

SNEEZING, FLU AND BANK EXAMINATIONS

by [Steve Brown](#)

Did you know a sneeze will travel out of your mouth at about 100 to 200 miles per hour? That is as powerful as the wind of a Category 5 hurricane (155 mph). That strength is also the main reason your mom always told you never to try and suppress a sneeze and hold it inside. In banking, when examiners visit, they too can blow through banks on occasion like a hurricane, knocking down loan officers and leaving behind the wreckage of a major storm. Since so many banks are getting hit with regulatory orders in one form or another these days, here are some things you should know about each one.

Regulators have many actions they can take when it comes to enforcement. One of the most basic and least aggressive, is to simply build into the report of annual examination areas requiring management and board attention. Over the years, bankers have seen and experienced this type of response regularly, so we won't spend any more additional time here.

The next level up from the basic report of examination starts as regulators decide what additional action might be taken. These run the gamut of an informal agreement (typically known as a supervisory letter or a board resolution); which is followed next in line by a memorandum of understanding (MOU), then by a written agreement (Agreement) and finally by the dreaded cease & desist (C&D) order. Each action carries with it additional reporting at a minimum; but fines, penalties and other legal action can also come into play depending on the severity, so nuances are worthy of further discussion.

Informal agreements are the first step up the severity ladder from the normal annual examination. These are not made public and regulators view issues as relatively minor violations. The bank may be "less than satisfactory" in only a single component or limited number of areas; and regulators believe the bank is likely to consent and comply with the informal action, so that is the course chosen. Such Informal actions include commitment letters, board resolutions and memoranda of understanding (MOU). It is interesting to note that these actions are not enforceable in a court, but banks that fail to take corrective action are very likely to find themselves under a formal agreement.

On the subject of MOUs, we found it interesting that much to the chagrin of bankers, board members and regulators everywhere; it was reported by the WSJ in July 2009 that both Bank of America and Citigroup had been placed under one. We don't know if that is true or not, because MOUs are not public, but it is interesting nonetheless.

Moving beyond informal agreements, we next discuss the formal variety. These are more severe and can subject the bank and individuals to civil monetary penalties and other legal actions. These are considered "formal," because they are enforceable under Federal Deposit Insurance Act. Primary formal actions include written agreements and cease & desist orders (which can be temporary or permanent).

When it comes to formal actions, the written agreement is the least severe type. In basic form, it is really a contract signed by the bank, individuals at the bank and the regulatory agency. A written agreement usually contains the same types of provisions found in a C&D, but it does not include a

notice of charges. Written agreements can be referred to under a variety of names including "written," "formal," or "supervisory" agreements.

The C&D is typically the granddaddy of actions a regulator will take. It is the most severe and it requires a person and/or a bank to halt certain practices and to take action to correct violations immediately. The C&D compels the bank to steps spelled out by regulators or face civil monetary penalties and other legal action.

As you ponder the fact that a sneeze will travel up to 12 feet, try pacing it off in your office this morning. Then, put down a strip of brightly-colored tape near the door for visitors to stand behind during this flu season. At the very least, doing this gives you an instant Business Continuity Plan. Here's hoping your bank doesn't catch the regulatory equivalent of the flu this season.

BANK NEWS

M&A

First National Bank (\$279mm, IL) has agreed to purchase First State Bank (\$105mm, IL) for an undisclosed sum.

DIF Replenishment

The FDIC is considering asking banks to prepay their regular insurance premiums and/or borrowing funds from healthy banks to rebuild the DIF.

OD Fees

Amid increasing Congressional uproar, both JP Morgan and BofA have cut OD fees. The banks will allow consumers to opt out of checking OD protection; JP will cancel fees for accounts overdrawn by \$5 or less (BofA will cancel for \$10 or less) and both banks are looking at instituting period caps on the total amount of OD fees that can be charged. Other banks are expected to follow suit.

Performance

Less than half of bank CEOs have at least a somewhat strong ability to evaluate the effectiveness of training on employee performance. According to a survey by the ABA and Corporate Executive Board, on average, \$650 is spent per employee on training (33% less than the average spent by businesses).

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