

II. “Lions Hunting Zebras”: The Wells Fargo Fake Accounts Scandal and its Aftermath

On September 8, 2016, the Consumer Financial Protection Bureau (CFPB) announced that it had issued a consent order (Order) against Wells Fargo Bank, NA (Bank or Wells Fargo).¹³⁸ The Order effectively settled a lawsuit brought by the City of Los Angeles in 2015 after allegations arose that Wells Fargo employees were engaging in illegitimate sales practices.¹³⁹ The Order found that Wells Fargo engaged in a number of unfair, deceptive, or abusive acts and practices (UDAAPs), including opening deposit accounts, applying for credit accounts, and issuing debit cards, all without customer authorization.¹⁴⁰ As part of the Order, Wells Fargo was to pay \$185 million, including \$100 million in damages directly to the CFPB.¹⁴¹ This was “the largest penalty the CFPB has ever imposed.”¹⁴²

This article explores the Wells Fargo scandal, the CFPB’s order, and the impacts both will have on the banking industry. Section A discusses the origins of the CFPB, and provides a brief explanation of the UDAAP standards applied in the Wells Fargo case. Section B explains the sales practices carried out by Wells Fargo employees

¹³⁸ See *Consumer Financial Protection Bureau Fines Wells Fargo \$100 Million for Widespread Illegal Practice of Secretly Opening Unauthorized Accounts*, CONSUMER FIN. PROTECTION BUREAU (Sept. 8, 2016), <http://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-fines-wells-fargo-100-million-widespread-illegal-practice-secretly-opening-unauthorized-accounts/> [<http://perma.cc/E83E-FPUT>] [hereinafter *CFPB Announcement*]. See generally *Wells Fargo Bank, N.A., CFPB No. 2016-CFPB-0015* (2016).

¹³⁹ See Andrew Khouri & Jim Puzzanghera, *After L.A. Lawsuit, Wells Fargo Customers Express Anger Over Bank’s Practices*, L.A. TIMES (May 6, 2015), <http://www.latimes.com/business/la-fi-wells-fargo-20150506-story.html> [<https://perma.cc/D7B2-YGRQ>] (alleging that “the bank’s high-pressure sales culture set unrealistic quotas, spurring employees to engage in fraudulent conduct to keep their jobs and boost the company’s profits”); *Wells Fargo Will Pay \$190 Million to Settle Customer Fraud Case*, CNBC (Sept. 8, 2016), <http://www.cnbc.com/2016/09/08/wells-fargo-reaches-185m-settlement-to-settle-secret-account-fraud-case.html> [<https://perma.cc/26FH-6LR5>] (“The bank said that the deal this week settles the ‘allegations that some of its retail customers received products and services that they did not request.’”).

¹⁴⁰ *Wells Fargo Bank, N.A., CFPB No. 2016-CFPB-0015* (2016).

¹⁴¹ *CFPB Announcement*, *supra* note 1.

¹⁴² *Id.*

and the resulting Order against Wells Fargo. Section C analyzes the immediate fallout from the Order, including the Order's effect on the Bank, subsequent investigations by government agencies, and private lawsuits. Finally, Section D considers the broader effect the Order has on the banking industry.

A. The Consumer Financial Protection Bureau

The CFPB was created as part of the Dodd Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank),¹⁴³ which was enacted in 2010 in large part as a response to the 2008 financial crisis.¹⁴⁴ The CFPB's stated purpose is to "implement and, where applicable, enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive."¹⁴⁵ The CFPB has direct supervision over insured financial entities with over \$10 billion in assets.¹⁴⁶

In addition to its supervisory authority, the CFPB is authorized to investigate violations of consumer protection laws, which include Title X of Dodd-Frank,¹⁴⁷ along with a list of other "enumerated consumer laws."¹⁴⁸ These investigations may be carried out solely by the CFPB or jointly with other agencies or parties.¹⁴⁹ The CFPB is also authorized to bring both administrative proceedings and civil actions.¹⁵⁰ In such proceedings, the CFPB may seek a number of different remedies, both at law and in equity.¹⁵¹

¹⁴³ 12 U.S.C. § 5491 (2012).

¹⁴⁴ See Mark Koba, *Dodd Frank Act: CNBC Explains*, CNBC (May 11, 2012), <http://www.cnbc.com/id/47075854> [<https://perma.cc/UAN4-VCVE>].

¹⁴⁵ § 5511(a).

¹⁴⁶ *Id.*

¹⁴⁷ Dodd Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1001–1100H (2010) (12 U.S.C. § 1591 *et seq.*) (establishing, among other things, the CFPB and the UDAAP standard).

¹⁴⁸ 12 U.S.C. § 5511(c) (2012) (describing the primary functions of the CFPB); §§ 5481(12), (14) (defining "enumerated consumer laws" and "federal consumer financial law").

¹⁴⁹ § 5562(a)(1).

¹⁵⁰ §§ 5563–64.

¹⁵¹ § 5565(a).

1. UDAAPs

Title X prohibits UDAAPs in connection with consumer financial products and services.¹⁵² There are separate legal standards for what constitutes an unfair, deceptive, or abusive practice, and a violation of one can be found absent violations of the others.¹⁵³

An act or practice is “unfair” if: (1) it “causes or is likely to cause substantial injury to consumers,” (2) the injury is “not reasonably avoidable by consumers,” and (3) the “injury is not outweighed by countervailing benefits to consumers or to competition.”¹⁵⁴ Generally speaking, the “substantial injury” consumers suffer is financial in nature.¹⁵⁵ An injury can be “substantial” if it “causes a small amount of harm to a large number of people.”¹⁵⁶ The CFPB acknowledges that “consumers cannot avoid injury if they are coerced into purchasing unwanted products or services or if a transaction occurs without their knowledge or consent.”¹⁵⁷ Finally, a finding of an unfair act or practice requires the act or practice to cause a net injury (i.e., the injury caused by the action is not outweighed by the benefit of the action).¹⁵⁸

An act or practice is considered “deceptive” when: “(1) The representation, omission, act or practice misleads or is likely to mislead a consumer; (2) The consumer’s interpretation of the representation, omission, act, or practice is reasonable under the circumstances; and (3) The misleading representation, omission, act, or practice is material.”¹⁵⁹ Typical examples of deceptive acts or practices include misrepresentations and inadequate disclosures.¹⁶⁰

Finally, an abusive act or practice is one that “materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service.”¹⁶¹ Generally, an

¹⁵² § 5531.

