The FCA and SEC Annual Reports—A Statistical Comparison

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Key Points

- The SEC and the FCA each publish annual reports on their enforcement actions.
- Whilst enforcement data only shows a snapshot of the regulators' activities, there is much to be learned from these reports, particularly as it can help to identify trends, themes and priorities in the regulators' approach to enforcement.
- As well as the number of cases brought and their subject matter, the data also provides an insight on the average length of time it is taking the regulators to conduct investigations through to their resolution.
- Compared to the previous year, the most recent full SEC figures show the Commission having brought fewer cases in 2020, but yet imposed a similar quantum of financial penalties, and indeed the SEC increased the amount of disgorgement sought to a new high. The FCA's recently published figures show general stability year-on-year in the number of investigations resolved, and a slight decrease in the quantum of financial penalties imposed.
- Given that the coronavirus pandemic is likely to have pushed back the resolution of cases, and potentially delayed the opening of investigations as well, the expectation is that the results in 2021/2022—and likely for the next few years, given that most investigations are multiyear affairs—will be higher, and 2020 will be looked back on as something of an anomaly.

Introduction

The U.S. Securities and Exchange Commission (SEC or the "Commission") and the UK Financial Conduct Authority (FCA) have enormous powers to affect the businesses and individuals which they regulate. Ultimately, each regulator has the power to force a business to suspend or cease trading, pay very substantial fines and/or change the careers and lives of those working in the financial services sector. It is not only the regulatory sanctions which can have these effects, however: regulatory investigations themselves can dominate management time for years, can cost significant amounts in legal and other professional fees[1] and leave individuals practically unable to move jobs or function as they would like.

In this context, understanding the regulators' current approach to enforcement—including what types of actions they are bringing, and the timescales—is helpful. As the regulators themselves point out, however, only looking at enforcement outcomes "can never present a full picture of the effectiveness of an enforcement program",[2] though the numbers can be a helpful insight into trends and patterns, in particular.

At a high level, the SEC remains—on paper—the more active regulator, bringing many more actions than the FCA within 2020, and imposing larger fines. At the same time, however, the number of cases filed by the SEC in 2020 was reduced compared to the previous year, whereas the number of cases resolved by the FCA (whether by taking action or deciding against doing so) has remained steady. Given that the coronavirus pandemic is likely to have pushed back the resolution of cases, and potentially delayed the opening of investigations as well, the expectation is that the results in 2021/2022 (and likely for the next few years, given that most investigations are multiyear affairs) will be higher, and 2020 will be looked back on as something of a nadir. This may be especially pronounced with respect to the SEC, which has seen the appointment of new leadership who have already made clear the agency plans to step up its enforcement regime.

The Data and Time Period Covered

Both the SEC and the FCA provide reports on their enforcement data. The most recent report from the SEC covers the year November 2019—November 2020,[3] which means that approximately eight months of the covered period was disrupted due to the pandemic. The FCA, in turn, has recently published its report for the year March 2020—March 2021,[4] meaning that effectively all the data is from periods when the UK was under differing levels of restrictions due to the coronavirus.

Number and Type of Cases

SEC

The SEC provides data on the enforcement actions which it has filed within the relevant year. In Fiscal Year (FY) 2020, the SEC filed 715 enforcement actions, of which 405 were "standalone" actions (i.e. not follow-on administrative procedures or delinquent filings). This was down from previous years. For example, in FY 2019 the SEC filed 862 actions (of which 526 were standalone) and in FY 2018 it filed 821 actions (of which 490 were standalone).

As to subject matter, the most notable decrease was in actions filed against investment advisers/investment companies, which went down from 191 actions in FY 2019 to only 87 actions in FY 2020. There were also slight decreases in cases filed under the Foreign Corrupt Practices

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[1] Indeed, the FCA notes that its average costs for cases resolved by agreement are approximately £365,000, with cases disputed through to the Upper Tribunal costing it on average roughly £827,000. Undoubtedly, the costs for the party under investigation can be significantly higher than this.

