Ep. 55: The SEC and FCA Annual Reports: Facts, Figures, Trends

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Jose Garriga: Hello, and welcome to *OnAir with Akin Gump*. I'm your host, Jose Garriga.

Governmental financial regulatory bodies play a critical role in national economies, laying out the ground rules and then enforcing them. In the U.S., the Securities and Exchange Commission, or SEC, is tasked with, in its own words, protecting investors; maintaining fair, orderly and efficient markets; and facilitating capital formation. In the U.K., the Financial Conduct Authority, or FCA, similarly looks to protect consumers, enhance market integrity and promote competition. One of the ways in which those in or entering these markets can get an overview on the regulators' activities and areas of focus, and, by extension, their potential impact on their respective markets, is through the SEC and the FCA's annual reports.

We have with us today, from our London office, financial regulatory partner Helen Marshall and, from our New York office, Michael Asaro, who co-heads the firm’s white collar defense and government investigations practice. They'll be discussing the SEC and FCA reports, comparing them and teasing out similarities and differences that I know our listeners will find both fascinating and useful.

Welcome to the podcast.

Mike, welcome to the show; Helen, welcome back. This is a great topic, so let's get right to it.

To start, as I mentioned, both the FCA and SEC publish annual reports. Helen, let me ask you to lead off, please. Can you tell us a bit about the sort of information included in the FCA's report?

Helen Marshall: Sure. Every year, the FCA publishes an annual report, and, from my point of view, the most interesting part of that report is the section on its enforcement activities. It includes information about the FCA's priorities and, as far as enforcement is concerned, the report covers information such as the number of cases that the FCA's bringing, together with details about subject matter of those cases, enforcement trends, the amounts levied in fines and restitution, and also, pretty interestingly, it provides reporting data from the FCA around the length of time it has taken the FCA to conduct an investigation from start to finish. The report's typically available for review in the second quarter of the year, and the data generally runs from March to March, though this year's report was published in July.

Jose Garriga: Thank you, Helen. Mike, is it the same in the U.S.?

Michael Asaro: Yes. Yes, it is. The SEC's most recent report covers a slightly different time period but roughly the same. It's from November 2019 to the end of October 2020, and it was published on November 2nd, so it's about eight months of that period, importantly, that was affected by the pandemic. As we'll get into the podcast later, it covers, really, very similar ground to the FCA report.

Now, while the enforcement data only shows a snapshot of the regulators' activities, it's a useful source for identifying trends, themes and priorities for the SEC's approach to enforcement. That said, I think the devil's always in the details when it comes to statistics, and the data really needs to be considered in context, and the most important context here is that we have a brand new set of SEC leadership under Chairman Gary Gensler and also, more recently, the new enforcement chief Gurbir Grewal, and based on their histories serving in regulatory capacities previously and the things they've done already since taking over and the statements that have been made publicly, it's very clear that this new Commission leadership is going to be much more hawkish and aggressive.

They've already brought some new enforcement cases right out of the gate, pressing really novel legal theories in the areas of insider trading and cybersecurity as well, and other areas, so I think you just need to keep in mind that the data and trends here from that are, I think, meaningful, but it's got to be considered in the context of this qualitative information.

One last point, also, why does this matter? This matters because the SEC and the FCA have tremendous powers to impact the organizations that they regulate and the individuals who work for those organizations. The SEC can levy serious financial, and the FCA, serious financial fines and penalties. They could suspend trading of a public company. They could, essentially, shut down the activities of any regulated entity, and then, what's more, even if the sanctions never happened, a mere investigation, if it's a serious one, if it leaks publicly can cause real reputational harm, and even if it's not public, it's a huge strain on any organization if it's a real serious investigation. It could take years. It could take huge resources, both internal, of the people involved in management in dealing with it, and external cost in resources for law firms and sometimes outside experts that you need to handle these situations.