¹⁵³ See CONSUMER FIN. PROTECTION BUREAU, CFPB SUPERVISION AND EXAMINATION MANUAL, UDAAP 1–10 (2012), http://files.consumerfinance.gov/f/201210_cfpb_supervision-and-examination-manual-v2.pdf [<https://perma.cc/4SPZ-5V98>] [hereinafter CFPB MANUAL].

¹⁵⁴ § 5531(c).

¹⁵⁵ CFPB MANUAL, *supra* note 16, at UDAAP 2.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at UDAAP 5.

¹⁶⁰ *Id.* at UDAAP 7–8.

¹⁶¹ 12 U.S.C. § 5531(d)(1) (2012).

abusive act or practice “takes unreasonable advantage of” a consumer’s limited financial knowledge, experience, or trust.¹⁶² The CFPB manual contains no clarifications on what constitutes “unreasonable advantage.”¹⁶³

B. Wells Fargo

Wells Fargo was founded in 1852, primarily to serve the western United States.¹⁶⁴ As of the third quarter of 2016, when the Order was issued, Wells Fargo ranked third in bank size, measured by deposits among all FDIC-insured institutions.¹⁶⁵ At the time, Wells Fargo had \$1.9 trillion in assets under supervision, and had a business relationship with one third of American households.¹⁶⁶ Industry experts have noted that the Bank is a “profit-making machine,” primarily due to an “aggressive sales culture.”¹⁶⁷ This aggressive culture is at the heart of Wells Fargo’s accounts scandal and the resulting Order.¹⁶⁸

¹⁶² See § 5531(d)(2) (explaining that an abusive act or practice “takes unreasonable advantage of (A) a lack of understanding on the part of the consumer of the material risks, costs or conditions of a product or service; (B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or (C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.”).

¹⁶³ See generally CFPB MANUAL, *supra* note 16.

¹⁶⁴ *History of Wells Fargo*, WELLS FARGO, <https://www.wellsfargo.com/about/corporate/history/> [<https://perma.cc/CY58-7VXD>].

¹⁶⁵ WELLS FARGO, WELLS FARGO TODAY: 3RD QUARTER 2016 QUARTERLY FACT SHEET 2 (2016) <https://www08.wellsfargomedia.com/assets/pdf/about/corporate/wells-fargo-today.pdf> [<https://perma.cc/BRP4-UVXU>] (announcing that Wells Fargo was third in total deposits).

¹⁶⁶ *Id.* at 2–3.

¹⁶⁷ Michael Corkery, *Wells Fargo Struggling in Aftermath of Fraud Scandal*, N.Y. TIMES: DEALBOOK (Jan. 13, 2017), https://www.nytimes.com/2017/01/13/business/dealbook/wells-fargo-earnings-report.html?_r=1 [<http://perma.cc/5AF5-ETB8>].

¹⁶⁸ See Wells Fargo Bank, N.A., CFPB No. 2016-CFPB-0015 (2016).

1. The Violations

“The analogy I use was that it was like lions hunting zebras . . . They would look for the weakest, the ones that would put up the least resistance.”¹⁶⁹

Wells Fargo had always sought to “distinguish itself in the marketplace as a leader” in what is known as cross selling.¹⁷⁰ Cross selling, the so-called “Holy Grail” of banking, entails expanding a customer’s relationship through the sales of multiple accounts or services.¹⁷¹ Former Wells Fargo CEO John Stumpf claimed that Wells Fargo’s “goal is to have as deep a relationship as we can with . . . households.”¹⁷² Wells Fargo saw cross selling as a way to promote trust in the bank.¹⁷³ In an effort to further their cross selling strategy, Wells Fargo employees were encouraged to sign customers up for as many as eight separate financial products, with the Bank claiming that “eight is great.”¹⁷⁴ While more accounts may have promoted a greater relationship of trust between Wells Fargo and their customers, more accounts also meant more fees for the bank.¹⁷⁵

¹⁶⁹ See Stacy Cowley, ‘Lions Hunting Zebras’: Ex-Wells Fargo Bankers Describe Abuses, N.Y. TIMES: DEALBOOK (Oct. 20, 2016), <https://www.nytimes.com/2016/10/21/business/dealbook/lions-hunting-zebras-ex-wells-fargo-bankers-describe-abuses.html> [<https://perma.cc/5SAR-U8K3>].

¹⁷⁰ CFPB Announcement, *supra* note 1.

¹⁷¹ See Rachel Louise Ensign, *What the Wells Fargo Cross-Selling Mess Means for Banks*, WALL ST. J. (Sept. 15, 2016), <https://www.wsj.com/articles/what-the-wells-fargo-cross-selling-mess-means-for-banks-1473965166> [<https://perma.cc/6JTH-ZGJR>] (“Cross-selling at a bank is ‘kind of like at McDonald’s, where they ask Would you like french fries with your cheese-burger?’”).

¹⁷² *Holding Wall Street Accountable: Investigating Wells Fargo’s Opening of Unauthorized Customer Accounts Before the H. Comm. on Fin. Servs.*, 114th Cong. 2 (2016) (testimony of John Stumpf, Chairman & Chief Executive Officer, Wells Fargo), <http://financialservices.house.gov/uploadedfiles/hhr-114-ba00-wstate-jstumpf-20160929.pdf> [<http://perma.cc/3H7F-DL5A>] [hereinafter *House Hearing*].

¹⁷³ *Id.*

¹⁷⁴ Evan Weinberger, *Top House Dem Aims To Break Up Wells Fargo*, LAW360 (Sept. 29, 2016, 4:31 PM), <https://www.law360.com/articles/846500/top-house-dem-aims-to-break-up-wells-fargo> [<https://perma.cc/DWL6-SDLU>].