[2] https://www.sec.gov/files/enforcement-annual-report-2020.pdf, page 11 (internal page 7).

[3] https://www.sec.gov/files/enforcement-annual-report-2020.pdf

[4] https://www.fca.org.uk/data/enforcement-data-annual-report-2020-21

Act (from 18 in 2019 to 10 in 2020) and relating to market manipulation (30 in 2019 to 22 in 2020), with insider trading cases remaining fairly steady (30 in 2019 compared with 33 in 2020). The most significant increase in number of cases filed was in relation to securities offerings, which increased from 108 in 2019 to 130 in 2020.

As noted above, however, we expect these figures to be somewhat artificially low on account of the pandemic, and even in the last few months it appears that the number of enforcement cases may be on the rise, including against investment advisers: see our client alert here. We expect the enforcement trend lines to increase from here.

FCA

In 2020/2021, the FCA opened 134 cases and closed 186 cases, leading to a net reduction of 52 cases. This is the first significant reduction in the number of open cases for at least four years, though it is notable that the absolute number of cases that the FCA has closed has remained steady for a number of years (186 cases closed in 2020/21, 185 in 2019/20 and 189 in 2018/19). The change, therefore, is that the FCA has not opened as many cases this past year as it has done previously—indeed, in the most recent reporting period, it opened just under 40 percent of the number of cases it opened in 2018/19, for example. As noted, it seems possible—if not likely—that this decrease was due to the coronavirus, perhaps as the FCA turned from investigations of more traditional matters towards COVID-19-specific concerns, such as how firms were implementing the novel working-from-home procedures.

The FCA reports its case data by subject matter as well, and as such it is clear that there have been a significant number of “net closures” in cases involving allegations of:

- Insider dealing—of the 87 cases open at the beginning of the year, 48 closed and 33 were opened.
- Market manipulation—of the 29 cases open at the beginning of the year, 15 closed and 3 were opened.
- Financial crime—of the 71 cases open at the beginning of the year, 21 closed and 4 were opened.

The only significant “net opening” in case numbers is in relation to cases involving allegations of unauthorised business (7 cases closed, 41 opened). One explanation for this may be an increase in scams and online frauds which the FCA has reported on, and the FCA’s greater focus on updating its Warning List almost daily, leading to more investigations into firms operating without authorisation at all.[5]

Comparison

It is perhaps not unexpected that fewer cases would have been opened/filed in 2020 by each of the regulators than in prior years, given the pandemic.

[5] https://www.fca.org.uk/news/speeches/rise-scams-and-threat-legitimate-financial-services-industry

It is interesting, however, that both the SEC and the FCA have closed or not filed as many "market conduct" cases in this year. This is particularly notable given a general concern at the start of the pandemic that 'working from home' would allow individuals greater opportunity to engage in behaviour constituting market abuse or insider trading once they were outside of the immediate watchful gaze of a compliance department in the office.[6] Whilst it remains possible that these cases have yet to be brought, the early indications might suggest that the level of concern were unfounded—or perhaps misplaced—and the ability for firms to monitor personnel working remotely was greater than might have been expected. As the FCA's Director of Market Oversight noted in October 2020, "firms [had] overcome th[e] challenges" which were initially encountered in recording and surveillance, and she noted the FCA's gratitude to people across the sector who had worked to ensure that the regulator received accurate transaction and order reporting.[7]

Similarly, from the SEC's report, the Commission emphasised the successes of its Coronavirus Steering Committee, noting that from the Steering Committee's start in mid-March through the end of the fiscal year, "the Division's Office of Market Intelligence triaged approximately 16,000 tips, complaints, and referrals (a roughly 71% increase over the same time period last year), and the Division opened more than 150 COVID-related inquiries and investigations and recommended several COVID-related fraud actions to the Commission".[8]

Financial Penalties, Including Disgorgement and Redress

SEC

In 2020, the SEC obtained orders requiring the payment of approximately $1.1 billion in financial penalties and $3.6 billion in disgorgement (which set a new high).[9] Whilst the total financial penalties figure remained similar to the previous year (approximately $1.1 billion in 2019 as well), there was an increase of over $300 million in the disgorgement figure. Similarly, the number and amount of whistleblower awards exceeded prior years; the awards issued in 2020 accounted for roughly 37 percent of the total number of individuals awarded over the entire life of the SEC's whistleblower program.

