On July 9, 2019, the United Kingdom’s Financial Conduct Authority (FCA) published its latest Enforcement annual performance report for the year 2018/19. This follows the publication of its final FCA Mission: Approach to Enforcement (Statement) in April 2019 after a consultation that ended in June 2018. In the Statement, the FCA acknowledges that “increasingly, severe penalties and sanctions alone are not enough to reduce and prevent serious misconduct” and that it “must increase the likelihood of detection in tandem with efficient investigations.”

Taking the FCA’s latest Enforcement annual performance report together with its Statement as an opportunity, our lawyers in the UK, United States and Hong Kong have prepared this e-bulletin to compare how regulators in these jurisdictions approach enforcement.

United Kingdom – investigation as a diagnostic tool

The FCA’s Director of Enforcement and Market Oversight, Mark Steward, joined the FCA after spending nine years with the Hong Kong Securities and Futures Commission (SFC). We observe that the enforcement approach as set out in the Statement resembles the approach that Mr. Steward adopted when he was with the SFC. In order to increase the likelihood of detection of wrongdoing by firms, the FCA has opened considerably more investigations since Mr. Steward’s arrival in order to be perceived as “always present.” In the financial year 2018/19 alone, the FCA opened 343 enforcement investigations — the number of open investigations increased from 496 on April 1, 2018, to 650 on March 31, 2019 (a 31% increase). The types of cases that have seen the biggest increase have been in the areas of retail conduct, insider dealing and unauthorized business. The table below sets out the number of enforcement investigations that the FCA has opened since 2016.

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<tbody>
<tr>
<td>Number of open enforcement investigations</td>
<td>247</td>
<td>410</td>
<td>496</td>
<td>650</td>
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</table>

The Statement confirms that such strategy will continue, although the FCA reiterates that the opening of an investigation does not mean that it believes misconduct has occurred or that anyone involved in the investigation is guilty of misconduct. The FCA confirms that it does not prejudge the outcome of an investigation, and the purpose of such investigations is just to get a full understanding of the facts so that the FCA can make a decision about whether and, if so, what kind of action may be necessary. Our UK partner Matthew Allen observes that “rather than being solely a route to a public outcome, investigation
is now being considered and used by the FCA as a diagnostic tool."

While the above may have achieved the purpose of increasing the likelihood of detection, it is unclear in the Statement as to what steps the FCA is going to take to ensure investigations are conducted efficiently. For instance, unlike the position in the US and to some extent Hong Kong, which are discussed below, the Statement does not set any target that the FCA will commit to with regard to the length of an investigation. In addition, the statistics relating to the time it is taking the FCA to conclude investigations appears to contradict the FCA’s intention to be more strategic and efficient in its approach to enforcement. During the financial year 2018/19, the average length of concluded enforcement cases that resulted in an agreed settlement was 29.1 months, a significant increase from an average of 23.2 months in 2016/17, albeit slightly lower than the average of 32.3 months in 2017/18.

In the circumstances, it seems that firms in the UK will continue to experience large numbers of investigations on both major and minor infractions with no clear indication of how long such investigations will last.

United States – mixed messaging

In the US, we have seen mixed messages from the securities regulators regarding the number of examinations and enforcement proceedings. Each year, two of the most prominent financial regulators in the United States—the Securities and Exchange Commission (SEC) and the Financial Industry Regulatory Authority (FINRA)—provide annual statistics on their respective examination and enforcement programs. These annual releases demonstrate the regulators’ priorities and help the industry identify trends and substantive areas of interest.

At the SEC, for fiscal year 2018 (FY 2018) (October 2017 through September 2018—the last full year for which data is available), the SEC’s Office of Compliance Inspections and Examinations (OCIE) conducted over 3,150 examinations, which is a 10% increase over fiscal year 2017 (FY 2017). OCIE examined approximately 17% of SEC-registered investment advisers, up from approximately 15% in FY 2017. OCIE also completed more than 300 examinations of broker-dealers.

In FY 2018, the number of SEC enforcement actions increased by approximately 9% from 754 in FY 2017 to 821. Similarly, the amount of penalties ordered increased approximately 73% from $832 million in FY 2017 to $1.439 billion in FY 2018. Overall monetary remedies obtained by the SEC (penalties and disgorgement) increased by 4% from approximately $3.789 billion in FY 2017 to $3.945 billion in FY 2018.