¹⁷⁵ Diana Novak Jones, *Chicago Suspends Wells Fargo From City Business For A Year*, LAW360 (Oct. 5, 2016, 6:49 PM), <https://www.law360.com/ar->

In an effort to incentivize employees to cross-sell products, Wells Fargo “based a portion of employees’ compensation on the number of accounts” they sold.¹⁷⁶ This compensation program was the ultimate impetus of the Wells Fargo scandal.¹⁷⁷ Some commentators believe that, at its heart, the scandal was never an attempt to defraud Wells Fargo customers of their hard-earned money, but rather an effort by employees to exploit the Bank’s poorly monitored incentive compensation program.¹⁷⁸

From January 1, 2011 to September 8, 2016, the CFPB estimated that Wells Fargo employees opened roughly 1.5 million deposit accounts that may not have been authorized by customers.¹⁷⁹ Additionally, Wells Fargo employees applied for approximately 565,000 potentially unauthorized credit cards, issued debit cards without customer’s “knowledge or consent,” and enrolled customers in online banking without their knowledge.¹⁸⁰ In some cases, employees would use email addresses such as “noname@wellsfargo.com” to open fraudulent accounts.¹⁸¹ In others, Wells Fargo employees would create PIN numbers for customer debit cards without the customers’ knowledge.¹⁸² The practice of assigning fake PIN numbers extended beyond debit cards, as Wells Fargo employees would also assign fake PIN numbers, such as “0000,” to enroll customers in online banking.¹⁸³ Further, employees engaged in a practice called sandbagging, where

articles/848658/chicago-suspends-wells-fargo-from-city-business-for-a-year [https://perma.cc/ATH3-QQ39].

¹⁷⁶ *Id.*

¹⁷⁷ See Corkery, *supra* note 30.

¹⁷⁸ See, e.g., Evan Weinberger, *Wells Fargo Fraud Exposes Soft Spot In Bank Supervision*, LAW360 (Sept. 16, 2016, 8:27 PM), <https://www.law360.com/articles/839996/wells-fargo-fraud-exposes-soft-spot-in-bank-supervision> [https://perma.cc/8PHF-V7YN] (“‘It’s an interesting case because, as I see it, it’s not a scheme devised to defraud customers of money, per se. It’s like an internal fraud used to game the incentive structure,’ said David Gibbons, a senior adviser at Alvarez & Marsal and a former top OCC official.”).

¹⁷⁹ Wells Fargo Bank, N.A., CFPB No. 2016-CFPB-0015, ¶ 16 (2016).

¹⁸⁰ *Id.* ¶ 23

¹⁸¹ Weinberger, *supra* note 41.

¹⁸² CFPB Announcement, *supra* note 1.

¹⁸³ Cara Mannion, *Wells Fargo Faces Suit Over Phony Accounts Scandal*, LAW360 (Oct. 19, 2016, 7:06 PM), <https://www.law360.com/articles/853312/wells-fargo-faces-suit-over-phony-accounts-scandal> [https://perma.cc/CY6M-BYMA].

legitimate customer account openings would be delayed so as to fall under a new sales reporting period for the employee.¹⁸⁴ Other employees would falsely inform customers that certain banking services had to be purchased in bundles with other banking services.¹⁸⁵ All the while, Wells Fargo “continued to promote and monetarily reward” these employees, and “rewarded its managers and senior executives with millions in bonuses.”¹⁸⁶

While the opening of fraudulent accounts alone was a significant issue, employees would often engage in the prohibited practice of simulated funding.¹⁸⁷ Employees needed to engage in simulated funding in efforts to earn their commission on the accounts, since the account needed to be “funded shortly after opening” in order to qualify.¹⁸⁸ This practice of simulated funding for fraudulently opened accounts led employees to withdraw customers’ money from their legitimate accounts to fund the fraudulently opened ones.¹⁸⁹ Without the money in their legitimate accounts, customers would sometimes be charged overdraft or insufficient funds fees.¹⁹⁰ Customers with fraudulently opened credit cards also incurred various fees and charges.¹⁹¹ These led customers to unknowingly “spend money on monthly service payments for accounts they did not want, jeopardizing their credit scores and forcing them to fight with debt collection agencies for fees charged on unauthorized accounts.”¹⁹² Evidence after the scandal suggested that Wells Fargo employees would take advantage of especially vulnerable populations, including Native Americans, Mexicans, the elderly, and college students.¹⁹³

2. The Consent Order

As a condition of the Order, Wells Fargo neither admitted nor denied any of the findings of fact or conclusions of the CFPB,

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ Jones, *supra* note 38; Mannion, *supra* note 46.

¹⁸⁷ *House Hearing, supra* note 35, at 2.

¹⁸⁸ Wells Fargo Bank, N.A., CFPB No. 2016-CFPB-0015, ¶ 10 (2016).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* ¶ 16.

¹⁹¹ *Id.* ¶ 23.

¹⁹² Mannion, *supra* note 46.

¹⁹³ *See* Cowley, *supra* note 32.

but nevertheless consented to take the remedial actions.¹⁹⁴ The CFPB assessed whether each type of fraud constituted a UDAAP of any type.¹⁹⁵ Ultimately, the CFPB found that: (1) the unauthorized deposit accounts and credit cards, as well as simulated funding, constituted both an unfair and abusive act and practice; (2) the unauthorized enrollment in online banking services constituted an abusive act and practice; and (3) the unauthorized debit cards and associated PINs constituted an abusive act and practice.¹⁹⁶

The penalties levied against Wells Fargo included both financial penalties and the institution of a compliance plan.¹⁹⁷ In total, Wells Fargo had to pay \$185 million, including a \$100 million civil penalty to the CFPB.¹⁹⁸ Wells Fargo cannot claim any tax deductions, write-offs, or benefits by virtue of paying the penalty.¹⁹⁹ Additionally, Wells Fargo is not allowed to argue in any subsequent proceeding based on the scandal that it is entitled to a penalty offset in a later case due to the civil penalty paid to the CFPB.²⁰⁰ In any case where Wells Fargo nevertheless receives such a penalty offset, they must “notify the [CFPB], and pay the amount of the [p]enalty [o]ffset to the U.S. Treasury.”²⁰¹

In addition to the monetary penalties, the CFPB required Wells Fargo to establish a fund for the purpose of providing redress to those customers affected by the scandal.²⁰² This included an obligation to “refund all affected consumers the sum of all monthly maintenance fees, nonsufficient fund fees, overdraft charges, and other fees they paid because of the creation of the unauthorized accounts.”²⁰³ As of the fourth quarter of 2016, Wells Fargo had already returned around

¹⁹⁴ Wells Fargo Bank, N.A. CFPB No. 2016-CFPB-0015, ¶ 2 (2016).

