

SEC Enforcement Statistics From Cornerstone and NYU

Earlier this year the SEC's Enforcement Division published its annual report, reviewing FY 2019 which ended on September 30, 2019. As in the past, the Report reviewed not just the statistics from the year but also the entire program and its goals.

Nevertheless, statistics from the program remain a key issue metric for many who track trends for SEC enforcement actions. Cornerstone Research, in conjunction with the Pollack Center for Law and Business at NYU, published their annual report which focuses largely on statistics ([here](#)). Overall the Report largely tracks statistics on actions involving public companies and their subsidiaries, document trends which echo those in the Enforcement Division Report.

The report

The 526 enforcement actions filed by SEC Enforcement in FY 2019 is the largest number over the last seven years with the exception of 2016 when 548 cases were brought. The number filed last year eclipses that from FY 2018 when 490 cases were filed and 2017 with 446.

During that same seven-year period the Commission filed 95 actions involving public companies and their subsidiaries. That compares to 2018 with 72 such cases, 2017 with 65 and 2016 with 91. Fiscal 2019 thus has the largest number of actions involving public companies and their subsidiaries.

As the Report notes, however, 26 of the actions counted as involving public companies and their subsidiaries in FY 2019 were from the highly successful Share Class Initiative program that centered on investment advisers purchasing mutual fund shares for clients that paid fees back to them rather than the lower price shares which did not make such payments.

When the actions tied to the Share Class Initiative are removed from the total, only 69 actions were filed against public companies and their subsidiaries. That compares to FY

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2018 when 72 were filed, 2017 with 65, 2016 with 91 and 2015 with 82.

For FY 2019 Cornerstone and NYU report that for the first time actions involving investment advisers and investment companies was the largest group of cases. This is consistent with the statistics reported by the Division. Cases involving issuer reporting and disclosure were the second largest category. The third largest group of cases were those involving broker-dealers and FCPA allegations.

Finally, statistics regarding cooperation and the amount of disgorgement and prejudgment interest are reported. While the percentage of cases that involved cooperation and no monetary settlement ticked up slightly in FY 2019, at 5% it remained a very small component of the actions reported. Indeed, the percentage of cases involving cooperation and no penalty has been consistently quite small since 2013. In contrast, from 2010 through 2013 the percentage ranged from as high as 18% to a low of 10%.

The largest component of settlement dollars in 2019 was disgorgement and prejudgment interest at 59%. That compares to 49% in FY 2018, 63% in 2017 and 54% in 2015. Overall, the 59% in 2019 is the highest percentage since 2010 with the exception of three years -- 2013 at 63%, 2014 at 71% and 2017.

Comment

As the Division notes in its earlier reports, statistics are only one point of consideration when evaluating the Enforcement Program. Nevertheless, they do serve to highlight certain trends.

First, the trend that has been developing for several years fully emerged last year. The largest group of cases involved investment advisers and investment companies. That trend traces back several years and while it was no doubt impacted by the Share Class Initiative, it reflects a key focus of SEC Enforcement.

Second, there is no doubt that the Share Class Initiative was very successful. That result should be considered in conjunction with the percentage of actions resolved without a financial component. While the number ticked up to 5%, in 2019 for that group of actions, over the last several years it is quite low, particularly compared to the earlier part of the decade. Some might argue that those numbers may in part reflect the insistence of the agency on obtaining disgorgement. While that may be correct, that point could also be asserted with respect to the early part of the period.

Third, although the Division's Report cited the negative impact of *Kokesh*, the statistics here fail to support the contention. To the contrary, as a percentage of the overall amount of dollars in Commission settlements, the amount of disgorgement and prejudgment interest in FY 2019 is one of the largest figures this decade. While one might argue that additional disgorgement and prejudgment interest could have been obtained but for the Supreme Court's decision and the short limitation period (which is being addressed in draft legislation), the agency could avoid much if not all of the impact

of that case if it limited its requests to actual equitable disgorgement to be returned to those harmed.

Finally, the success of the Share Class Initiative, coupled with the statistics on cooperation and monetary awards, more than suggests that the Division consider its approach to the question of cooperation. Reserving the question of cooperation credit to its discretion until the end of the action may seem prudent. Yet the Share Class Initiative and the dismal percentage of cases that involved cooperation with no monetary settlement component more than suggests that a new approach is merited.