United States Senate
WASHINGTON, DC 20510

September 28, 2016

The Honorable Mary Jo White
Chair
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Dear Chair White:

We write to urge the Securities and Exchange Commission to investigate whether Wells Fargo and its senior executives – including Chairman of the Board and CEO John Stumpf – violated federal securities laws in connection with the conduct described in the Consumer Financial Protection Bureau's September 8, 2016 Consent Order.[1]

For years, Wells Fargo touted its ability to sell additional products to existing customers – a tactic it called "cross-selling." According to the CFPB consent order, Wells Fargo Bank, N.A. "set sales goals and implemented sales incentives, including an incentive-compensation program" to promote cross-selling by its employees. In response to these aggressive sales goals and incentives, thousands of Wells Fargo employees engaged in improper behavior, including opening deposit accounts and credit card accounts without customer authorization. Wells Fargo fired more than 5,300 employees between 2011 and 2016 for engaging in this kind of conduct.[2]

After regulators discovered this widespread problem, Wells Fargo conducted an analysis that revealed that employees may have opened as many as 1.5 million checking accounts and obtained as many as 565,000 credit cards without customer authorization. Those fraudulent accounts cost customers millions in fees.[3]

These facts – as well as testimony from Mr. Stumpf before the Senate Banking Committee on September 20, 2016 – justify an investigation into at least three types of securities law violations.

Sarbanes-Oxley

During the Enron scandal, Enron's Chairman and CEO, Ken Lay, claimed that he did not know the extent of the fraud at his company. In response, Congress enacted the Sarbanes-Oxley Act and created a series of internal control disclosures that were meant to reduce corporate fraud and protect investors by holding senior executives more accountable.

[1] CFPB Consent Order (Sept. 8, 2016), available at http://files.consumerfinance.gov/f/documents/092016_cfpb_WFBconsentorder.pdf.
[2] Id.
[3] Id.

Now CEOs are required to sign off on their company's financial reporting. Under Section 302 of Sarbanes-Oxley, CEOs and CFOs must certify in each annual or quarterly report that the signing officer has reviewed the report and that, based on the officer's knowledge, the report does not contain untrue statements of material fact, does not omit to state a material fact resulting in a misleading report, and fairly represents in all material respects the financial condition and results of operations of the company.

Further, Section 906 of Sarbanes-Oxley requires each periodic report containing financial statements filed with the SEC to include a written certification from the CEO and CFO that the information "fairly presents, in all material respects, the financial condition and results of operations" of the company. If the CEO or CFO submits a certification knowing that the statement does not meet this standard, they can be fined up to $5 million and imprisoned for up to 20 years.

Mr. Stumpf's testimony under oath before the Senate Banking Committee raises questions about whether he violated the Sarbanes-Oxley Act. According to his testimony before the Banking Committee, Mr. Stumpf became aware of the widespread fraud occurring at his bank in 2013,[4] yet Mr. Stumpf and the company's CFO submitted certifications relating to SEC filings after 2013 that did not indicate any knowledge of this massive fraud.[5]

<u>Securities Fraud</u>

The Commission should also investigate whether Wells Fargo and its senior executives committed securities fraud by failing to promptly disclose material facts to investors and by knowingly providing investors with material false information.

As you know, Section 17(a) of the Securities Act of 1933,[6] Section 10(b) of the Securities Exchange Act of 1934,[7] and SEC Rule 10b-5[8] prohibit companies from misleading investors about facts that could affect their business and their stock price.

Mr. Stumpf admitted that he became aware of widespread fraud at the bank in 2013, yet neither he nor the company disclosed that information to investors until the CFPB Consent Order became public in September 2016. In the interim, during quarterly earnings calls, Mr. Stumpf personally touted Wells' cross-sell ratio[9] – its measure of the average number of accounts per

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[4] United States, Congress, Senate Banking, Housing, and Urban Affairs Committee, "An Examination of Wells Fargo's Unauthorized Accounts and the Regulatory Response," 114th Congress, 2nd Session, Accessed September 28, 2016. Available at: http://www.banking.senate.gov/public/index.cfm/hearings?ID=B80F9B81-4331-4F95-91BC-718288EC9DA0

[5] See, e.g., Wells Fargo 10-K for 2014, available at https://www.sec.gov/Archives/edgar/data/72971/000007297115000449/wfc-12312014x10k.htm

[6] 15 U.S.C. § 77q(a).