¹⁹⁵ *See id.* ¶¶ 16–37 (analyzing individually, the unauthorized deposit accounts and simulated funding, the unauthorized credit cards, the unauthorized enrollment for online banking services, and the unauthorized debit cards).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *CFPB Announcement, supra* note 1.

¹⁹⁹ Wells Fargo Bank, N.A. CFPB No. 2016-CFPB-0015, ¶ 60 (2016).

²⁰⁰ *Id.* ¶ 61.

²⁰¹ *Id.*

²⁰² *See id.* ¶ 49 (“Within 10 days of the Effective Date, Respondent must reserve or deposit into a segregated deposit account an amount not less than \$5 million, for the purpose of providing redress to Affected Consumers as required by this Section.”).

²⁰³ *CFPB Announcement, supra* note 1.

\$3.2 million to customers.²⁰⁴ Additionally, the Bank established a free mediation program for affected customers.²⁰⁵

Finally, the Order included a series of provisions related to the implementation of an independent review and a compliance plan for Wells Fargo's future.²⁰⁶ As a condition of the Order, Wells Fargo was obligated to retain an independent consultant to conduct a review of the Bank's sales practices within the Community Bank Regional Bank Branch Network.²⁰⁷ Wells Fargo is required to correct any deficiencies identified in the independent review.²⁰⁸ Finally, the CFPB's Regional Director retains the right to object to or modify anything contained in the compliance plan.²⁰⁹ In response, Wells Fargo has hired two outside consultants: the first to meet the aforementioned requirements under the Order, and the second to review company-wide sales practices.²¹⁰ In April 2017, Wells Fargo released the results of the sales practices investigation report, conducted by Shearman & Sterling, which identified "sales misconduct" dating back to at least 2002.²¹¹

C. The Fallout

1. Effect on Wells Fargo

As news of the scandal broke, Wells Fargo began to suffer financially and through the loss of its leadership.²¹² Former CEO John

²⁰⁴ Evan Weinberger, *Wells Fargo Says Account Scandal Recovery Moving Along*, LAW360 (Jan. 13, 2017, 7:11 PM), <https://www.law360.com/articles/881045/wells-fargo-says-account-scandal-recovery-moving-along> [<https://perma.cc/SN5F-BCPU>].

²⁰⁵ *Id.*

²⁰⁶ Wells Fargo Bank, N.A., CFPB No. 2016-CFPB-0015 (2016).

²⁰⁷ *Id.* ¶ 39.

²⁰⁸ *Id.* ¶ 42.

²⁰⁹ *Id.* ¶ 50.

²¹⁰ Weinberger, *supra* note 67.

²¹¹ See INDEP. DIRS. OF THE BD. OF WELLS FARGO & CO., SALES PRACTICES INVESTIGATION REPORT 73 (2017), <https://www08.wellsfargomedia.com/assets/pdf/about/investor-relations/presentations/2017/board-report.pdf> [<https://perma.cc/N78G-DWCY>] ("Employment Section lawyers encountered sales misconduct and the termination of several employees at one time (discussed within the Law Department as "mass terminations"), dating back at least to 2002.").

²¹² Kat Greene, *Wells Fargo CEO Retires Amid Fraudulent Accounts Scandal*, LAW360 (Oct. 12, 2016, 5:56 PM), <https://www.law360.com/articles/850908/>

Stumpf resigned on October 12, 2016 in the wake of numerous claims that he shirked his responsibilities in allowing such events to occur.²¹³ As part of his resignation, Stumpf “agreed to forfeit \$41 million in unvested equity awards,” give up his 2016 bonus, and waive a severance package.²¹⁴ In April 2017, Wells Fargo announced that they had “clawed back an additional \$28 million” from Stumpf.²¹⁵ Stumpf was replaced by Tim Sloan as CEO of Wells Fargo, and Stephen Sanger as the board of director’s chairman, effectively splitting Stumpf’s former role.²¹⁶ While many felt as though Stumpf’s resignation was a necessary step in the remediation of the Wells Fargo name, others felt as though simply resigning was not enough.²¹⁷ In addition to Stumpf leaving the Bank, Wells Fargo fired upwards of 5,300 employees who were involved in the scandal, reduced top management’s 2016 bonuses

wells-fargo-ceo-retires-amid-fraudulent-accounts-scandal [<https://perma.cc/G4YT-9VFZ>].

²¹³ *E.g.*, *id.* (“Mr. Stumpf bears direct responsibility for failing to stop this fraud from proliferating under his leadership.”); Weinberger, *supra* note 37 (“It’s just beyond credibility that somebody up the food chain either didn’t order this, condone this or turn a blind eye to this”); see Evan Weinberger, *Stumpf’s Departure Won’t Ease Pressure On Wells Fargo*, LAW360 (Oct. 13, 2016, 5:33 PM), <https://www.law360.com/articles/851052/stumpf-s-departure-won-t-ease-pressure-on-wells-fargo> [<https://perma.cc/QHB5-W327>] (“I have decided it is best for the company that I step aside.”).

²¹⁴ Brandon Lowrey, *Wells Fargo CEO’s Retirement Leaves Questions, Sens. Say*, LAW360 (Oct. 20, 2016, 7:27 PM), <https://www.law360.com/articles/854011/wells-fargo-ceo-s-retirement-leaves-questions-sens-say> [<https://perma.cc/F6J6-7M5W>] (describing how Stumpf would forfeit the equity awards and “forego a bonus for 2016”); Greene, *supra* note 75 (indicating that Stumpf would not receive a severance package).