Helen Marshall: Just picking up Mike's point there about the cost of investigations, in particular, just to give some context, the FCA actually publishes data on the average costs that the FCA incurs, and it says in its report that the average cost per case to get resolved by agreement, so something that doesn't ever have to get litigated in the Regulatory Decisions Committee or the Tribunal. The average cost for a case like that the FCA spends is 265,000 GBP, and disputed cases, the cases that go through to the Upper Tribunal, cost the FCA, on average, over 800,000 pounds each. Now, those are just the costs that the regulator is attributing to each matter, and undoubtedly, the costs for the party who’s under investigation are probably likely to be significantly higher than that.

Jose Garriga: Thank you, both. That's interesting. The firm recently put out a client alert, you all were intimately involved in it, called "The FCA and SEC Annual Reports: A Statistical Comparison," available on our website for listeners to read separately. But I noted in the alert that the SEC remains, on paper at least, the more active regulator. Is that right, Mike?

Michael Asaro: Yes. That is what the statistics show. During the period covered by the reports, the SEC brought more enforcement actions and imposed larger fines than the FCA, and I'll let Helen give an overview of the FCA statistics, but on the SEC side of things, while the number of cases filed by the Commission in 2020 is higher than the FCA, if you look at the numbers, it was down from the previous year, if you compare it to the SEC's prior report. But in my view, there are a few reasons for this which make it pretty clear that that downward trend is not likely to continue. It's going to be, in my view, a blip, and, so, it's really two primary things.

First, the coronavirus pandemic. That, of course, was a massively disruptive event for all organizations and the SEC is no exception, and there can be no doubt that when the pandemic hit, and people were adjusting, it likely delayed the opening of new investigations and also pushed back pace of ongoing investigations and resolutions. Now, as we've all, unfortunately, been at this for well over a year now, which is kind of insane to say, we've all had to adapt to the new normal, and the SEC is no exception. The business of regulating has had to move forward, and they figured out how to adapt to the new environment. They are moving investigations along remotely; while that's not the SEC yet, I've had some other agencies bring witnesses in for in-person interviews.

That's one point; I think the pandemic slowdown is no longer going to be a real impediment. And then the other piece is the new SEC leadership, which, sorry to beat a dead horse, but it's, I think, tremendously important. They've re-energized the Enforcement Division. I've heard anecdotally from people in the Division, they are very excited about the new leadership, and they're going to push the envelope, and they're going to be more aggressive. And when you put those two things together, I think it is the conventional wisdom that we're going to see a lot more enforcement activity when we're looking at the next version of this report about a year from now.

Jose Garriga: Thank you, Mike. Helen, what do the FCA's numbers look like?

Helen Marshall: Well, significantly smaller than the number of cases being brought by the SEC. In the last year, the FCA only opened 134 cases, but it did manage to close 186, and that, ultimately, resulted in them doing 52 cases less this year than the previous year, and this is, actually, the first significant reduction in the number of open cases, although the absolute number of cases that the FCA closes year-on-year remains pretty steady. What does that actually tell us? Well, the key change is that, during this pandemic year, March to March, the FCA did not open as many cases as it did in the year before, and that's completely not surprising, given, as Mike said, the impact of the pandemic on businesses of all kinds, including the FCA, but the statistics are quite stark.

The FCA opened less than half the cases that it opened in the year before. I think what that reflects is a decrease due to the pandemic, and the FCA also potentially turning from their traditional way of opening a full investigation, potentially towards maybe looking at some of the issues that came out of the COVID issue, such as how firms were implementing proper compliance oversight, et cetera, with working-from-home procedures, and spending time on those activities rather than the traditional, full-blown FCA enforcement cases. It is worth flagging that this most recent report is March to

March, which obviously means that all of that timeframe is from periods when the U.K. was under various levels of restriction due to COVID, whereas the SEC report, actually, does at least contain some normal time before the onset of the pandemic. It seems a bit of a world away now, so we're not really comparing like with like here, but definitely cases on the FCA side are down.

Jose Garriga: Thank you, Helen. Let me stay with you and the topic of the FCA. Could you please give us an overview of the types of cases that are being brought by the FCA, and also, if you could give us any insight into, perhaps, any key themes that you could tease out of the types of cases that are being brought?