At FINRA, which regulates only broker-dealers, for calendar year 2018, the regulator conducted 1,171 cycle exams (routine exams conducted on a regular basis), 22% down from 1,492 conducted in 2017; 446 branch exams (exams of
The number of enforcement cases reported by FINRA in 2018 decreased to 921 from 1,369 cases in 2017, a decline of almost 33%. The fines reported by FINRA in 2018 decreased slightly (6%) to $61 million from $65 million in 2017. In 2018, FINRA ordered $26 million in restitution, a decrease of 61% from the $67 million reported in 2017. The decrease in fines and restitution is less pronounced when FINRA’s overall monetary sanctions are analyzed. In 2018, the total monetary sanctions ordered by FINRA (fines, restitution, and disgorgement) were $124 million. The total sanctions ordered in 2017 was $150 million.

Both SEC and FINRA enforcement officials have stated publicly that they do not believe the number of investigations opened or formal actions brought by their organizations are a useful metric for evaluating the success of their respective enforcement programs. The data they publish (cited above) relate only to the number of enforcement or disciplinary actions brought formally (e.g., litigated in civil or administrative proceedings or settled through public orders), not the number of investigations opened or informal issues identified by examination staff. Those figures are not generally made public. The bottom line in the US is that both the SEC and FINRA will continue to bring enforcement cases that they see as sending important messages to the industry and appropriately remediating investors.

Hong Kong – focus on high-impact cases

Thomas Atkinson, who was formerly with the Ontario Securities Commission, succeeded Mark Steward at the SFC to become its Executive Director of Enforcement. Under Mr. Atkinson’s leadership, the SFC has (i) focused its resources on high-impact cases, meaning it devotes more resources to transactions that appear to be oppressive or unfairly prejudicial to shareholders, or where fraud or other serious misconduct is suspected, and (ii) adopted a “front-loaded” approach, meaning it will intervene at an early stage in order to protect investors’ interests and market integrity.

Our Hong Kong partner John Siu observes that “the SFC has, in a way, gone completely opposite to the FCA’s approach — it is now focusing on issuing big-ticket fines in order to send a strong deterrent message to the market in the hope that everyone would raise their game to ensure compliance.”

The SFC’s enforcement approach is reflected in the enhanced level of penalties and the reduced number of investigations.

In terms of the level of penalties, firms subject to disciplinary proceedings by the SFC would in the past expect a fine of no more than HK$10 million (about GBP1 million, or US$1.2 million). However, consistent with the policy to focus on high-impact cases, the SFC has recently imposed a record-breaking fine of over HK$800 million (about GBP80 million, or US$102 million) against a total of five
firms for various sponsor failures.

In terms of the number of investigations started by the SFC, the figure has dropped significantly since 2015. Please refer to the table below for more details.

<table>
<thead>
<tr>
<th>Number of investigations started</th>
<th>2015/16</th>
<th>2016/17</th>
<th>2017/18</th>
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Given the focus is now on high-impact cases, which would by their nature be more complex and difficult to investigate, the SFC has since 2017 stopped referring to its self-imposed target of completing most of its investigations within seven months, which was set by the SFC back in 2008. Statistics available prior to the change show that the percentage of investigations that the SFC was able to complete within seven months had reduced from 70% in 2014/15 to 51% in 2015/16 and 46% in 2016/17. After 2017, there is no available information about the length of time that the SFC took in completing investigations.

It appears that the industry as a whole is experiencing a smaller number of investigations by the SFC. But in the event that one is started, chances are that it will last longer (at least seven months) and that a hefty penalty is more likely than before.

**Conclusions**

The difference in the enforcement approach can have a profound impact on whether the regulator will start an investigation and how such investigation will be conducted. An investigation may well implicate the laws of multiple jurisdictions and require knowledge of the different laws and regulatory approaches. Firms with multijurisdictional presence should therefore pay heed to the different enforcement approaches and monitor their development.
Legal Alert: Regulators’ approach to enforcement – an international comparison

If you have any questions about this legal alert, please feel free to contact any of the attorneys listed above or the Eversheds Sutherland attorney with whom you regularly work.