²¹⁵ Laura J. Keller, *Wells Fargo Board Claws Back \$28 Million More From Ex-CEO*, BLOOMBERG L.: BIG L. BUS. (Apr. 10, 2017), <https://bol.bna.com/wells-fargo-board-claws-back-28-million-more-from-ex-ceo/> [<https://perma.cc/PFF3-LWZK>].

²¹⁶ Greene, *supra* note 75; see Evan Weinberger, *Wells Fargo Account Openings Fall After Settlement*, LAW360 (Oct. 14, 2016, 5:27 PM), <https://www.law360.com/articles/851758/wells-fargo-account-openings-fall-after-settlement> [<https://perma.cc/N4HN-ECFT>].

²¹⁷ See, *e.g.*, Lowrey, *supra* note 77 (lamenting that “[a] bank teller would face criminal charges and a prison sentence for stealing a handful of \$20s from the cash drawer. A bank CEO should not be able to oversee a massive fraud and simply walk away to enjoy his millions in retirement.”).

by \$32 million, and cancelled \$47 million of stock options held by the former head of the community bank division.²¹⁸

Wells Fargo also made permanent changes to its employee compensation system.²¹⁹ In September 2016, Wells Fargo announced that it “would eliminate all of the product and sales goals in its retail banking unit starting in January,” and later moved that date up to October 1, 2016.²²⁰ Now, “employees will be judged on customer feedback, product usage and the performance of their team, and branch goals rather than individual product sales”²²¹ Finally, the Bank raised the minimum wage for approximately 26,000 branch employees from \$13.50 to \$17 per hour.²²²

The scandal also significantly impacted Wells Fargo’s bottom line.²²³ The changes to the monitoring and compliance program required by the Order alone could cost the Bank “tens of millions of dollars.”²²⁴ Furthermore, a survey suggested that Wells Fargo “could lose as much as \$212 billion in deposits and \$8 billion in revenue” in the year and a half following the scandal.²²⁵ This loss would represent a 17 percent decrease in deposits and a 9 percent decrease in revenue.²²⁶ Approximately 14 percent of customers responding to the survey stated that they had “decided to bank elsewhere.”²²⁷ Consulting firm Cg42 claimed in the worst-case scenario as many as 30 percent of

²¹⁸ Matt Egan, *Wells Fargo strips CEO and 7 top execs of 2016 bonuses*, CNN MONEY (Mar. 1, 2017), <http://money.cnn.com/2017/03/01/investing/wells-fargo-strips-ceo-bonus-fake-account-scandal/?iid=EL> [<https://perma.cc/5LC6-8RSM>]; Keller, *supra* note 78; Martin O’Sullivan, *SEC, DOJ Investigating Wells Fargo Over Account Scandal*, LAW360 (Nov. 3, 2016, 1:30 PM), <https://www.law360.com/articles/859024/sec-doj-investigating-wells-fargo-over-account-scandal> [<https://perma.cc/2SE5-TPH5>].

²¹⁹ See Greene, *supra* note 76.

²²⁰ *Id.*; House Hearing, *supra* note 35, at 5.

²²¹ Weinberger, *supra* note 67.

²²² *Id.*

²²³ Lucinda Shen, *Wells Fargo’s Scandal Could End Up Costing Bank \$8 Billion*, FORTUNE: FIN. (Oct. 24, 2016), <http://fortune.com/2016/10/24/wells-fargos-scandal-could-end-up-costing-bank-8-billion/> [<http://perma.cc/VEZ7-UPJM>].

²²⁴ Weinberger, *supra* note 79.

²²⁵ Shen, *supra* note 86.

²²⁶ *Id.*

²²⁷ *Id.*

Wells Fargo customers could leave the bank.²²⁸ These concerns began to materialize almost immediately after the scandal was announced.²²⁹ Wells Fargo's expense ratio, a measure of a bank's expenses divided by its revenue, was an abnormally high 61 percent.²³⁰

2. Government Response

Prior to resigning, John Stumpf was called to Capitol Hill to testify on behalf of Wells Fargo before both the Senate and the House of Representatives.²³¹ In his testimony, Stumpf apologized, discussed certain employee compensation policies, and explained some of the steps Wells Fargo had taken to rectify the scandal.²³² In response, many congressmen called for Stumpf's resignation.²³³ Others called for a criminal probe into Wells Fargo executives.²³⁴ One congresswoman,

²²⁸ *Id.*

²²⁹ See Corkery, *supra* note 30 (describing that in the fourth quarter of 2016, "new credit card applications were down 43 percent" from a year ago, "new checking account openings fell 40 percent" from a year ago, "[t]eller transactions fell 6 percent", and "customer interactions with the bankers in the branches declined 14 percent").

²³⁰ See *id.*

²³¹ See generally House Hearing, *supra* note 35; *An Examination of Wells Fargo's Unauthorized Accounts and the Regulatory Response Before the S. Comm. on Banking, Hous., and Urban Affairs*, 114th Cong. (2016) (testimony of John Stumpf, Chairman & Chief Executive Officer, Wells Fargo), http://www.banking.senate.gov/public/_cache/files/18312ce0-5590-4677-b1ab-981b03d1cbbb/3B18AA6E3A96E50C446E2F601B-854CF1.092016-stumpf-testimony.pdf [<https://perma.cc/K5LT-MVY6>] [hereinafter *Senate Hearing*]

²³² See House Hearing, *supra* note 35, at 1 ("I am going to explain this morning what happened and what we have done about it. But first, I want to apologize to all Wells Fargo customers."); *Senate Hearing*, *supra* note 94, at 1.

²³³ E.g., Maggie McGrath, *Elizabeth Warren To Wells CEO Stumpf: You Should Resign And Face Criminal Investigation*, FORBES (Sept. 20, 2016), <http://www.forbes.com/sites/maggiemcgrath/2016/09/20/wells-fargo-ceo-john-stumpf-to-apologize-to-senate-banking-committee/#3bdf3ead60da> [<https://perma.cc/7MZZ-DXNG>].

