

SEC Enforcement By the Numbers

The merits of the SEC Enforcement program cannot be assessed by numbers and statistics chronicling events like how many cases were filed or the total amount of dollars ordered in judgments. At least that is the claim frequently repeated by the agency and the Division of Enforcement. Yet various sources publish numbers about Division of Enforcement ranging from the newly minted Annual Report (started last fiscal year) of the Division to various consulting firms and universities. Many who practice in the area, or closely follow the agency, discuss metrics and numbers tied to the work of the Enforcement Division. The question thus becomes “What, if anything, do SEC Enforcement statistics tell us?”

The New York University Pollack Center for Law and Business is one source of statistics about the work of SEC Enforcement that is outside the agency. The Center teams with Cornerstone Research to publish its data. The most recent compilation from this team is: Cornerstone Research, SEC Enforcement Activity: Public Companies and Subsidiaries (December 2018), available [here](#) (Cornerstone Report).

Number of Enforcement cases: Many of the metrics highlighted in the Report are familiar, echoing the earlier Enforcement Annual Report, published in October 2018 ([here](#)). The top line key metric is always the number of cases filed by the Division. Both reports agree that 490 standalone enforcement actions were filed FY 2018. The Division likes to add an asterisk to the number, noting that the MCDC (Municipalities Continuing Disclosure Cooperation initiative) skews the trend analysis over time. The Cornerstone Report faithfully footnotes the claim. The Division offers little explanation for this claim. The Cornerstone Report offers none. While there is no doubt that MCDC added a number of cases to the totals, the same might be said of the current Enforcement efforts regarding the share class selection initiative which is not mentioned.

Perhaps the most significant point about the 490 FY 2018 total is not whether an asterisk is added by but how the Division was able to file that many cases. In the first half of FY 2018 the Division only filed 159 standalone cases. In the second half of the year over

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twice as many cases were brought – 331. The tables included in the Cornerstone Report demonstrate that this is the largest number of actions brought in any six-month period in the last several years with or without the asterisk. While it is typical to see the numbers go up in the waning months of the fiscal year as the Division empties its pipeline and looks to enhance its year end statistics for the fall Congressional budget hearings, more than doubling the first half output is a significant achievement. That number becomes even more remarkable in view of the Cornerstone Report's statement that 44% of the FY 2018 independent SEC actions were filed in the fourth quarter. Unfortunately, there is no discussion regarding these achievements in the Cornerstone Report or the Division's Annual Report.

Public company cases: The focus of Cornerstone Report is cases involving public companies and/or their subsidiaries. Here the numbers can be difficult to square with those from the Enforcement Annual Report. For example, according to the Cornerstone Report the SEC filed 71 new enforcement actions against public companies and subsidiaries in FY 2018. The bulk of those cases – 46 – were filed in the last quarter of the fiscal year. That number represents a record for this decade.

Again, there is no discussion of the numbers revealing how the Division accomplished this feat. Perhaps more importantly, the numbers here do not precisely track those from the Enforcement Annual Report. The Division's Annual Report says that 16% of its cases involved issuer reporting, accounting and auditing issues. That calculates to 78 cases (the number is not in the report). Whether the category described by the SEC is the same as that used by Cornerstone is unclear. Neither report offers definitions which could clarify the question.

Venue selection: Venue selection is another key question about SEC Enforcement as reflected in the series of cases that resulted in the Supreme Court's decision in *Lucia v. SEC*, 138 U.S. 2044 (2018) which held that SEC ALJs are not properly appointed in accord with the Constitution's Appointments Clause (which of course has nothing to do with the real question raised by the case which was venue selection – federal court or administrative proceeding). The statistics here are even murkier. The Cornerstone Report states that 85% of the public company and subsidiary actions were filed as administrative proceedings. A year by year chart that traces back to 2010 reflects this point. It shows slightly fewer administrative proceedings being filed last year compared to the prior three years but far more than in any year from 2010 through 2014.

The meaning of the venue statistics is unclear. The Cornerstone Report does not disclose the percentage of those cases that were settled. Most public companies and their subsidiaries settle actions at the time of filing, a fact not mentioned in the Cornerstone Report. If, for example, all or almost all of the cases filed as administrative proceeding have been settled by the time of filing the number could suggest that SEC Enforcement is no longer shifting its contested enforcement actions to the administrative forum rather than bringing them in federal district court – the trend that spawned *Lucia*.

Statistics presented at the December 5, 2018 Fifth Annual Dorsey Federal Enforcement Forum by Urska Velikorja, a professor at Georgetown Law School who specializes in

SEC Enforcement ([here](#)), demonstrate that virtually all of those cases were settled. Indeed, Professor Velikorja noted that every SEC enforcement action filed as an administrative proceeding since May 2018 has been settled. Whether this is a new, but unannounced enforcement policy, or just the by-product of the glut of cases on the administrative docket following *Lucia* as the Commission sought to implement the Court's mandate is unclear.

Monetary sanctions: Similar difficulties arise regarding two other key metrics – dollars in judgments and case selection. In FY 2018 a record setting \$2.4 billion is reflected in the settlements from 89% of the actions according to the Cornerstone Report. This is another milestone number that traces back to the beginning of the decade.

The Cornerstone Report also notes that the percentage of firms cooperating with the staff investigations was about 61%, relatively consist with other years. Juxtaposing the two numbers, the question becomes what if anything the cooperators got for their efforts? Stated differently, did the large dollar amount result from giving less credit for cooperation? The Cornerstone Report does not specify if the dollars are disgorgement, prejudgment interest or penalties, which is important since SEC Enforcement tends to reward cooperation by discounting penalties but not disgorgement.

The only discussion of the monetary sanctions is a sentence stating that 74% of the total came from one huge, record setting settlement of \$1.8 billion in an FCPA case. Since portions of those dollars go to other actions as the Cornerstone Report states, just how much cash the SEC garnered from enforcement is unclear. And, it cannot be determined how the total in the Cornerstone Report squares with that in the Division's Annual Report which puts the total at \$3.945 billion without touting the amount as a record.

Case type: Finally, the Cornerstone Report and the Enforcement Annual Report both present statistics regarding the types of cases brought in FY 2018. The Cornerstone Report claims the top category is issuer reporting at 34% followed by broker-dealers at 27%. In contrast the Enforcement Annual Report states that the largest category of cases was offerings at 25% while 22% involved investment advisers and investment companies. Issuer reporting and disclosure cases accounted for 16% of the total number of cases (or 78 cases compared to 122). As in other parts of the two reports there are no definitions to aid the user. There is little to no discussion to elucidate the statistics.

Some clarity is added by the numbers presented at the Dorsey Federal Enforcement program cited above. There it was noted that in the fourth quarter of FY 2018 over 50 actions were brought against investment advisers, a total which seems to support the statistics offered by the staff in its Annual Report.

Conclusion: One point which is clear from considering the Cornerstone Report and the Enforcement Annual Report: SEC Enforcement brought 490 standalone enforcement actions in FY 2018, a significant number of cases. It is also clear that large sums of money were included in the settlements.

Finally, there is also a suggestion that the Enforcement Division may be moving away from the pre-*Lucia* days of bringing contested actions as administrative proceeds – at least for now. Perhaps in the future Cornerstone Research and the Division of Enforcement will shed additional sunlight on these trends.