WINDING DOWN

by Steve Brown

There are lots of ways to wind down - from tipping back in a chair, closing your eyes and taking a quick nap; to wandering step by step down a spiral staircase; or by just finding something to do that you enjoy. As the year winds down and bankers begin to think of things they might rather be doing, we pause and take a moment to review regulatory enforcement actions. You may wonder how this topic will help you wind down, so we take the opportunity to point out that while it may not help you relax, we review the nuances of a recent regulatory update to at least help you avoid vertigo if your bank ever finds itself in need of the information.

At a high level, regulatory enforcement actions happen in response to violations of law, rules, regulations, orders or when banks are operating in an unsafe and unsound manner. They occur when regulators find weaknesses at a bank and regulatory agencies use the action at an early stage to keep banks from developing issues that adversely affect the bank's performance or viability. One interesting thing to note that we have heard often from bankers that have been hit with orders; is that enforcement actions are not necessarily correlated with the completion of the report of examination. Timing can be sooner because, depending on the severity of the issues, regulators want to see problems corrected as quickly as possible.

Regulatory orders can take one of two forms and are either informal or formal. The informal variety of enforcement action happens when regulators view the bank's overall condition as sound, but feel it is necessary to obtain written commitments from the board of directors to make sure identified problems will be promptly corrected. Such actions are explicit in nature and while not a legally binding document, the failure to honor the commitment most often leads to a formal action. Informal actions include commitment letters (document signed by board reflecting specific written commitments to take corrective actions), memoranda of understanding or MOU (in form and content looks like a formal enforcement action); safety and soundness plans (a description of the steps the bank will take to correct deficiencies and the time within which these steps are to be taken).

A formal enforcement action is another matter entirely, as these are authorized by statute, are more severe than informal actions and are disclosed to the public. Formal actions include consent orders (an order to cease and desist that outlines restrictions and remedial measures the bank must take to correct deficiencies or violations) and cease and desist orders (identical in form and legal effect to the consent order, but is imposed on an involuntary basis after issuance of charges and a hearing before a judge). These first two types give regulators the power to restrict the growth of the bank, dispose of assets and prohibit payments on contracts the bank has with others. Another type of formal agreement is in fact, a formal written agreement. As with the consent order and the C&D, this document sets out and specifically indicates restrictions and measures the bank needs to take to correct deficiencies or violations. It is a legally recognized document, but unlike the consent order and the C&D, it is not enforceable through the federal court system. In addition, while willful violation of a consent order or C&D can be used to appoint a receiver, the formal agreement may not. Finally, we focus on the prompt corrective action (PCA). The PCA subjects the bank to mandatory restrictions based on the bank's capital category and gives a time line to comply. The PCA has the same force and effect as a C&D and when banks are undercapitalized or worse, are often used in anticipation of an early resolution. Of note, violations of a consent (or other) order are used to provide the legal basis for assessing civil money penalties against directors and officers. In addition, formal enforcement actions can require a bank to raise capital, sell itself, merge, restrict asset growth, make restitution, dispose of assets, rescind contracts or agreements, employ qualified officers or even liquidate, so clearly regulators aren't messing around.

There is much still to cover in this regard, particularly when it comes to capitalization, so we will close that off tomorrow as we wind down our discussion on this topic.

BANK NEWS

FDIC on CRE

The Regulator will host a free seminar for bankers (targeted at $1B institutions and smaller) on Dec. 15th between 1pm and 3pm ET to discuss regulatory and accounting issues around real estate loan workouts. Of particular interest will be the proper handling of troubled debt restructurings. For background material and more info on getting on the call, go http://tiny.cc/PCBBFDICCRE.

Retail Sales

According to ShopperTrak, sales on Black Friday were 6.6% above last year. According to the Nat'l Retail Federation, sales for the 4-day weekend put in a more impressive growth rate of 16.6% year-over-year. Consumer spent an average of $398.62, up 9.1% from last year. Online sales had 26% growth from 2010 and accounted for approximately 38% of total sales (another record).

EU Bank Ratings

S&P will update its credit ratings of EU Banks this week, which have markets worried

Wealth Management

BofA will hire 250 new wealth managers in TX and FL to target mass affluent customers between $50k and $250k of investible assets.

European Impact

Fears of a market meltdown overseas have more than doubled foreign bank deposits at the Federal Reserve to $715B from $350B since the end of 2010. A survey by ICAP finds 47 foreign banks held balances of more than $1B each at the Fed as of 9/30, up from 22 at the end of 2010. Amid all the global turmoil, the data shows banks still feel the Fed is the safest place to park excess funds.