²³⁴ See, e.g., John Kennedy, *Senate Dems Call For Criminal Probe Of Wells Fargo Execs*, LAW360 (Oct. 5, 2016, 10:22 PM), <https://www.law360.com/articles/848781/senate-dems-call-for-criminal-probe-of-wells-fargo-exec> [<https://perma.cc/Q3Z4-EG2U>] ("Senate Democrats on Wednesday called for a criminal probe of Wells Fargo executives after revelations that thousands of accounts were opened without consumers' permission, urging the

Maxine Waters, “the ranking Democrat on the House Financial Services Committee, said she is drafting legislation to break up Wells Fargo and potentially other banks.”²³⁵

In addition to the hearings before Congress, separate investigations have been opened by various government agencies.²³⁶ Wells Fargo revealed in a filing with the Securities and Exchange Commission that it is under investigation by the agency.²³⁷ The Financial Industry Regulatory Authority (FINRA) has asked former employees to come forward if they believe that Wells Fargo wrongfully fired them for trying to act as a whistleblower by reporting events related to the Order.²³⁸ The Department of Labor is conducting a “top-to-bottom” review of Wells Fargo to ascertain whether the Bank violated labor laws “by forcing employees to work unpaid overtime to meet the aggressive sales quotas.”²³⁹ Moreover, at least three U.S. Attorney’s Offices have opened investigations.²⁴⁰ Finally, the Office of the Comptroller of the Currency (OCC) is continuing its investigation despite its involvement in the Order.²⁴¹

In addition to federal government agencies, at least two states have opened independent investigations into Wells Fargo.²⁴² Then-

U.S. Department of Justice to follow through on its year-old promise to strengthen its pursuit of individual corporate wrongdoing.”)

²³⁵ See Weinberger, *supra* note 76 (claiming that “[i]t is unclear how such legislation would work, and with Congress out of session prior to November’s election, it is unclear when any bill will be introduced”).

²³⁶ See O’Sullivan, *supra* note 81.

²³⁷ *Id.*

²³⁸ Carmen Germaine, *FINRA Seeks Information From Fired Wells Fargo Reps*, LAW360 (Dec. 9, 2016, 9:19 PM), <https://www.law360.com/articles/871211/finra-seeks-information-from-fired-wells-fargo-reps> [https://perma.cc/4ZBB-SZ5U].

²³⁹ *Id.*

²⁴⁰ See Y. Peter Kang, *Wells Fargo CEO Steps Down From SF Fed Advisory Council*, LAW360 (Sept. 22, 2016, 10:49 PM), <https://www.law360.com/articles/843662/wells-fargo-ceo-steps-down-from-sf-fed-advisory-council> [https://perma.cc/RP87-SV3L].

²⁴¹ Weinberger, *supra* note 76.

²⁴² See Jessica Corso, *Wells Fargo Cut Off From Banking On Ill. Investments*, LAW360 (Oct. 3, 2016, 2:12 PM), <https://www.law360.com/articles/847533/wells-fargo-cut-off-from-banking-on-ill-investments> [https://perma.cc/GFJ3-ZNPC]; Kat Greene, *Calif. AG Launches Criminal Probe Into Wells Fargo Accounts*, LAW360 (Oct. 19, 2016, 8:45 PM), <https://www.law360.com/articles/853547/calif-ag-launches-criminal-probe-into-wells-fargo-ac>

California Attorney General Kamala Harris “launched an investigation into whether the bank committed felony identity theft.”²⁴³ Harris served a search warrant on October 5, 2016 for information and communications regarding the fraudulent accounts.²⁴⁴ Furthermore, Illinois has launched an audit to determine if Wells Fargo was “holding onto fees charged to customers who didn’t know that bank employees were opening accounts on their behalf.”²⁴⁵

Finally, a number of states and cities have taken steps to sanction Wells Fargo in one way or another. California was the first to announce that the state would suspend its relationship with the Bank for “one year to sanction the bank for opening millions of unauthorized customer accounts.”²⁴⁶ In the announcement, California State Treasurer John Chiang made it clear that the state’s sanctions could “escalate to a complete termination” of their relationship with Wells Fargo, depending on Wells Fargo’s compliance with the Order.²⁴⁷ In addition, Chiang noted that he was communicating with the California Public Employees’ Retirement System and the California State Teachers’ Retirement System, who collectively hold more than \$2.3 billion in Wells Fargo fixed-income securities.²⁴⁸ After California, four other states, Massachusetts, Illinois, Pennsylvania, and Ohio, followed suit, each suspending Wells Fargo from doing any business with the state for a period of one year.²⁴⁹ Both Massachusetts and Illinois have also

counts [<https://perma.cc/2QEL-2HXF>]; O’Sullivan, *supra* note 81.

²⁴³ O’Sullivan, *supra* note 81.

²⁴⁴ Greene, *supra* note 105.

²⁴⁵ Corso, *supra* note 105.

²⁴⁶ Cara Bayles, *Calif. Suspends Biz With Wells Fargo Over Accounts Scandal*, LAW360 (Sept. 28, 2016, 6:13 PM), <https://www.law360.com/articles/845534/calif-suspends-biz-with-wells-fargo-over-accounts-scandal> [<https://perma.cc/6CMG-ZG63>] (describing the sanction as including suspensions on “Wells Fargo as an underwriter on state bonds, its investment in Wells Fargo securities and its use of Wells Fargo as a broker for investment purchasing”).