Helen Marshall: Sure. The FCA reports its cases subject by subject, which, I think, the SEC also does, and Mike will come on to talk about that, and, so, the subject areas with the highest numbers of open investigations as of the end of March are unauthorized investment business, and that, basically, is activity which is beyond the regulatory framework, so, people acting without the appropriate FCA authorization; retail conduct, so that is poor behavior which impacts significantly on retail investors, and insider trading, and market abuse-type issues. There were also a number of cases open relating to wholesale misconduct and market conduct, and all of those areas have been a focus for the FCA in recent years, and they come up very, very regularly as a priority in the business plans that the FCA also publishes.

Looking at the data a little bit further, we can see that there have been a significant number of closures during the past year, firstly, in cases where there were investigations of insider dealing. There were 87 of those cases open at the start of the year, and, during that year, 48 closed, and also relating to financial crime, where of the 70-odd cases open at the beginning of the year, 21 were closed, and only four new financial crime cases opened, so there's been quite a focus on closing cases out, whereas in contrast, the only significant net opening in case numbers is in relation to those perimeter unauthorized types of business cases, where they only closed out seven yet opened 41 new cases, and I think one explanation for that is a general perception of an increase in online fraud, scams and behavior that the FCA has focused on during the pandemic and the FCA's greater focus on updating its warning list about unauthorized firms very frequently, which could have led to the FCA looking into more firms who have been operating without authorization.

Jose Garriga: That's interesting. Mike, let me pose the same question to you. Could you summarize the kinds of cases that the SEC has been bringing?

Michael Asaro: Before I start hurling numbers at folks, I want to pick up on something Helen said, which was she talked about the statistics of the FCA closing cases, which, I think, highlights a really fascinating difference between the two agencies. The SEC rarely closes cases. That's one of, I think, the problems with the agency. I think, because of the internal bureaucracy to get a matter closed. I used to joke, when I worked at the SEC many, many moons ago, that sometimes it would be more work to close a case than it would be to bring a case, and, so, when investigations lose steam at the SEC, they tend to just end up on somebody's shelf collecting dust in terms of the files, and then you have a question if it is pressuring the organization, what do you do? Do you ask for a closure letter? Do you not ask for a closure letter? Usually, you don't want to kick the sleeping dog because it may result in more activity, but I think that's a really interesting difference between the two agencies.

But just to get back to the numbers, like I said, there's been a slight decrease in the number of enforcement actions filed by the SEC during the last period of their report compared to the prior one. The most notable decrease was in actions against investment advisors and investment companies, which went down from 191 actions in fiscal year 2019, to only 87 actions in fiscal year 2020. That, I think, is something that is definitely going to change. We've already seen a lot more activity in the investment advisor space in terms of just, anecdotally, what we've seen with openings of new investigations, a renewed desire to pursue investigations that were open for a while, and also an increase in examinations of regulated entities like investment advisors, but those are the numbers on investment advisors.

There was also a decrease on cases filed under the Foreign Corrupt Practices Act from 18 in 2019 to 10 in 2020 and also related to market manipulation, from 30 in 2019 to 22 in 2020. I think these are both going to also increase. I think under the Trump administration, FCPA was, while it's always been a priority, a bit of a lesser priority. I think that's going to change, but I think, also, market manipulation is an area we're going to see more activity from the SEC, and, in part, that's because Chairman Gensler's history was as the chairman of the CFTC under the Obama administration, where market manipulation is very much a key focus of those markets, and then also, what we've seen with the fallout from GameStop. I think everyone's anticipating the SEC's going to issue their report on GameStop soon and that, I think, is going to grapple with some interesting issues about what market manipulation is and result in more focus.

Insider trading cases, which are a staple, remain steady: 30 in 2019 compared with 33 in 2020. And an area where we saw a significant increase, in contrast to the other numbers I've bandied about, is in cases filed regarding securities offerings, which was definitely a focus for the prior administration, and particularly in the crypto space, when crypto is considered a security or crypto related instrument, and also just focusing on the protection of retail investors, that's going to continue to be a focus. Like I said, we expect, because a lot of these numbers have been down, that that's really artificial for all the reasons I've already talked about. We're going to just see all these areas across the board, increase.

Jose Garriga: Thank you, Mike. Helen, we've heard a lot of numbers. For listeners, what do you see as being the big-picture points, then, that we can take out of this aggregation of statistics regarding FCA?