[7] 15 U.S.C. § 78j(b).

[8] 17 C.F.R. § 240.10b-5(b).

[9] *See, e.g.,* Transcript of Q1 2013 Wells Fargo Earnings Conference Call, April 12, 2013, *available at* http://www.warren.senate.gov/files/documents/2013Q1_WellsFargoEarningsCall.pdf ("Our growth reflects the benefit of our relationship model, as demonstrated by achieving record Retail Banking cross-sell of 6.1 products per household."); Transcript of Q2 2013 Wells Fargo Earnings Conference Call, July 12, 2013, *available at* http://www.warren.senate.gov/files/documents/2013Q2_WellsFargoEarningsCall.pdf ("We achieved record retail

customer – as well as Wells' success in opening new deposit accounts[10] and credit card accounts.[11] He did so apparently with knowledge that many of these retail accounts were created without customer authorization.

The SEC has previously found securities fraud when an executive makes misleading statements on earnings calls. For example, in April 2014, the SEC entered into a $20 million settlement with CVS Caremark Corp. based in part on allegations that CVS "misled investors on an earnings call."[12] Similarly, in 2010, the SEC entered into a $75 million settlement with Citigroup and two of its executives based in part on allegations that bank officials provided misleading information during investor phone calls about the bank's subprime mortgage exposure.[13]

At the recent Senate Banking Committee hearing, Mr. Stumpf claimed under oath that the firing of more than 5000 employees for creating more than two million possibly fake accounts was not "material" to investors.[14] But Mr. Stumpf personally emphasized the company's increasing number of retail accounts and growing cross-sell ratio on quarterly earnings calls with investors and analysts, and a number of analyst reports from that period recommend purchasing Wells Fargo stock in part because of those strong numbers.[15] Mr. Stumpf and Wells Fargo investors clearly believed that the cross-sell ratio and the number of retail accounts were material to investment decisions – and yet Mr. Stumpf did not disclose that those numbers had been inflated by millions of fraudulent accounts.

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cross-sell of 6.14 products per household."); Transcript of Q3 2013 Wells Fargo Earnings Conference Call, Oct. 11, 2013, *available at* http://www.warren.senate.gov/files/documents/2013Q3_WellsFargoEarningsCall.pdf ("We deepened relationships across our Company achieving record retail banking cross-sell of 6.15 products per household."); Transcript of Q4 2013 Wells Fargo Earnings Conference Call, Jan. 14, 2014, *available at* http://www.warren.senate.gov/files/documents/2013Q4_WellsFargoEarningsCall.pdf ("By focusing on meeting our customers' financial needs, we achieved record cross-sell across the company with retail banking cross-sell growing to 6.16 products per household."); Transcript of Q1 2014 Wells Fargo Earnings Conference Call, April 11, 2014, *available at* http://www.warren.senate.gov/files/documents/2014Q1_WellsFargoEarningsCall.pdf ("We deepened relationships across our Company, achieving record retail banking cross-sell of 6.17 products per household."); Transcript of Q2 2014 Wells Fargo Earnings Conference Call, *available at* http://www.warren.senate.gov/files/documents/2014Q2_WellsFargoEarningsCall.pdf ("We deepened relationships across our company. Retail banking cross-sell was 6.17 products per household.").

[10] *See, e.g.,* Transcript of Q3 2014 Wells Fargo Earnings Conference Call, Oct. 14, 2014, *available at* http://www.warren.senate.gov/files/documents/2014Q3_WellsFargoEarningsCall.pdf ("We grew primary consumer checking customers by 4.9%."); Transcript of Q4 2014 Wells Fargo Earnings Conference Call, Jan. 14, 2015, *available at* ("And we grew the number of primary consumer checking customers by 5.2%.").

[11] *See, e.g.,* Transcript of Q3 2014 Wells Fargo Earnings Conference Call, Oct. 14, 2014, *available at* http://www.warren.senate.gov/files/documents/2014Q3_WellsFargoEarningsCall.pdf ("And the increases you're seeing in debit card activity and credit card, we almost have 40% of our customers now [] carry our credit card. That was 22% in 2009.").

[12] https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370541437806.

[13] https://www.sec.gov/news/press/2010/2010-136.htm.