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *See* Corso, *supra* note 105 (“Wells Fargo will be blocked for at least a year from handling any portion of Illinois’ \$1 trillion in investment activity”); John Kennedy, *Mass. Bars Wells Fargo As Bond Underwriter For 1 Year*, LAW360 (Oct. 19, 2016, 1:54 PM), <https://www.law360.com/articles/853136/mass-bars-wells-fargo-as-bond-underwriter-for-1-year> [<https://perma.cc/LE4P-NC8F>] [hereinafter Kennedy, *Mass.*] (“Massachusetts has

begun to look into existent contracts with Wells Fargo.²⁵⁰ Additionally, the Chicago City Council passed a similar ban.²⁵¹ San Francisco removed Wells Fargo from “a list of banks where the city recommends low-income residents open bank accounts.”²⁵² Going one step further, New York Governor Andrew Cuomo included a proposal in his State of the State address to ban “bad actors” who commit frauds akin to those at Wells Fargo from the banking and insurance industries.²⁵³

3. Private Actions

In addition to the responses by various government and state agencies, a number of private actions have been filed around the country.²⁵⁴ Wells Fargo customers have filed at least ten separate class actions.²⁵⁵ In these cases, Wells Fargo has gone to great lengths to move the cases to arbitration, causing multiple legislators to respond

become the latest state to ban Wells Fargo from underwriting its bonds”); John Kennedy, *Kasich Blackballs Wells Fargo From Ohio Debt Offerings*, LAW360 (Oct. 17, 2016, 2:57 PM), <https://www.law360.com/articles/851876/kasich-blackballs-wells-fargo-from-ohio-debt-offerings> [<https://perma.cc/AEE5-WL9H>] (“Wells Fargo is banned from participating in Ohio debt offerings and other financial services contracts handled by certain state agencies for one year”); Dan Packel, *Pa. Becomes Latest State To Pause Ties With Wells Fargo*, LAW360 (Nov. 3, 2016, 7:29 PM), <https://www.law360.com/articles/859394/pa-becomes-latest-state-to-pause-ties-with-wells-fargo> [<https://perma.cc/7SYB-TCTM>] (“Wells Fargo is suspended for one year from any investment or trading activities with Pennsylvania”).

²⁵⁰ See Corso, *supra* note 105; Kennedy, *Mass.*, *supra* note 112.

²⁵¹ See Jones, *supra* note 38 (“The ban, which lasts 12 months, prevents the city’s chief financial officer, comptroller, treasurer and other officials from using the bank as a municipal depository, bond underwriter, loan or redevelopment agreement trustee, broker or financial adviser, according to the ordinance. It was passed unanimously”).

²⁵² Jody Godoy, *San Francisco Boots Wells Fargo From Consumer Program*, LAW360 (Sept. 23, 2016, 8:06 PM), <https://www.law360.com/articles/844003/san-francisco-boots-wells-fargo-from-consumer-program> [<https://perma.cc/7D4R-YSJ9>].

²⁵³ See Kat Greene, *NY Aims To Ban Wells Fargo-Styled Scammers From Banking*, LAW360 (Jan. 9, 2017, 7:17 PM), <https://www.law360.com/articles/878794/ny-aims-to-ban-wells-fargo-styled-scammers-from-banking> [<https://perma.cc/A6VU-577X>].

²⁵⁴ O’Sullivan, *supra* note 81.

²⁵⁵ *In re Wells Fargo Fraudulent Account Opening Litigation*, MDL No. 2766, 1 & n.1 (J.P.M.L. Apr. 5, 2017).

by attempting to prevent such cases from being arbitrated.²⁵⁶ In March 2017, Wells Fargo reached a settlement in one of the class action cases.²⁵⁷ On the basis of that settlement, the U.S. Judicial Panel on Multidistrict Litigation denied an order to centralize eight of the ten cases on the grounds that such centralization could impact the class-wide settlement.²⁵⁸ In April 2017, Wells Fargo announced that they had expanded the prior settlement to a current total amount of \$142 million.²⁵⁹ In addition, at least two other cases have been filed on behalf of former Wells Fargo employees.²⁶⁰ One case is seeking \$2.6 billion and was filed in Los Angeles County Superior Court “on behalf of the bank’s California workers who were allegedly fired or demoted

²⁵⁶ *E.g.*, H.R. 6423, 114th Cong. (2016) (attempting to ban arbitration in cases of fraud, including Wells Fargo); S. 349, 114th Cong. (2016) (attempting to ban arbitration in cases of fraud, including Wells Fargo); S.B. No. 33, 2017 Leg. (Cal. 2016) (“This bill would prohibit a person from requiring a waiver of a legal right that arises as a result of fraud, identity theft, and any other act related to the wrongful use of personal identifying information as a condition of entering into a contract for the provision of goods or services.”); see Evan Weinberger, *Dems Offer Bill To Bar Arbitration On Wells Fake Accounts*, LAW360 (Dec. 1, 2016, 5:13 PM), <https://www.law360.com/articles/868166/dems-offer-bill-to-bar-arbitration-on-wells-fake-accounts> [<https://perma.cc/EG7V-MQ3C>] (“But Wells Fargo has moved to block those suits, claiming that the arbitration clauses in place on the accounts those customers, who already had existing Wells accounts before the fraudulent ones were created, mandated arbitration.”).

²⁵⁷ *Wells Fargo expands class-action settlement for retail sales practices to \$142 million, adds accounts as early as May 2002*, WELLS FARGO (Apr. 21, 2017) https://www.wellsfargo.com/about/press/2017/class-action_0421/ [<https://perma.cc/T2QP-55TL>] [hereinafter *Wells Fargo Expands Settlement*].

²⁵⁸ *In re Wells Fargo*, MDL No. 2766 at 1.

²⁵⁹ *Wells Fargo Expands Settlement*, *supra* note 120.

²⁶⁰ See Matt Egan, *Fired Wells Fargo Workers Fight Back With Federal Lawsuit*, CNN MONEY (Sept. 27, 2016), <http://money.cnn.com/2016/09/26/investing/wells-fargo-fake-accounts-worker-lawsuit/index.html?iid=EL> [<http://perma.cc/KH3T-ZCWS>].

for refusing to participate” in the scandal.²⁶¹ Finally, at least one class action has been filed on behalf of Wells Fargo investors.²⁶²

D. Long Term Consequences

At the time of the Order’s announcement, the CFPB made it clear that the Order should serve as a warning to all financial institutions.²⁶³ Shortly after the Order’s announcement, Richard Cordray, Director of the CFPB, told reporters, “I believe we’re putting the entire industry on notice.”²⁶⁴ The CFPB took its warning one step further by releasing a compliance bulletin on November 28, 2016, which targeted incentive-based compensation.²⁶⁵ In the bulletin, the CFPB notes that “[d]espite their potential benefits, incentive programs can pose risks to consumers, especially when they create an unrealistic culture of high-pressure targets.”²⁶⁶ The bulletin references behaviors found in the Wells Fargo scandal in a number of places, including the claim that “[s]ales goals may encourage employees, either directly or indirectly, to open accounts or enroll consumers in services without

²⁶¹ Bonnie Eslinger, *Wells Fargo Hit With \$2.6B Suit Over Scam-Related Firings*, LAW360 (Sept. 23, 2016, 11:09 PM), <https://www.law360.com/articles/844160/wells-fargo-hit-with-2-6b-suit-over-scam-related-firings> [<https://perma.cc/883Y-YS53>].