Helen Marshall: I think it's fair to say that we generally would have expected that they would have brought fewer cases given the challenges of the pandemic and the difficulties that the FCA would have had in pivoting to working from home. One of the interesting things, though, I think, is that at the start of the pandemic, the FCA gave lots of very direct messaging to businesses and firms who they regulate around concerns about the working-from-home environment and the potential challenges of that, and the FCA expectation that insider trading and market-type cases would increase on the basis that individuals would have much greater opportunity to engage in poor behavior once they were outside the watch of their compliance officer on their floor, but we haven't actually seen those cases coming through.

Obviously, it's possible that some of those cases are under investigation, and we don't yet know about them, and slowly they'll make their way through to becoming actual cases, but, interestingly, I think the early indications are that the initial level of concern from the FCA was perhaps a little bit misplaced, and the firms' ability to monitor and take on appropriate compliance activities for their personnel who were working remotely was probably greater than the FCA might have been concerned about, and the FCA is now saying that it recognizes that many firms were able to quite successfully overcome that challenge that they had. So, I think, as Mike says, the figures over this year are potentially quite artificial, but that expected increase in market cases didn't show, and, so, maybe we'll just get a bit more back to normal levels as the next year’s cases come through.

Michael Asaro: Let me pick up from the SEC's perspective. I think I would just add one thing there, and that's that the Commission's report emphasize the success of its Coronavirus Steering Committee, which, I think, is a nod to the agency's efforts to adapt to the pandemic. And, so, in particular, just to throw out some more numbers, the SEC opened more than 150 COVID-related inquiries and investigations and recommended several COVID-related fraud actions. They've also been, I think, working with other agencies. The DOJ has come up with a COVID fraud taskforce. I do think this is going to be an overlay of an additional area of enforcement cases that we're going to see, and I do want to make the note that when we say COVID-related cases, you really got to think broadly. It's not just Ponzi scheme run by a couple of mooks from Brooklyn operating out of their basement, trying to get people to Venmo them money to develop a new cure for COVID. Some of these can actually be very sophisticated matters.

There have been reports of investigations involving public companies with COVID-related products, which could be legitimate, but the question is how legitimate, and particularly in the pandemic with all the volatility, any COVID-related announcement caused huge movement, sometimes, in stock prices. So, that's one area where, I think, we're going to see more investigations. And also just all the other collateral effects of COVID, I think I would put into that bucket. Things like cybersecurity being much more of a focus with people working remotely, and the SEC has brought cases recently against investment advisors for not protecting customer data after being subject to intrusion. So, I want to just make a note of that when we say “COVID-related cases,” a lot of those cases are really traditional cases like market manipulation, like cybersecurity, insider trading, but with a COVID overlay.

Jose Garriga: Thank you, Mike. Let me stay with you to pick up a topic that I'm sure all our listeners will be interested in, and that's, how did the level of financial penalties, including disgorgement and redress, compare between the regulators?

Michael Asaro: Sure. I think the SEC, as I already said, if you're comparing, has brought, certainly during the last reporting period, larger fines and other financial penalties, but, again, to just put some numbers out there, in 2020, the SEC obtained orders requiring the payment of approximately $1.1 billion in financial penalties, and $3.6 billion in disgorgement, and a penalty is just a straight-up fine, disgorgement is a different type of remedy that has to do with taking away ill-gotten gains.

The total financial penalties remained similar for the SEC to the previous year, while there was an increase of over $300 million in disgorgement, and the SEC, I think, was very pleased about that new high, especially because there were several litigations that resulted in important precedents, which pared back, to some degree, the SEC's ability to get disgorgement relating to statutes of limitations, but then also reaffirmed their ability to get disgorgement just as a general remedy.