[14] United States, Congress, Senate Banking, Housing, and Urban Affairs Committee, "An Examination of Wells Fargo's Unauthorized Accounts and the Regulatory Response," 114th Congress, 2nd Session, Accessed September 21, 2016. Available at: http://www.banking.senate.gov/public/index.cfm/hearings?ID=B80F9B81-4331-4F95-91BC-718288EC9DA0

[15] *See, e.g.,* analyst reports available at http://www.warren.senate.gov/wellsfargo/.

Whistleblower Retaliation

The Commission should also investigate whether Wells Fargo violated whistleblower protection laws when it fired employees who reported misconduct to the company.

Wells Fargo has reportedly fired several employees who had reported misconduct to their superiors or called Wells Fargo's internal ethics hotline.[16] Other former Wells Fargo employees have contacted Members of Congress to share similar stories of being fired shortly after having reported misconduct internally.

Congress enacted whistleblower protections to encourage employees to report misconduct. These protections allow whistleblowers to come forward without having to fear that they will lose their jobs or suffer other consequences at work. Both Sarbanes-Oxley and the Dodd-Frank Wall Street Reform and Consumer Protection Act have anti-retaliation provisions to protect employee whistleblowers who report certain types of fraud and violations of securities law.

For instance, Sarbanes-Oxley prohibits a publicly-traded company from terminating or discriminating against an employee who provides information about what he or she reasonably believes is a type of fraud, a violation of any SEC rule or regulation, or a violation of federal law related to fraud against shareholders.[17] The language explicitly protects employees who report information internally to "a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct)."[18]

Dodd-Frank also has an anti-retaliation provision to protect whistleblowers "in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002."[19] The SEC has interpreted the anti-retaliation provision in Dodd-Frank to apply to an employee who reports information consistent with the way one would do so under Sarbanes-Oxley, which therefore would include employees who report misconduct internally.[20] Several courts, including the U.S. Court of Appeals for the Second Circuit, have held that whistleblowers who report internally are protected under the anti-retaliation provision in Dodd-Frank.[21]

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[16] Matt Egan, *I called the Wells Fargo ethics line and was fired*, CNN Money, (Sept. 21, 2016), *available at* http://money.cnn.com/2016/09/21/investing/wells-fargo-fired-workers-retaliation-fake-accounts/; Stacy Cowley, *Wells Fargo Workers Claim Retaliation for Playing By the Rules* New York Times (Sept. 26, 2016), at http://www.nytimes.com/2016/09/27/business/dealbook/wells-fargo-workers-claim-retaliation-for-playing-by-the-rules.html?ref=business&_r=0.

[17] 18 U.S.C. § 1514A(a)(1).

[18] 18 U.S.C. § 1514A(a)(1)(C).

[19] 15 U.S.C. § 78u-6(h)(1)(A).

[20] 17 C.F.R. 240.21F-2(b)(1). *See also* Securities Whistleblower Protections & Incentives, 76 Fed. Reg. 34300, at 34304 (June 13, 2011) *available at* https://www.sec.gov/rules/final/2011/34-64545fr.pdf ("the statutory anti-retaliation protections apply to three different categories of whistleblowers, and the third category includes individuals who report to persons or governmental authorities other than the Commission.").

[21] *See, e.g.*, Berman v. Neo@Ogilvy LLC, 801 F.3d 145 (2d Cir. 2015).

Published reports and court filings indicate that Wells Fargo harassed and ultimately terminated employees for raising concerns about the creation of fake deposit and credit card accounts. These claims deserve the SEC's careful investigation.

Conclusion

Wells Fargo recently disclosed to the SEC and its investors that it is under investigation by "Federal, state and local government agencies, including the United States Department of Justice, and state attorneys general and prosecutors' offices."[22] Additionally, the United States Department of Labor announced that it would conduct a "top-to-bottom" review to determine whether Wells Fargo violated labor laws.[23]

The SEC should join in these efforts to ensure that Wells Fargo and its senior executives are held accountable for a massive, years-long fraud that hurt thousands of customers and potentially cost investors billions of dollars.

We appreciate your consideration of this matter.

Sincerely,

Jeffrey A. Merkley
United States Senator

Elizabeth Warren
United States Senator

Robert Menendez
United States Senator

cc: SEC Commissioner Kara Stein
SEC Commissioner Michael Piwowar

[22] Wells Fargo & Company, Form 8-K, filed Sept. 27, 2016.
[23] Letter from Secretary of Labor Thomas E. Perez to Senator Elizabeth Warren, Sept. 26, 2016, available at http://www.warren.senate.gov/files/documents/2016-9-26_DOL_ltr_to_Warren.pdf.