FCA AND PRA ENFORCEMENT ACTION
TRENDS AND PREDICTIONS

Calum Burnett, Sarah Hitchins, Nikki Johnstone, Zoë Jensen and David McMenamin of Allen & Overy LLP explore the trends in the enforcement actions taken by the Financial Conduct Authority and Prudential Regulation Authority during 2021 and make predictions for how these will develop in 2022.

As the dust looks like it is starting to settle on the COVID-19 pandemic, the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA) have been busy resuming their enforcement agendas. With a new chief executive at the helm of the FCA, and the PRA starting to bring more standalone enforcement actions, the appetite for and breadth of enforcement activity appears to be increasing.

Although some of the regulators' pre-pandemic priority areas remain, the FCA and the PRA are also sharpening their focus on new issues that have crept up their agendas as a result of both consumer and firm behaviour during the pandemic and there is likely to be greater attention paid to these areas during 2022.

This article considers the main themes around which the FCA's and PRA's enforcement actions have centred over the last 12 months and looks at how those trends may carry forward into 2022.

A LOOK BACK AT 2021

The FCA has publicly acknowledged that the COVID-19 pandemic slowed down the progress of some of its enforcement investigations. For example, proposed interviews relating to a number of FCA enforcement investigations were paused during the first few months of the pandemic in 2020 before the FCA moved to conducting interviews remotely. However, the FCA has now resumed business as usual.

During 2021, the FCA imposed just over £567.7 million in financial penalties on seven firms, mainly banks, and three individuals; its highest overall total since 2015. The majority of this figure, just over £328.7 million or 58%, was imposed by the FCA in December 2021, as a result of financial penalties imposed on two firms for issues relating to financial crime.

2021 looked set to be the first year since 2013 when the PRA took no enforcement action at all. However, that all changed in the last two weeks of December 2021 when the PRA took enforcement action against two firms for issues relating to their compliance with regulatory reporting requirements and imposed fines totalling just over £51.9 million. This represents the highest annual total of financial penalties imposed by the PRA since it was established in April 2013 (*see box "Common themes and topics"*).

This means that half of the financial penalty notices that the FCA issued during 2021 (totalling £476,730,020, or 84% of the total amount of financial penalties imposed by the FCA during 2021) were imposed for issues

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relating to firms' financial crime systems and controls, and all of the financial penalties that the PRA imposed during 2021 were imposed for issues relating to firms' compliance with their regulatory reporting obligations.

CURRENT ENFORCEMENT FOCUS AND PRACTICE

The FCA and PRA not only have distinct areas of focus when it comes to enforcement, they also each have a different approach to how they exercise their enforcement powers in practice.

The FCA

The FCA continues to have a high number of open enforcement investigations: 603 at the end of the third quarter of 2021. This figure is slightly lower than the number of open enforcement investigations that the FCA had in March 2019 (650) and March 2020 (646). This slight decrease in the number of open enforcement investigations has been caused by the lower number of new enforcement investigations that the FCA has opened in the last two years (53% fewer than in 2018 and 2019), most likely due to the impact of the COVID-19 pandemic, which caused progress on some existing investigations to slow, and diverted FCA resources that could have been spent on identifying and working on new investigations to other pandemic-related matters.

The FCA's current enforcement portfolio is dominated by two areas, each of which represent 32% of the FCA's current enforcement caseload: unauthorised business and retail conduct. The next most common topics of FCA enforcement investigations are market abuse (14%) and financial crime (10%).

In the 2020/21 financial year, it took the FCA on average just over two and a half years to conclude enforcement investigations that settle at the earliest possible stage and approximately four years to conclude enforcement investigations that settle following a referral to the FCA's Regulatory Decisions Committee (RDC). Although these figures are marginally lower than those for 2019/20, they are notably higher than the time it took for the FCA to conclude enforcement investigations between 2015 and 2017, meaning that FCA investigations that result in enforcement action have been taking longer to complete over the last six years.

Common themes and topics

Some of the enforcement action taken by the Financial Conduct Authority (FCA) attracts significant press attention, with the FCA also publishing its own press releases when it takes enforcement action against a firm or an individual.

Press commentary typically focuses on the key topic of an enforcement action, be that financial crime, market abuse, mis-selling or another topic. As a result, a number of common themes that run through FCA enforcement action receive little or no air time. For example, over the last two years:

- 36% of final notices that the FCA issued to firms involved addressing issues revealed by skilled person reviews and 56% referred to internal audit findings. In these cases, the FCA highlighted how firms that had been subject to internal or external reviews which identified issues or weaknesses in their controls had failed to act properly, promptly or, in some cases, at all to address those identified issues or weaknesses.

- 100% of final notices that the FCA issued to firms involved criticisms of firms' policies and procedures. This criticism typically focused on the adequacy of firms' policies and procedures but, in some cases, the FCA instead, or also, highlighted how firms' employees failed to comply with internal policies and procedures, how firms failed to adequately monitor compliance with their policies and procedures or failed to take adequate steps to address known instances of non-compliance with internal policies and procedures.

- 45% of final notices that the FCA issued to firms identified deficiencies in firms' training programmes, including inadequate or a "one size fits all" approach to training employees, or a culture where employees did not complete mandatory training.