The number of whistleblower awards also exceeded prior years, with awards issued in 2020 accounting for roughly 37 percent of the total number of individuals given awards during the life cycle of the program. That's another area of focus. We've seen more and more cases that are driven by whistleblowers. An organization faced with a whistleblower is always in a precarious situation. Whistleblowers, sometimes, have legitimate things that they're bringing to light, obviously; I don't want to detract from that. But whistleblowers often have an axe to grind. They're often disgruntled employees. They often have an agenda, and an organization can be in a really terrible position if you have that type of whistleblower. So, anytime you get a whistleblower you really need to handle it carefully, make sure you're not doing anything that could be viewed as retaliatory, and you may want to think about bringing outside counsel in, because I think that's an increasing focus, and whenever there's a whistleblower, it just adds fuel to the fire for any investigation.

Also, diving into the numbers, the SEC said that the largest 5 percent of cases accounted for approximately 81 percent of the total penalties in disgorgement awards, and, so, that tells us that a small number of cases, likely against large institutions, resulted in very significant penalties, and that's slightly distorted the figures.

Helen Marshall: Yeah, and on the FCA side, the figures are very, very much smaller in comparison, so, over the course of the year, the FCA imposed financial penalties totaling, totaling, around 190 million GBP in 10 separate cases, eight of which were against firms, and two against individuals, and that was down on the previous year where the total was almost £225 million. Redress, which is the parallel for disgorgement, is also sought by the FCA, and the figures are not always easy to find, but it seems that, in the course of the year, the FCA has imposed arrangements which would put expectations on four or five businesses to pay a total of around 300 million GBP in redress to consumers.

Jose Garriga: Thank you. Is there a reason why the SEC figures are so much higher?

Helen Marshall: I think the main issue is it's just a very different legal culture here in the U.K. The FCA is obliged to consider an individual or an entity's ability to pay where there's a claim of financial hardship, and that does appear quite frequently in the FCA final notices to suggest that the penalty's been reduced to reflect that, and obligations to pay money following the resolution of cases in the U.K. are lower than in the U.S., and I think the lower figures just reflect all of those issues and the very different culture.

Michael Asaro: I think it's also one of the reasons why in the U.S. there's so many more jokes about why people hate lawyers than there is in the U.K., but, anyway, go ahead with your question [*laughter*].

Jose Garriga: Let's look at a different topic. That is to say, and this is something that I think both of you have already alluded to, and in terms of the time it takes to investigate cases, are there any differences, really, between the jurisdictions? Mike, what do you think?

Michael Asaro: Well, I'll speak to the SEC, and Helen can chime in on the FCA, but the SEC stated in its report that it is focusing on shortening the length of time it takes to complete investigations and to recommend more-appropriate enforcement actions, and noting, and I think this is true, that enforcement cases have the greatest impact when they're closely related in time to the conduct at issue. The SEC reports that the median time it has taken to file an action in the past year was 21.6 months, which is the fastest it has been in five years, and that may seem like a long time, but when you're talking about it in terms of how fast things move in the government and at an agency like the SEC, that's pretty fast. Like I said, faster than it's been in a long time.

Also, the average time to complete an investigation has been reduced from 37 months to 34 months, so, slightly, and look, these reductions are noteworthy. Again, you got to always be wary of statistics because statistics can be reported in ways that are massaged, so I'm always a little bit skeptical, but I do want to give the SEC its due. That is an impressive change, particularly given that we're talking about a period that was largely affected by COVID.

Helen Marshall: Well, and similarly, from an FCA point of view, actually, it's a similar position. The FCA has been trying to shorten the amount of time it takes them to deal with cases, so, the average time it takes to resolve a case is down. That now a case resolved by agreement, the average time taken is now 32.6 months, down from 37.4 months in the year before, and the average case referred to the Regulatory Decisions Committee takes 47 months to resolve, down from 53 months in the year prior. But the cases referred to the Tribunal, so those are cases that are argued all the way to the external forum, the average length has pretty much doubled from 57 months last year to 120 months in 2021, and that figure, that shows Mike's points about the distortion of the statistic. That is distorted by an anomaly in which a very long-running case has been appealed to the Court of Appeal and also then subject to an additional costs application, which has extended that time massively. But taking a step back, whilst the statistic for each regulator suggests the general improvement in the length of time it takes to resolve a case, that time is still pretty significant. If you or your firm is the subject of a regulatory investigation, that experience is likely to be a very, very long process and one which the pandemic may not have contributed very positively to.

