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PERSPECTIVE

No accountability for financial misconduct means no change

By David S. Casey Jr. and Jeremy K. Robinson

The Great Recession was supposed to be a wakeup call that the nation's big financial institutions were out of control. And to some degree, it was. Among other things, the economic collapse resulted in the Dodd-Frank Wall Street Reform and Consumer Protection Act, a major piece of regulatory legislation designed to rein in fraudulent and predatory banking practices, and the creation of the Consumer Financial Protection Bureau.

But, problems persist, both big and small. In the past few years, we have witnessed not one, but two major banking scandals by Wells Fargo— one involving fake accounts and another involving unneeded auto insurance being forced on borrowers— as well as massive data breaches impacting credit bureaus, rampant abuse by payday lenders and other high interest lenders, and a string of staggering money laundering revelations.

The underlying causes of these problems are varied and widespread, and unpacking them is beyond the scope of a single article. Still, there are issues worth discussing and a few potential actions that might help.

The first focus is government regulation. Although the financial meltdown 10 years ago spawned many additional laws and regulations for financial institutions, not everyone was a fan. Banks and other companies argue the bad players are outliers (a pretty dubious claim considering the list of offenders) and stringent regulation could shrink the supply of essential credit to the economy. And they have found a sympathetic ear in the GOP majority.

The Trump administration has taken several steps to ratchet back government oversight of financial institutions and enforcement of existing laws. For example, in 2018, Trump signed the so-called Economic Growth, Regulatory Relief and Consumer Protection Act, a bill sponsored by Senator Mike Crapo that eliminates many of the oversight measures put into place by Dodd-Frank to protect investors. Trump and the GOP have also taken steps to weaken the CFPB's powers and reduce its budget.

Finally, under Trump's leadership, the U.S. Security and Exchange Commission (SEC) has scaled back its enforcement role. The number of SEC enforcement actions has dropped dramatically in the past few years, and SEC Chairman Jay Clayton has made it clear his priority is not enforcement but rather giving information to investors so they can protect themselves. This is little consolation to the average consumer struggling to figure out 401(k) investment options while being buried in mounds of indecipherable financial jargon.

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The takeaway is the government isn't going to help much. At least not right now. And, if the government isn't going to take action, that leaves private enforcement. Traditionally, private enforcement is done by way of class actions using federal statutes such as RICO and the National Banking Act, as well as a host of securities laws, and state law unfair business practices statutes. Those cases have proven effective at remedying wrongdoing in the financial sector.

Unfortunately, a Wall Street-friendly Congress recently rolled back a Consumer Financial Protection Bureau (CFPB) rule that banned mandatory arbitration clauses (invariably containing a class action waiver) in the fine print of credit card and bank account documents. Such clauses, which have received significant publicity of late, are loved by businesses and loathed by consumers because they essentially eliminate meaningful private enforcement by banning collective action. And while proponents claim private arbitration can be effective, a report by the CFPB showed that class actions paid out about 1,000 times more money to consumers overall than consumers got through arbitration.

Financial service problems are magnified by the fact that financial advisers often don't offer a fee-for-advice business model. Instead they rely on sellers of financial products to pay them upfront or through a trailing commission, in return for promoting their products. Which, while much more lucrative for the advisor, creates a fairly obvious conflict of interest and often results in investors buying financial products they don't need.

Not surprisingly, all this takes a toll on the consuming public. A report titled "The Millennial Disruption Index" found the 10 least-loved brands by millennials included all four main banks in the U.S. and 70 percent of millennials report that they would rather visit the dentist than listen to what a bank rep has to say.

Part of the issue is structural change will have to come from the financial institutions. Finance is complicated and with ever increasing frequency, key decisions about complex financial topics are being foisted on hapless consumers. With pensions largely a thing of the past and borrowing money ever more risky, inexperienced consumers are being asked to make judgments on things they know nothing about, with potentially life-altering consequences.

If financial institutions want to thrive in today's market, they must focus more on helping consumers and less on making money any way the possibly can. This means putting the customer first and understanding the type of experiences that customers want.

Beyond that, if the government is unwilling to provide public enforcement, it should at least clear the way for private plaintiffs to take over. The current combination of lax government oversight and de facto immunity from class actions is unacceptable. At a minimum, the government should step up and reinstate the ban on class action waivers in financial service agreements so that consumers aren't left with nothing. Strengthening private enforcement remedies to include statutory penalties or damage multipliers would help, as well. Simply put, no accountability means no change.

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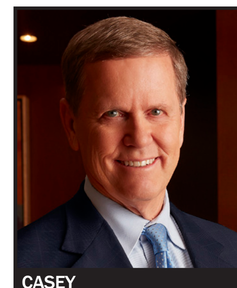
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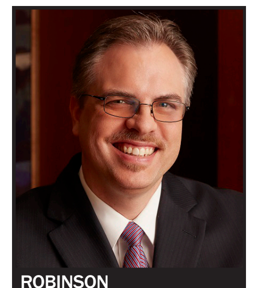
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