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Bank Directors and the Wells Fargo Order

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For those who follow such things, the press release, consent cease and desist order and official letters of reprimand published by the Federal Reserve Board on February 2, 2018, with respect to Wells Fargo & Company (Wells) and named directors (combined, the Wells Order) were highly unusual, and raise issues that should cause all bank directors significant pause.

Much of the "typical" language contained in regulatory enforcement orders is present in the Wells Order. However, what is most unusual and troublesome about the Wells Order (and related documents) is the public disclosure of items that the Federal Reserve has not typically made part of such orders, the "optics" of politicization of the Wells Order, and the virtual plaintiff's counsel roadmap provided by the Federal Reserve to those who would use the Wells Order and related materials as prima facie evidence of lack of adequate and appropriate board oversight. Publishing such personalized agency "findings" in conjunction with a consent order is not to be taken lightly, and the implied pronouncement of individual "guilt" outside of due process proceedings is troubling.

What caused this deviation from the norm was not explained in the materials, however long time industry observers can perhaps infer that political pressures may have been involved. In fact, the Wells Order was followed by a press release by a United States senator claiming credit for the actions.

Publicizing internal regulatory positions regarding the performance of individuals within a regulated entity can lead to a slippery slope of disclosure that is inconsistent with the nature of maintaining regulatory information as confidential. Particularly information relating to agency views of systematically important institutions. There exists a long history of confidentiality when it comes to regulatory oversight of public depositories, subject only to certain very limited exceptions, with good reason. Openly disclosing personalized internal agency positions on the operations of depository institutions may serve to backfire when

it comes to protecting confidential supervisory information in other situations, and seems inconsistent with that important concept.

A number of things can and do influence agency positions on subjective standards of director responsibilities and performance. Therefore, reaching conclusions and naming names can deprive board or executive "targets" of appropriate opportunities to properly defend themselves. Doing so on a selective basis can deprive targeted individuals of important due process rights, and political pressures can result in a lack of important independence within the agencies.

Importantly, the Wells Order was issued by the Federal Reserve nearly simultaneously with an announcement by Wells that it was replacing four board members. In that regard it takes on the aura of an "indirect" removal action but without the typical legal processes that accompany such actions. There are important statutory and regulatory procedures for removal of institution-affiliated parties and for barring individuals from future involvement with depository institutions consistent with respecting due process rights. Whether and how the Wells Order and related activities may impact such actions remains to be seen.

The Wells Order was followed on the very same day by an announcement by Senator Elizabeth Warren, who has been outspoken in her criticism of the industry generally and the Wells organization in particular, openly claiming credit for the Federal Reserve action by then Federal Reserve Chair Yellen "...in her last act as chair." In fact, the Senator's press release claims "Today, Chair Yellen sent a letter in response to Senator Warren's many calls for removing Wells Fargo Board Members." Granted, the Federal Reserve has no control over press releases issued by United States senators. However, the direct language of the press release by the senator, combined with the simultaneous actions by the Federal Reserve, create the perception that perhaps political pressure played a role in not only the enforcement actions themselves, but in the unique nature of the actions. Industry observers who recall the Keating debacle of the 1980s, involving allegations of political interference in the regulatory process, should find this very open claim of political pressure on the historically fiercely independent Federal Reserve to be troubling at best.

How this will impact long-recognized board expectations of agency independence, confidentiality and access to due process remains to be seen. To be sure, this particular type of unilateral regulatory "guilt" pronouncement will not be helpful in attracting and retaining good directors, may have a very strong and adverse impact on director liability protections under applicable law, could impact indemnification and D&O coverage, and may place the agency in a much different position than that of its historical oversight and enforcement processes. Personalized press releases with names of select directors, and publishing personal letters of reprimand, take on a much different aura.

However, if the Wells Order signals a change and if the agencies are intending a revised approach to public enforcement actions that will be accompanied by specific findings of lack of appropriate oversight by named individuals, then it is only fair that the new approach be better defined and the industry placed on notice so that directors (and prospective directors) as well as other institution-affiliated parties can plan and react appropriately. The potential for abuse and political influence is significant, and may well adversely impact an industry that depends on its ability to attract and retain good people in an environment that is already suffering under the weight of extensive regulatory pressures.

Hopefully the Wells Order is unique in the manner, timing and in the style in which it was presented. The "optics" of the Wells Order and surrounding activities are unfortunate.