Jose Garriga: Thank you, Helen. Looking at this, people think of this as being a corporate issue, looking at companies being investigated, but let's look at individuals. Is investigation of individuals a focus area for regulators?

Helen Marshall: Oh, very much so. Certainly from the FCA's part. Although the FCA only concluded a very small number of cases against individuals last year, so, two actions and 200,000 pounds in penalties, given the introduction of the Senior Managers and Certification Regime in 2019 to all firms regulated by the FCA, the FCA has repeatedly emphasized that that regime, as part of its intention to get senior managers' interests aligned with what the FCA wants them to do. But the FCA is absolutely focused on looking at those individuals where that behavior is off, and trying to bring cases.

There's one interesting point we're flagging, I think, as a new commentary on the FCA's interactions with individuals. The FCA, in the annual report, included a case study, and a case study would generally be something that you would expect the regulated industry would take notice of, and that case study is in relation to an individual who was convicted of a sexual offense involving his position as a landlord of a rental property, and the FCA included that case to highlight the fact that it was looking at nonfinancial misconduct behavior to reiterate the importance it places on the integrity of individuals. And, so, action was taken against him because the FCA thought that he was not a fit and proper person to be involved in the industry, but there's been a fair amount of questioning about how nonfinancial misconduct should be taken into account by the regulator.

One of the similar cases has also just got through to the Upper Tribunal, where, although the Tribunal dismissed the individual's reference—he was trying to have a prohibition order imposed on him set aside—the Tribunal actually took the view that simply seeking a prohibition order against an individual based on a conviction, in this case, another sexual offenses conviction, was not, of itself, necessarily related to the individual's fitness and properness as a regulated activity, although, in fact, in all the circumstances, various other things that had happened then did mean it was open to the FCA to prohibit him. But I think we are going to see more from the regulator on that, and we've recently published a client alert on this particular case *["Upper Tribunal Clarifies FCA's Powers Regarding Non-Financial Misconduct by Regulated Individuals"*], so if anyone's not yet read that judgment in the matter of Frensham, I'd recommend doing so.

Michael Asaro: I think that's really a very interesting point, and I think that client alert, I've read it, it's a very good one. I think, from the SEC perspective, there's also, quote unquote, nonfinancial misconduct is something to focus on, I think, particularly, in the context of ESG, or environmental, social and corporate governance, that's something the current Commission leadership has been talking a lot about. I did a fireside chat with Commissioner Crenshaw for the MFA conference recently, and that was a very important topic to her, and, so, disclosures in any of those areas, particularly ones who have disclosures like that would be what you described, when you have something regarding the workplace misconduct with a senior manager, could give rise to disclosure issues.

I think that in terms of just individual liability, that has been a long focus for the SEC, really going back to the Obama-era SEC. The recent report indicated that the Commission charged individuals in 72 percent of the standalone cases it brought, although I think, anecdotally, they were a little bit more understanding about the notion of the prior Commission that not every case should fall on the doorstep of one individual. Sometimes it can be a corporate, organizational issue. I think we're likely to see a trend back to the Obama era, "we need a scalp," with the new administration. That's just something to keep an eye on.

Jose Garriga: Thank you. In conclusion, then, any remarks, big-picture takeaways that you might want to offer listeners? Helen, let me pass that over to you.

Helen Marshall: Notwithstanding the pandemic, both regulators have clearly remained pretty active, and even if there has been a sort of a reduction in the number of cases they brought during the past year, no doubt this will rebound once we get through the pandemic, and it's also a reminder that regulators are able to shift their focus pretty quickly, and for businesses and firms looking at the material that the regulators put out on a regular basis, it is quite important in terms of knowing the day-to-day areas of interest of the regulator and to try and keep ahead of that.

Michael Asaro: Yeah. I very much agree, Helen. I think we're going to see, in terms of specific areas to focus on, increase particularly in areas of heightened regulatory concern. Here's just some specific areas to keep in mind. One is ESG, which I talked about. Crypto, the SEC has brought some very significant recent cryptocurrency-related frauds and also offering regulation violation cases. Investment advisor cases, I think is something I've already highlighted, where we're seeing more activity. Probably the most recent thing that comes to mind, and that also touches on another area, is there was a group of advisors were recently charged, and we do have a client alert on this *["SEC Cyber Enforcement Actions – Lessons for Private Fund Managers*"], with violations of Reg S-P, which is a regulation that requires the protection of personal information of clients, where, basically, several firms were hit with an enforcement action all at once for that, so that's something to look at.

