Wells Fargo Ruling Shows Government Action, Yet Raises Questions

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Last week, the American people saw an example of effective government, but the question of just how effective remains unanswered.

A multi-agency enforcement action, led by the Consumer Financial Protection Bureau and the OCC, assessed fines totaling nearly $200 million on Wells Fargo after making findings that thousands of the bank's employees had created over 2 million fake accounts in the names of its customers. This was not the work of a rogue clique; to blame, say the regulators, were wholesale institutional failures, including overly aggressive cross-selling, misaligned incentive-based pay, and absent monitoring mechanisms. In trading since the news of the enforcement action broke, Wells Fargo's share price has fallen over 7% (part of a year-to-date drop of nearly 13% relative to the S&P 500 Financials Index). Its market capitalization, though at a whopping $240 billion, has dipped to second behind that of JP Morgan Chase.

On one hand, the CFPB's own $100 million fine is the largest in its (short) history, and observers think that the Wells Fargo example will be a powerful public relations weapon against efforts by the House Financial Services Committee to handcuff the Bureau. On the other hand, Wells Fargo's position improved so greatly while it pushed cross-sales that the fines may not sour others on similar strategies. The market might be selling Wells Fargo because of brand damage, warnings from credit ratings agencies, or because consent and cease-and-desist orders could put an end to some of Wells Fargo's most successful sales tactics. Those forces will not deter a new wrongdoer in the same way that compensation claw-backs, larger fines, or criminal penalties would.

Bankers and financial services industry groups have criticized the CFPB from its inception on the grounds that it enforces sweeping standards, sometimes unpredictably, and with insufficient oversight. These arguments dovetail with a separation-of-powers Constitutional critique that some administrative law scholars and attorneys argue requires redesigning the agency. Wells Fargo's misconduct was egregious and victimized consumers, abusing their trust. The CFPB is right to use its tools to rid the United States of such practices. But the Bureau's critics make fair points about the risk that enforcement actions will be too arbitrary in their extent and severity.

How, for instance, does the CFPB decide when to make criminal referrals to the Department of Justice? 12 U.S.C. § 5566 provides that the Bureau "shall" refer to the Attorney General "such evidence" it discovers that "any person" "has engaged in conduct that may constitute a violation of Federal criminal law." However, it is not obvious that the CFPB follows this law to the letter. Public comments from agency officials and prosecutors make distastefulness seem like the operative element that tips an enforcement case into potential criminal one, and such a test is obviously inadequate. Also, what process, other than an amorphous multi-factor test, determines the size of its fines? A $100 million fine to Wells Fargo averages less than $50 for every fake account, and stands in contrast to $5.6 billion in most-recent quarterly profits.

How will the Bureau explain itself when less severe wrongdoing than Wells Fargo's is met with greater proportional fines, or with criminal referrals? To avoid distorting competition and to avoid injustice, the Bureau must be more forthcoming about how it makes critical choices about penalties and referrals. Otherwise, there is no easy way for the public to exercise oversight, and the most serious wrongs may not face the most serious consequences.

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