²⁶² See Melissa Daniels, *Wells Fargo Hit With Securities Suit Over Fake Accounts*, LAW360 (Sept. 26, 2016, 10:04 PM), <https://www.law360.com/articles/844975/wells-fargo-hit-with-securities-suit-over-fake-accounts> [<https://perma.cc/5VAS-9TMT>] (“The suit alleges that Wells Fargo violated the Securities Exchange Act of 1934 and Securities and Exchange Commission rules over making false statements and failing to disclose information by created artificially inflated stock trading prices by covering up the methods of cross-selling that included unauthorized account opening.”).

²⁶³ *CFPB Announcement*, *supra* note 1.

²⁶⁴ Evan Weinberger, *CFPB Wells Fargo Fine A Red Flag On Pay, Sales Plans*, LAW360 (Sept. 8, 2016, 8:19 PM), <https://www.law360.com/articles/837931/cfpb-wells-fargo-fine-a-red-flag-on-pay-sales-plans> [<https://perma.cc/R883-69CX>].

²⁶⁵ CONSUMER FIN. PROTECTION BUREAU, CFPB COMPLIANCE BULL. 2016-03, DETECTING AND PREVENTING CONSUMER HARM FROM PRODUCTION INCENTIVES 1 (2016), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201611_cfpb_Production_Incentives_Bulletin.pdf [<https://perma.cc/5ZXP-ZSMF>].

²⁶⁶ *Id.*

their knowledge or consent.”²⁶⁷ The CFPB instructed that incentive-based compensation structures, while not completely barred, need to be handled properly in order to avoid potential violations of consumer protection laws.²⁶⁸ The compliance bulletin echoes sentiments expressed by Cordray that the CFPB will be stepping up its reviews of other banks.²⁶⁹

Both the CFPB and OCC have already reached out to some of Wells Fargo’s main competitors, seeking information related to their cross selling practices.²⁷⁰ While Wells Fargo’s competitors claim that their sales practices are materially different, “employees at other banks say that such sales quotas are common.”²⁷¹ In addition, FINRA has asked the broker-dealers it regulates to provide them with information about their cross selling platforms.²⁷² Some believe that the scrutiny will not end with financial institutions and may spread to other industries, further broadening the fallout from the scandal.²⁷³

²⁶⁷ *Id.* at 2.

²⁶⁸ *See id.* at 3.

²⁶⁹ Weinberger, *supra* note 127.

²⁷⁰ *See* O’Sullivan, *supra* note 81; Evan Weinberger, *Federal Regulators Open Review Of Bank Sales Practices*, LAW360 (Oct. 25, 2016, 4:40 PM), <https://www.law360.com/articles/855483/federal-regulators-open-review-of-bank-sales-practices> [<https://perma.cc/4NW7-MYZA>] (“[E]xecutives at banks including JPMorgan Chase & Co. and Bank of America Corp. have publicly said on earnings calls and in other venues that their sales cultures were different and that they did not expect to see problems similar to those at Wells Fargo in their banks.”).

²⁷¹ Joe Valenti, *In The Hot Seat: Wells Fargo Displays Arbitration’s Failure*, LAW360 (Oct. 3, 2016, 12:56 PM), <https://www.law360.com/articles/846368/in-the-hot-seat-wells-fargo-displays-arbitration-s-failure> [<https://perma.cc/7N28-V7XC>].

²⁷² Germaine, *supra* note 101.

²⁷³ *See* Brad Karp et al., *CFPB Sets Demanding Standard For Incentive Programs*, LAW360 (Dec. 9, 2016, 11:42 AM), <https://www.law360.com/articles/868564/cfpb-sets-demanding-standard-for-incentive-programs> [<https://perma.cc/G4RY-W54M>] (“The recent attention on this issue could well cause the U.S. Department of Justice, the Federal Trade Commission, state attorneys general and other industry regulators to focus on sales and other incentives in consumer-facing businesses as potential progenitors of legal violations.”).

E. Conclusion

While public condemnation of Wells Fargo began to spread not long after the Order was published, many were also quick to praise the efforts of the CFPB.²⁷⁴ With increased calls for the CFPB to be eliminated or fundamentally altered, the Wells Fargo case serves as a justification for its continued existence.²⁷⁵ While the ultimate fallout from the Wells Fargo case may take years to unravel, it is clear that the Wells Fargo fake accounts scandal will remain a big “win” not just for the CFPB, but for consumers everywhere.

Merric Kaufman²⁷⁶

²⁷⁴ See, e.g., *ICBA Statement on Wells Fargo Fine for Illegal Sales Practices*, INDEP. COMMUNITY BANKERS ASS'N (Sept. 9, 2016), <http://www.icba.org/news-events/news-details/2016/09/09/icba-statement-on-wells-fargo-fine-for-illegal-sales-practices> [<https://perma.cc/7VNR-LRMQ>] (“This is yet another example of the industry inequality that plagues our nation’s banking system, favors the largest and riskiest financial institutions, puts taxpayers and everyday consumers at risk, and creates widespread market imbalance. Unfortunately for community banks and the millions of Americans harmed by Wells Fargo’s spurious conduct, this settlement is too little, too late.”); Valenti, *supra* note 134 (“What the scandal has made clear, however, is that public enforcement through the Consumer Financial Protection Bureau is working . . .”).

²⁷⁵ *Id.* (“Preventing the next Wells Fargo demands both a strong, independent CFPB and an end to mandatory consumer arbitration.”); Weinberger, *supra* note 41 (“We need to look no further than just last week to see why we need a strong Consumer Financial Protection Bureau.”).

²⁷⁶ Student, Boston University School of Law (J.D. 2018).