Big Data is another area where there's been a lot of talk but not an enforcement case yet[1]. I expect we will see an enforcement case in the next six to 12 months involving some type of Big Data violation, and the issue there would be getting access to Big Data. That could be material, nonpublic information, without potentially in a breach of a duty. SPACs is an area where there's been a lot of focus, and that's both from a disclosure focus in terms of a SPAC itself and whether its disclosures are adequate. Several SPACs have blown up after other disclosures. Commissioner Gensler has been very critical of the SPAC process as a means of going public, and I think the regulatory focus there is going to be both on the SPAC itself, but also potentially on the sponsor and large SPAC investors who are responsible for the deals, and as I said, pandemic-related fraud.

I also think the SEC is showing a willingness to step up its efforts in more traditional areas, like insider trading. To call out another alert, we did a recent client alert *["New 'Shadow Insider Trading' SEC Enforcement Action -- Four Lessons for Private Fund Managers"*] on a really novel and, I think, significant insider trading case recently brought by the SEC, highlighting a practice that's sometimes referred to as "shadow trading," and, so, that might be worth a read for folks. Accounting fraud, market manipulation and corporate disclosure cases, regular staples of the SEC, I think are going to continue to be a focus. So, bottom line, I think, is the SEC really is energized, and we're going to see a lot of activity.

What can companies do and organizations do to be ready for this? Well, I think a couple of final thoughts on that.

First, be mindful of the current trends in new SEC guidance. If your business touches on one of these hot areas that I've mentioned, consider performing a review of your policies and procedures to ensure they're up to date and in line with regulatory expectations. Second, if you're a registered entity like an investment advisor or broker-dealer, now is a good time to do exam readiness and be ready for a visit from the Division of Examinations. We've seen an uptick in SEC exams, especially when it comes to advisors and that includes newly registered advisors or even advisors who operate largely overseas, and a nod to my colleagues, but also have a registered entity in the U.S.; we've seen wide-ranging exams there.

Examinations are a key source of potential enforcement referrals, so, it is something you want to be focused on, and the SEC Division of Examinations issues risk alerts, which can be a very valuable source of keeping in step with trends that are important to the exam staff that could be important to enforcement.

And then, third, if you run into signs of problematic practices and potential misconduct, don't ignore them. If you've uncovered either a red or even a yellow flag in your organization, the SEC—and I believe Helen would say the FCA—expects you to get to the bottom of it. While every situation doesn't call for a costly internal investigation involving outside counsel, whenever that issue comes up, really, particularly supervisors or for a public company, directors, you need to, actually, take a beat, examine the situation and scope out a plan for what is an appropriate response to make sure you get to the bottom of it.

[1] Shortly after this podcast was recorded, the SEC brought its first enforcement action against an alternative data provider for securities fraud. ["SEC Brings First-Ever 'Alternative Data' Enforcement Action" (akingump.com)]

And outside counsel can be a valuable resource for that, not just after you've concluded that there needs to be a full-blown internal investigation. Outside counsel, and we have advised on just what is an appropriate response, and that will depend on the facts and circumstances. So, failure to respond appropriately could result in increased penalties, but it also could subject people who really had no role in the underlying misconduct, to supervisory liability or even, for a public company, directors could, potentially, have exposure for not satisfying their fiduciary obligations by responding to things that are later characterized as red flags.

Jose Garriga: Thank you, Mike. Listeners, you've been listening to Akin Gump financial regulatory partner Helen Marshall and litigation partner Michael Asaro. Thank you both for making the time to come on the show today and share this great info and these great insights with our listeners.

And thank you, listeners, as always, for your time and attention. Please make sure to subscribe to *OnAir with Akin Gump* at your favorite podcast provider to ensure you do not miss an episode. We're on, among others, iTunes, YouTube and Spotify.

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Until next time.