

SEC Enforcement Statistics for FY 2018: A New Focus on IAs

The SEC Enforcement Division published its annual report, discussing the results of the last fiscal year ([here](#)). As with last year's report, the glossy compilation of statistics, goals, and discussion emphasizes the achievement of the program while arguing that statistics do not fully reflect the accomplishments of the Division and its program. Yet there is little doubt that statistics are in fact a key question. Indeed, the emphasis on statistics is well illustrated by the analysis of SEC and DOJ enforcement results published by the *New York Times* ([here](#)) on November 4, 2018 (analyzing cases brought and penalties imposed under the current administration compared to those brought at the end of the prior administration).

The goals of the program – or principles as the Report calls them – are familiar: 1) Focus on Main Street investors; 2) individual accountability; 3) keep pace with technological change; 4) impose remedies that most effectively further Enforcement goals; and 5) constantly assess the allocation of resources. The Report highlights each principle or goal. For example, the emphasis of principal one on the Main Street investor is illustrated by the creation of the Retail Strategy Task Force. That group is designed to leverage “and implement strategies and techniques for addressing the types of misconduct that most affect retail investors.” An example of this focus is the Share Class Selection Disclosure Initiative or SCSDI, a program which traces its roots to cases developed earlier but turned into a cooperation program recently in a manner that is similar to the earlier Municipalities Continuing Disclosure Cooperation Initiative or MCDCI.

Similar examples are given for each of the other principles/goals. On principle 2, individual accountability, the Report notes that over 70% of its enforcement cases in the last fiscal year charged an individual. The discussion of principle 3 – technological change -- cites the work of the Cyber Unit, the case brought against Yahoo Inc. and the actions centered on initial coin offerings. The discussion of effective remedies – principle 4 – points to the settlements with the CEO of Theranos and Tesla where in each case the CEO of the firm, tied to the underlying violations, relinquished control of the firm.

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Finally, the fifth goal regarding the allocation of resources is reflected, according to the Report, by the overall results of the program despite an approximate 10% reduction in staff and the allocation of resources to ICOs and the implementation of the SCSDI.

The Report also includes an array of statistics. Those statistics begin with the number of cases brought. The report offers two different tables and ways to view the statistics. Table one includes the results of the MCDCl. This table shows that the number of enforcement actions brought in the last four years had generally declined with the exception of fiscal 2016: In FY 2015: 508 cases were filed; in FY 2016: 548; in FY 2017: 446; and in FY 2018: 490 cases were filed.

The table also details statistics for the number of follow-on administrative proceedings and delinquent filing cases. When those actions are added to the totals above the overall trend is not changed: In FY 2015: 807 cases were filed; in FY 2016: 868; in FY 2017: 754; and in FY 2018: 821 cases were filed.

A second table reiterates these statistics but excludes the cases that were part of the MCDCl. This exclusion alters the trend by showing that more standalone enforcement actions were brought last year than in fiscal 2015: In FY 2015: 449 actions were filed; in FY 2016: 464; in FY 2017: 446; and in FY 2018: 490 cases were filed. Adding the tag-along and delinquent filings actions does not change the trend: In FY 2015: 748 cases were filed; in FY 2016: 784; in FY 2017: 754; and in FY 2018: 821 actions were filed.

The reason for excluding the cases developed as part of the MCDCl –an approach initiated in the Report last year -- is unclear. It does, however, materially alter the trend. That alteration is perhaps more pronounced since the actions developed as part of the SCSDI, an initiative modeled on the MCDCl, are included.

Likewise, the reason for detailing statistics about tag-along cases and delinquent filings is also unclear. The former are typically brought to secure remedies in an administrative proceeding such as a collateral bar in addition to those obtained in a federal court civil injunctive action. The latter is an on-going program in which lists of microcap issuers are reviewed in alphabetical order to assess which companies have not filed their periodic reports as required. Typically, the action brought ends with a default judgment. Neither group of cases is a measure of actual enforcement activity or efforts to achieve the goals of the program in the same sense as statistics regarding standalone enforcement actions.

A second key group of statistics presented by the Report -- and perhaps a more telling indicator of the Division's efforts -- are those showing the areas in which the cases have been brought. The report breaks down the number of enforcement actions brought into several categories. The top two categories in fiscal 2018 were securities offerings and investment adviser/investment company actions. The former is a group of cases composed largely of Ponzi scheme and similar actions. It represented about 25% of the cases brought. The latter group is composed actions which involved an investment adviser and/or a investment company. This group of actions constituted about 22% of the total cases filed.

The results for fiscal 2018 regarding the area in which cases were brought differs significantly from those for one year earlier. In fiscal 2017 the largest group of actions brought involved issuer integrity and accounting. That category of actions has traditionally been the largest. The second largest group of cases in fiscal 2017 involved offerings.

The change in the composition of Enforcement's case load is consistent with the overall goals adopted by the Division last year as well as trends which extend beyond the current administration. Focusing on investment advisers and investment companies – most retail investors buy securities through mutual funds, pensions and similar vehicles – is fully consistent with the retail investor focus. In addition, the overall increase in the number of actions involving investment advisers and investment companies extends a trend which began under Chair White when a close working relation between Enforcement and OCIE.

The decline in the overall total amount of money ordered in enforcement actions is also consistent with the current focus of the Division. The report lists the amounts of money ordered in enforcement cases over the last four years as follows (in billions): FY 2015: \$4.194; FY 2016: \$4.083; FY 2017: \$3.789; and FY 2018: \$3.945. As the Report notes, the Supreme Court's decision in *Kokesh*, imposing a statute of limitations on disgorgement, no doubt impacted these numbers.

A more important driver, however, is the change in the composition of the Division's cases. While actions against investment advisers are consistent with the retail investor focus of the division they frequently do not result in the kind of monetary awards realized in actions against issuers. Thus, a decline in the total amount of money ordered is consistent with the overall focus of the Division.

Finally, while the Report's claim that the number of cases is not a true measure of the Division's work is no doubt true, it is at least a significant indicator. Indeed, the Division itself seems to recognize this point. In August 2018 the Division brought a total of 48 standalone enforcement actions. In September that number jumped to 73. Thus, in the last two months of the fiscal year a total of 121 standalone actions were brought – almost 25% of the cases filed in fiscal 2018 were filed just before year end.