The SEC noted that the largest 5 percent of cases accounted for approximately 81 percent of the financial penalties/disgorgement ordered, with the median financial penalty/disgorgement ordered being approximately $530,000 (down from approximately $550,000 the previous year). The SEC noted that it returned approximately $600 million to consumers, which was down from approximately $1.2 billion the previous year.

FCA

Over the year, the FCA imposed financial penalties totalling approximately £190 million in 10 separate cases—8 of which were against firms, and 2 were against individuals. This was a

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[6] See, for example, Market Watch 63 (here) from May 2020, which emphasised the FCA's early concerns about the potential problems working from home might cause.
[7] https://www.fca.org.uk/news/speeches/market-abuse-coronavirus
[8] SEC report, page 6.
[9] SEC report, page 7.

reduction from the previous year's total of approximately £224 million in relation to 15 separate cases—12 being against firms, and 3 against individuals.

The FCA was also active in seeking redress for consumers, and whilst the figures are not always easy to find, firms such as Redcentric plc, Alexandra Associates (UK) Limited (trading as Avacade Future Solutions, along with associated individuals) and Barclays Bank/Clydesdale Financial Services Ltd are expected to pay approximately £11.4 million,[10] £10.7 million[11] and £273 million[12], respectively, in redress to consumers respectively.

Comparison

Whilst the SEC figures are undoubtedly higher—both in number of penalties, and in total quantum –a few points should be noted. First, the FCA is obliged to consider an individual or entity's ability to pay where there is a claim of financial hardship, and it is regularly reported in FCA Final Notices that a penalty amount has been reduced to reflect such circumstances. While the SEC has the discretion to consider inability to pay, in practice it rarely does so. Second, as has been noted in the press,[13] whilst SEC fines have long been very significant, the SEC has historically struggled to collect the enforcement fines which it has imposed. Third, even outside of the financial sectors, obligations to pay money following the resolution of many cases in the UK—whether in tort, criminal or regulatory cases—is generally lower than in the U.S., and as such, the lower FCA figures should not be unexpected, but reflect a different legal culture.

Time Taken to Investigate

SEC

The SEC has stated in its report that it is focused on shortening the length of time it takes to complete investigations and to recommend enforcement actions, noting that regulatory intervention has the greatest effect when it is as closely related in time to the conduct at issue.[14] The SEC reports that the median time it has taken to file an action this past year was 21.6 months, which is the fastest it has been in five years. Further, the average time to complete the investigation has been reduced from 37 months to 34 months. These reductions are impressive, particularly given the difficulties of the COVID-19 pandemic, but it will be interesting to see whether these reductions have been maintained through 2021.

FCA

The FCA figures on the lengths of civil cases are somewhat difficult to analyse, given that—as the report itself notes—there was an anomalous outlier case which was appealed to the Court of Appeal and then was subject to an application for costs which appears to have distorted the statistics. Focusing on the vast majority of cases which are settled or which are taken just to the Regulatory Decisions Committee—the FCA's quasi-independent committee which makes decisions in contested cases—the figures are down, namely that the average case resolved by

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[10] https://www.fca.org.uk/news/press-releases/fca-publicly-censures-redcentric-plc-market-abuse
[11] https://www.fca.org.uk/news/press-releases/fca-wins-case-against-avacade-court-appeal
[12] https://www.fca.org.uk/news/press-releases/fca-fines-barclays-treatment-customers-financial-difficulty
[13] For example, https://www.wsj.com/articles/some-securities-fraudsters-escape-paying-sec-fines-11558344601
[14] SEC report, page 10.

agreement now takes 32.6 months (down from 37.4 months in 2019/20) and the average case referred to the RDC takes 47.2 months (down from 53.5 months in 2019/20).

