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The SEC and FCA: A Pond, 362 Investigations and $4 Billion in Penalties Apart

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18 August 2023

No financial services firm or professional welcomes an investigation by a regulator, let alone enforcement action. Each investigation proceeds differently depending on the target of the investigation, the subject matter and the regulator involved. Indeed, there are rarely clear answers to the questions "How long will this take?" or "What is the most likely outcome?" Frustratingly, it is often the answers to these questions which would most help a firm or individual determine how best to proceed in the investigation itself.

In the absence of a crystal ball, one of the few empirical guides we can use to understand enforcement trends is the data published by the regulators themselves. The United States Securities and Exchange Commission (SEC) and the United Kingdom Financial Conduct Authority (FCA) both publish annual statistics on their enforcement activities. It is, of course, true that these data should not be over-interpreted. As SEC Chair Gary Gensler said in announcing the fiscal year (FY) 2022 results, "[t]hese numbers … tell only part of the story", and "Enforcement results change from year to year". Studying the trends, however, can be useful metrics to give an indication of the regulators' direction of travel or likely areas of scrutiny.

Whilst the time periods do not match up perfectly, we now have data for FY22 for the SEC and 1 April 2022 to 31 March 2023 for the FCA, allowing for some comparison between the two regulators' activities.

Number, Length and Type of Cases

For the SEC, the number of stand-alone enforcement actions filed in FY22 increased by approximately 9% over the previous year (462 in FY22, compared to 434 in FY21).

By contrast, there was a significant drop in the number of FCA enforcement cases opened from April 2022 to March 2023, with the year-on-year numbers dropping from 194 to 100. This number should be treated with caution, however, as a new 'case' is opened by the FCA for each subject of an investigation (including each additional individual being scrutinised within the same investigation) and the number of investigations (as distinct from 'cases') has remained steady at 224 compared to 230 (as at 1 April 2023 and 2022, respectively). Arguably, therefore, FCA activity has actually remained fairly steady.

Unlike the SEC, the FCA also reports on duration of investigations, and it seems that the delays in investigations continue with the mean average duration of an investigation up to 40 months (compared to 38 in 2021/22 and 25 in 2020/21), albeit with some glimmer of hope that the average time from the end of the investigation to its conclusion is down four months to 24 months compared to 2021/22. Despite an overall 6% rise in headcount, the number of staff in the FCA's Enforcement and Market Oversight (EMO) division remained static (621 in 2022/23 against 625 the year before), so unless the number of open cases decreases significantly, or the FCA finds some other means to speed up its investigations, it seems unlikely that the subjects of an investigation can expect a faster experience any time soon.

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Unsurprisingly, perhaps, there is a significant overlap in the regulators' stated priorities for regulatory action. Both regulators emphasise individual accountability, with the SEC reporting that more than two-thirds of the stand-alone enforcement cases involved at least one individual, and over one-third of the total number of fines issued by the FCA last year were to individuals. Similarly, market abuse and data analytics remain of particular interest for each regulator. One area of stark contrast, however, is the focus on crypto; the SEC has brought a number of high-profile enforcement actions in this area while the FCA has previously distanced itself from crypto business, which has typically been outside the regulatory perimeter.

Financial Penalties, Disgorgement and Redress

FY22 was a bumper year for the SEC in terms of financial penalties ordered. As noted above, despite the number of stand-alone enforcement actions mildly increasing, the total quantum of penalties ordered was the highest on record, being almost three times higher than the previous year ($4.2 billion versus $1.5 billion), and indeed was more than the three prior years combined. These results would indicate that the SEC has achieved larger awards per case, rather than simply bringing more enforcement actions.

In terms of SEC disgorgement, there was a slight dip as compared to previous years ($2.2 billion in FY22, against $2.4 billion in FY21 and $3.588 billion in FY20). There was a similar strength in whistleblowing awards made by the SEC, with FY22 seeing approximately $229 million awarded in 103 awards, being the second highest year on both counts.

By contrast, the FCA had almost the opposite: far more financial penalties were imposed (24 compared to 11 in 2021/22), albeit the total quantum reduced significantly from £313 million (which itself excluded a £265 million criminal fine) down to £199 million, with one case accounting for over half of this sum. In context, however, it was 2021/22 which was the outlier, with the preceding years much more comparable to 2022/23 (£190 million in 2020/21 and £224 million in 2019/20).

Another interesting feature of the 2022/23 figures is how the FCA's penalties imposed on individuals (as compared to firms) have changed; whereas in 2020/21 and 2021/22 the FCA only fined two and three individuals respectively, this shot up to nine individuals in 2022/23 for a total of £1.4 million (up from £0.2 million and £0.4 million). This is arguably a sign of things to come with 385 cases relating to individuals currently afoot.

As to redress, the FCA also had a slower year in 2022/23 than the preceding year; in 2022/23, firms made distributions of £4 million compared to £23.5 million and $200 million of debt relief in 2021/22. The FCA has only recently started reporting these figures, however, so it is hard to draw significant conclusions on trends at this stage. The FCA also does not have the same powers as to whistleblowers as those held by the SEC, which make the comparison to the SEC less relevant, even though it is notable that the FCA published a statement earlier this year attempting to improve the protections for whistleblowers.

Looking Ahead - Will Firms Take Heed of the Regulators' Comments and Fall into Line?

On 13 April 2023, the FCA's Director of Enforcement left after eight years, to be replaced by two co-Heads of Enforcement—Therese Chambers, who has been at the FCA for many years, and Steve Smart, who most recently worked at the UK National Crime Agency. In particular, whilst the FCA repeatedly states that financial crime is a significant focus, there still remain comparatively few open financial crime investigations (30 out of 591), and it might be fair to think that this number could increase given Mr. Smart's appointment.

One significant similarity between the two regulators' messaging should also be noted: both regulators have made it clear that they do not view increasing regulatory interventions as a measure of success. In the press statement announcing the SEC's enforcement results, Gurbir Grewal, Director of the Division of Enforcement, said that the SEC did not expect to break records every year, "because we expect behaviors to change.

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We expect compliance.” In her first public speech after appointment, Ms. Chambers for the FCA similarly noted that firms should “do the right thing” and that “It should not be up to the regulators to come in and clean up the mess”. The FCA’s expectation is that enforcement action should not be necessary in a well-run system, but rather issues should be dealt with on their own.

Whether these shared desires to reduce regulatory intervention can bear fruit remains to be seen, but if this does signal a tendency away from measuring success by trying to bring more cases and penalties, that will be an interesting development.

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