

**Professional Perspective**

# **Coronavirus Crisis Will Spark Consumer Protection Enforcement Actions**

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# Coronavirus Crisis Will Spark Consumer Protection Enforcement Actions

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While financial institutions are focused on implementing the Coronavirus Aid, Relief and Economic Security Act (CARES Act) and assisting customers, regulators will be looking over their shoulders. The future holds an increased number of non-payments, evictions, foreclosures, credit reporting issues, debt collections, and a whole host of other issues connected to a distressed economy. Many state and federal consumer protection regulations are crafted to protect consumers facing these types of challenges. Thus, the risk of supervisory inquiries, investigations, and enforcement actions should remain front of mind.

The stakes are high, and the risk is heightened by cuts companies may have made to compliance departments, call centers, and technology in anticipation of a recession. Thus, as seen during the financial crisis, economic downturns often prove the perfect storm for fraud, regulatory risk, and sometimes compliance failures.

Financial institutions will soon face an uptick in supervisory inquiries, civil investigative demands (CIDs), and subpoenas. While some courts may be closed, the investigating agencies are open and working. This article examines what practices may spark inquiries from supervisory, regulatory, and enforcement agencies and how financial institutions can position themselves to respond and mitigate exposure.

## Likely Investigators

Multiple agencies can pursue perceived misconduct and consumer harm resulting from financial institutions' practices related to Covid-19, and have been already. On March 24, 2020, Deputy Assistant General Jeffrey A. Rosen issued a [memo](#) urging Department of Justice prosecutors to prioritize investigation and prosecution of Covid-19-related crimes and schemes. He also emphasized the need for federal prosecutors to coordinate on these matters with state attorneys general and enforcement agencies. Many state attorneys general and state regulatory agencies such as the New York Department of Financial Services and California's Department of Business Oversight are likely to act aggressively and independently to investigate Covid-related consumer protection issues.

At the same time, federal agencies such as the Consumer Financial Protection Bureau (CFPB) and the Federal Trade Commission will also conduct their own investigations. And many criminal law enforcement agencies, including the [Federal Bureau of Investigation](#) and the [Internal Revenue Service](#), have issued advisories on Covid-19-related issues.

Although federal banking regulators have [signaled](#) that they "do not expect to take a consumer compliance public enforcement action against an institution, provided that the circumstances were related" to the Covid-19 national emergency and that "the institution made good faith efforts to support borrowers and comply with the consumer protection requirements, as well as responded to any needed corrective action," financial institutions should not assume there will be no investigations based on consumer protection laws or that the steps they are taking will be deemed to be in "good faith."

Even if regulators claim for the moment that they will be "flexible," there will be enforcement activity. Indeed, consumer protection laws—such as Regulation X, and the Real Estate Settlement Procedures Act—unfair, deceptive, or abusive acts or practices laws, and fair lending laws, remain in force and certain obligations under the CARES Act are undefined. Further, the CFPB [proposed](#) a whistleblower award program, as incentive to employees to report wrongdoing, and assist the CFPB in bringing enforcement actions.

## Likely Targets

Financial institutions should expect that investigations and regulatory supervision in the mortgage industry will target many of the same practices that were targeted in the wake of the 2008 financial crisis.

This will almost certainly include prosecutions of fraudsters who offer fake loan modification programs or other mortgage relief scams, such as straw buyer short sales, where investigators may look to information or documents from the lender, as well as the lender's knowledge of the fraud or policies or procedures to prevent it.

Investigations and supervisory inquiries will also target financial institutions, as they did after the implementation of the Home Affordable Mortgage Program in 2009, and will likely scrutinize:

- Alleged failures to promptly respond to consumer inquiries about forbearance programs and to process loan modification applications
- Administration of mortgage forbearance programs to ensure they are administered in a non-discriminatory manner
- Alleged unfair or deceptive practices related to loan modification offers or forbearance programs
- Alleged failures to honor loan modifications when mortgages are transferred from one servicer to another
- Unfair and deceptive practices relating to debt collection, including failures to disclose terms of modifications or forbearance programs, delays in issuing modifications or converting trial plans to permanent modifications
- Improper credit reporting practices or practices that are unfair or deceptive in light of representations made about forbearance programs
- Charging excessive or unauthorized fees
- Misrepresenting fees or excessive cost for lender placed insurance issued upon a borrowers' default
- Deceptive advertising
- Scrutiny of compliance programs related to all of the above practices

Financial institutions should also be prepared to respond to other types of investigations that may be on the horizon, including anti-money laundering investigations that relate to high-priority criminal cases and possible alleged failures to detect fraud in the Paycheck Protection Program.

Investigators may also eventually turn their attention, as they did in the wake of the 2008 housing crisis, to other banking practices. These have included allegations that banks illegally adopted discriminatory lending practices and engaged in illegal "redlining" during the 2008 economic downturn.

In addition, numerous investigations examined the practices of entities that received federal funding. As the federal government injects trillions of dollars into the economy in response to Covid-19, investigations about the use of those funds are sure to follow. Should financial institutions apply for federal funding through the CARES Act or future government programs, their use of such funds could prompt future investigations. Such investigations of recipients of funding provided through the 2008 Treasury's Troubled Asset Relief Program were widespread.

## What to Do

Prosecutors and regulatory agencies have already issued subpoenas or civil investigative demands in early Covid-19-related investigations, but these initial investigations will be the tip of the iceberg. Now is the time for in-house counsel at financial institutions to prepare.

### **Review Protocols and Staff**

In-house counsel should review their protocols for responding to government investigations and take steps now to ensure their institutions are appropriately staffed and prepared to respond to enforcement and supervisory inquiries in the short and long term. Staff should be equipped to respond to CIDs or subpoenas, requesting additional time if needed, issuing document holds, negotiating limits to the scope of the CID or subpoena, and gathering and producing responsive documents and information (in encrypted form, to protect customer or proprietary information).

In-house counsel should confirm that compliance continuity plans are functioning and maintain frequent and open communication with regulators, before and after receiving any investigative inquiry. Some regulators have signaled some willingness to be flexible in their enforcement of compliance requirements (for instance, for meeting certain reporting

deadlines or delays in actions required by Regulation X), but in turn they expect regulated entities to assist borrowers in a “safe and sound” manner and will expect proactive communication about issues.

### ***Mitigate Risk***

In-house counsel should consider the types of inquiries they may receive, including those noted above, and consider mitigating the risk, by among other things, updating and documenting changes to policies and procedures, reviewing any new customer communications developed by the business, and educating and training employees on the front lines of consumer inquiries. Counsel should also consider now which documentation and employees they would need to consult if an inquiry were received and how they would do so, particularly if employees are working remotely.

### ***Watch Autopilot Processes***

Financial institutions should consider any automated processes and whether they have been updated to comply with state and federal regulations issued in response to Covid-19, such as credit reporting, default letters, escrow notices, and auto-debiting monthly payments from customer bank accounts. Problems with many of these systems—which sometimes run on “auto-pilot” absent intervention—have served as the predicate for various enforcement actions in the past.

### ***Review Consumer Complaints***

Finally, companies should review consumer complaints as a telltale sign of where regulators may be looking for problems. Often those complaints—viewed individually, as trends signaled by aggregated data from government agencies, or through litigations and enforcement actions elsewhere in the industry—may point to pain points for companies and may be the focus of regulators.

There is no doubt that investigations and enforcement actions will be launched related to Covid-19. As there is no prohibition to initiating those now, the time is ripe for financial institutions to prepare.