Comparison

Both regulators' statistics indicate an improvement in the average length of time it is taking for resolution of cases, both contested and settled. This notwithstanding, the length of time cases take to reach a conclusion is still very significant—the FCA's average of nearly four years in a contested case is case in point; and moreover the most significant and complex cases are taking even longer than this to reach a conclusion.

Whilst it is positive that there has been a decrease in these figures then, it remains true that being the subject of a regulatory investigation may be a very long process indeed, and it cannot be expected that the pandemic will have sped this up.

Individuals

Of course, as well as actions against firms, both the SEC and the FCA routinely investigate and bring actions against individuals, and in both of the regulators' enforcement reports, actions against individuals were specifically highlighted.

In SEC's report, it was noted that "the Commission charged individuals in 72% of the standalone enforcement actions it brought" and this included "individuals at the top of the corporate hierarchy, including numerous CEOs and CFOs, as well as accountants, auditors, and other gatekeepers". This figure of 72 percent was up slightly against last year (69 percent).

In the FCA's report, the number of cases and total quantum of financial penalties issued against individuals dropped slightly in 2020/21 to 2 actions and £200,000 in penalties, compared to 3 actions and £300,000 in penalties the previous year. Given the introduction of the Senior Managers and Certification Regime (SMCR) in 2016 for dual FCA and Prudential Regulation Authority firms (such as banks and insurers) and in 2019 for most other firms regulated by the FCA, one could be forgiven for questioning whether this has had the desired intention of increasing individual accountability given the paucity of actions which have been brought. However, the FCA has repeatedly emphasised that the SMCR has brought in "profound changes" in firms, and part of its aim is to align senior managers' interests with the FCA's requirements so that enforcement action becomes unnecessary.[15]

Perhaps the most important commentary on the FCA's interactions with individuals, however, is the inclusion of a "Case Study", namely the case of Mr. Horsey, who was criminal convicted of a sexual offence involving breach of his position as a landlord. The FCA included this to highlight the "broader collection of 'non-financial misconduct' cases" which it has brought recently, and to reiterate the importance it places on broader integrity assessments of individuals.[16]

[15] See, for example, https://www.fca.org.uk/news/speeches/compliance-culture-and-evolving-regulatory-expectations-mark-steward

[16] See Final Notice: https://www.fca.org.uk/publication/final-notices/mark-horsey-2020.pdf

There are also references to cases of nonfinancial misconduct in the SEC report, for example, three KPMG audit partners were suspended from appearing or practising before the SEC as accountants following a finding that they had improperly shared answers to internal training exams, and subsequent misconduct during the investigation. The prominence of the FCA's reference to Mr. Horsey, however, does appear to epitomise the difference in emphasis between the regulators.

Conclusion

Notwithstanding the pandemic, both the SEC and the FCA have clearly remained active. Even if there has been a reduction in the number of cases brought on both sides of the Atlantic, it can be expected that this will rebound as the world moves past the initial shocks of the pandemic (and indeed, the pick-up in enforcement actions may already be starting). The pandemic is a reminder that the regulators are able to shift their focuses according to current priorities fairly swiftly, and knowing the stated aims and areas of interest of each regulator is important for firms in the regulated sector.

Especially in areas of particular regulatory concern, whether that be ensuring operational resilience in light of the pandemic (or indeed more broadly) or issues of market conduct, firms should be mindful of how the regulators are likely to perceive their activities. This is particularly the case when potential misconduct involving these types of issues is identified, firms ought to ensure that they have suitable internal investigations of the conduct, and in turn make sure that this is appropriately communicated to the regulator. In this way, firms can develop positive relationships with the regulator, potentially making the difference between convincing the regulator that a firm is functioning as it should even if there is an isolated problem, and in effect inviting closer regulatory scrutiny. In a world where the regulators have ever-increasing access to data and associated abilities to monitor firms remotely, it has never been more true to recall that firms are under duties of openness and transparency with their regulators, and it is always worse for the regulator to find out about an issue from a third party.