

ALERTS

Even the Winners May Be Losers

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While striving to assist our clients and customers in responding to the outbreak, we also need to think about when it is over. There will be many losers, but also inevitably winners, either real or perceived.

Helping the distressed and others harmed by the outbreak is hard and critical work. Managing the response to those who helped the winners will be unpredictable and complex. Right now, we cannot fully know the winners. Will it be customers that supply a desperately needed product or those that have sold at an opportune time? Our actions will be viewed through hindsight layered with emotions.

Under the CARES Act, there will be an independent inspector general similar to the TARP IG in addition to existing federal agency IGs. Congress and the combined bank regulators are empowering banks to lend through relief from temporary debt restructuring limitations and lowering risk weights, if done prudently. Government backed loan programs are underway with specific requirements. Through advising and regulating over four decades of banking crises and challenges, we have learned that winners are initially lauded and then, many are vilified. The heroes of the Big Short faced withering regulatory enforcement action and lasting reputational harm. Many decisions made after the crisis faced False Claims Act scrutiny.

In this time of global need, our clients must step up – and they have, for which we are grateful and proud. How best to manage the possibility of later criticism or inquiry? To the extent practicable, by maintaining applicable internal governance, processes and practices. Assistance, from the mundane to the extraordinary and creative, supported by process and documentation, can then be celebrated and as necessary, defended. Prudent lending is determined at the time credit is extended – what did and could we know when deciding to forbear or extend credit? Proper documentation and procedure will support good decisions, both now and if need be, later.