Without Chairman Bair's proactive approach from the top down at the agency, the change would not have occurred. We are also very proud of the efforts our firm made in bringing about this change.

The new Consent Order, while still enforceable in federal court and with civil money penalties, should at least significantly mitigate the consenting banks' liquidity and reputational risks. Congratulations to the FDIC for making the change and our firm will continue to press for these necessary changes in an otherwise difficult regulatory environment.