In December 2021, the FCA implemented some important changes to streamline its decision-making processes (*see News brief "Regulatory decision-making processes: all change at the FCA", this issue*). These changes, part of the FCA's new innovative, assertive and adaptive approach, reallocated responsibility for some decision-making from the RDC to the FCA's Authorisations, Supervision and Enforcement Divisions and have been met with significant resistance from the industry. Although the RDC will continue to consider contested enforcement cases, decisions about whether the FCA should start civil or criminal proceedings will now be taken under the FCA's executive procedures. As a considerable proportion of the RDC's workload has now been reallocated, the time that it takes for the RDC to consider contested enforcement cases may decrease quite considerably over the next few years.

The PRA

The PRA continues to take a more modest approach to enforcement than the FCA. In the third quarter of 2021, it had 11 open enforcement investigations involving eight firms and 13 individuals, a 21% decrease in comparison to 2020. This figure may now be slightly lower, given that the PRA concluded two of its enforcement investigations into firms during December 2021.

Although the PRA does not have a formal enforcement agenda as such, key areas that the PRA is likely to be interested in include: non-financial misconduct, the adequacy of firms' whistleblowing controls, the adequacy of firms' governance arrangements, firms' compliance with their regulatory reporting obligations, operational resilience and outsourcing.

The PRA continues to work closely with the FCA on enforcement investigations, with approximately half of the PRA's open enforcement investigations being joint investigations with the FCA (*see box "Rethinking the approach to joint investigations?"*). However, the PRA appears keen to undertake more of its own standalone enforcement investigations. The two enforcement investigations that the PRA concluded in December 2021 may be a sign of this intention, as in both cases only the PRA took enforcement action.

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RETAIL CONDUCT

Cases involving potential retail misconduct currently represent just under one third of the FCA's enforcement caseload. Although only one enforcement action taken by the FCA during 2021 focused on retail issues, over half of the cases where the FCA took enforcement action during 2020 involved retail issues.

Even though some of the FCA's current enforcement investigations may be discontinued with no action taken, the authors anticipate that there will be a steady flow of FCA enforcement action in relation to retail issues during 2022 and beyond given the high number of open investigations in this area and the FCA's clear focus on issues affecting retail customers.

The financial penalties that the FCA imposes on firms is just the tip of the iceberg in terms of the overall costs that are associated with retail issues that result in enforcement action. Based on published figures, firms that have been subject to FCA enforcement action for retail issues have also paid out almost £1 billion in redress to customers since the start of 2018, dwarfing by some margin the financial penalties that the FCA imposed on these firms. In some of these cases, the FCA has been willing to reduce fines where a significant, thorough and proactive redress exercise is undertaken; in one case, by 30%. However, other firms have fared less well, with the FCA declining to reduce fines where redress exercises went no further than what the FCA felt firms were obliged to do in order to compensate customers.

Customer communications

The fair treatment of customers and clarity of customer communications are common themes in enforcement cases involving retail issues. In fact, just over a third of FCA final notices since 2018 have included failings relating to these topics. Particular issues that have arisen in multiple enforcement cases include:

- The adequacy of documents used by customer-facing employees, such as guidance notes, scripts and Q&As.

- The quality and frequency of training that firms have provided to customer-facing employees about how they should interact with customers.

- The accuracy of statements made in written customer communications, particularly statements designed to encourage customers to take action.

The quality and appropriateness of customer communications remains a concern for the FCA. Not only is this topic at the heart of the FCA's work on sustainability disclosures and product labelling, it is also one of the four outcomes on which the new consumer duty will focus (*see box "The new consumer duty"*).

Vulnerable customers

2021 saw the FCA continue to focus on vulnerable customers, with the FCA publishing guidance on the fair treatment of vulnerable customers (*www.fca.org.uk/publications/finalised-guidance/guidance-firms-fair-treatment-vulnerable-customers*). This publication followed two enforcement actions against banks in 2020 relating to customers who fell into payment difficulties or arrears. In both of these cases, the customers affected were deemed by the FCA to fall within its definition of vulnerable customers, which affected the FCA's determination of the seriousness of the breaches when calculating the financial penalties imposed (*www.fca.org.uk/publication/final-notices/barclays-2020.pdf*).

The FCA's narrative relating to vulnerable customers is not only limited to traditional retail enforcement cases. In 2021, the FCA took enforcement action against a bank in relation to which the propensity for financial vulnerability within the population of an entire country said to be adversely affected by the breach was considered to be an aggravating factor.

The FCA's enforcement focus on the treatment of vulnerable customers will no doubt continue during 2022 and beyond. The FCA has stated on a number of occasions that the population of financially vulnerable customers in the UK has increased considerably as a result of the pandemic, so it is expected that the FCA will also be looking very closely at how firms are treating these customers along with other customers who display characteristics of vulnerability.

FINANCIAL CRIME

The FCA's appetite to open enforcement investigations and take enforcement action

Rethinking the approach to joint investigations?

In a judgment issued by the Upper Tribunal in July 2021, the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA) were formally directed to review their approach to joint investigations (*Forsyth v The Financial Conduct Authority and The Prudential Regulation Authority [2021] UKUT 0162 (TCC); www.practicallaw.com/w-032-3499*).

The case concerned proposed enforcement action by the FCA and the PRA against a former chief executive, Stuart Forsyth, of a regulated firm relating to his alleged attempts to inappropriately reduce his personal tax liability and to inappropriately involve himself in an internal investigation conducted by his firm into those allegations. The tribunal directed the FCA and the PRA to take no action against Mr Forsyth due to a lack of evidence. In its judgment, the tribunal questioned whether it would not have been better for there to have been a single investigation culminating in a single decision notice from the FCA, even though Mr Forsyth came within the scope of both regulators' remits.

Alongside a variety of criticisms that the tribunal levelled at the way in which the FCA and the PRA had handled their investigations, the tribunal formally recommended that the FCA and the PRA should review their approach to joint investigations, noting in particular that where conduct falls equally within both regulators' scope, consideration should be given as to whether there should be a single investigation by one of them and a single regulatory decision.

Although both the FCA and the PRA have acknowledged the tribunal's recommendations, they are yet to publicly comment on whether they intend to change their approach to commencing joint investigations.

in relation to financial crime shows no sign of waning. This has been a key area of focus for the FCA for a number of years, attracting some of the FCA's highest financial penalties and this looks set to continue.

More high financial penalties

Fines imposed on firms for failing to prevent or mitigate the risk of facilitating financial crime remain among the highest levied by the FCA. During 2021, the FCA imposed financial penalties totalling over £476.7 million on firms for these types of issues, representing 84% of all financial penalties it imposed in 2021, on firms for these types of issues. These financial penalties ranged from £178,000 to just over £264.7 million and the average financial penalty imposed was £95.3 million.

There are several reasons why financial penalties imposed for financial crime failings are among the highest, including the fact that the breaches usually occur over a relatively long period of time and affect substantial portions of a firm's business, both of which are factors that the FCA takes into account when calculating financial penalties. The FCA also typically assigns a high level of seriousness to these breaches when calculating a financial penalty.

Common breaches and areas of focus

Most, but not all, of the FCA's enforcement action relating to financial crime has been based on breaches of FCA Principle 2 (due skill, care and diligence) and FCA Principle 3 (management and control). Some cases have concerned failings relevant to specific transactions, whereas others have concerned more systemic weaknesses in firms' financial crime controls.

More than half of the cases where the FCA took enforcement action during 2021 highlighted weaknesses in firms' KYC (know your customer) policies and procedures. Through enforcement action, the FCA has also frequently been critical of firms' identification of red flags, escalation of financial crime issues, assessment and mitigation of financial crime risks, financial crime policies and procedures, record keeping, remediation of known weaknesses in financial crime controls, and prioritisation of financial crime risk mitigation. As regards senior management and oversight, in a number of its cases the FCA has highlighted inadequate governance and scrutiny relating to financial crime issues, a perceived or actual lack of senior management engagement relating to financial crime issues and under-resourced financial crime functions.

The FCA also appears to be taking a bold approach to how it uses its enforcement powers in relation to financial crime issues. In one case that it concluded during 2021, the FCA found a breach of FCA Principle 3 (management and control) in relation to financial crime issues affecting unregulated activities. The FCA justified this finding in relation to unregulated activities on the basis that the unregulated activities in question were carried out in a "prudential context"; that is, the activities have, or might reasonably be regarded to have, an effect on the UK financial system.

Criminal prosecutions

After much talk by the FCA about its intention to use its criminal powers under the Money Laundering Regulations 2007 (*SI 2007/2157*) (2007 Regulations) and the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (*SI 2017/692*) (2017 Regulations), the FCA secured its first and highly publicised criminal prosecution under the 2007 Regulations during 2021. This prosecution resulted in the imposition of the FCA's highest financial penalty for financial crime issues.

The FCA is continuing its approach of opening dual-track civil and criminal financial crime investigations, reflecting the approach that it has taken for a number of years in relation to suspected market abuse cases, where it is very common for the FCA to run parallel civil and criminal investigations into suspected misconduct. A number of the FCA's dual track investigations eventually transition into civil-only investigations, if the FCA decides to discontinue the criminal element. Even if this is the case, having a criminal element to an FCA enforcement investigation has significant ramifications in terms of how the FCA conducts its investigation, as well as how a firm manages and responds to that investigation.

The new consumer duty

Following consultations in May and December 2021, the Financial Conduct Authority (FCA) is proposing to introduce a new consumer duty which will require firms and their senior managers to act to deliver good outcomes for retail customers, with the FCA's objective being to create a significant shift in both culture and behaviour in regulated firms (*see News brief "Financial Services Act 2021: a suite of changes", www.practicallaw.com/w-031-0848*). Its significance will be marked by the introduction of a 12th FCA Principle for Businesses, alongside a suite of more specific rules for firms and a new Individual Conduct Rule to supplement the existing FCA Code of Conduct for individuals.

The new consumer duty will have a very broad scope, capturing all regulated firms involved in the manufacture and distribution (both widely defined) of products and services for prospective and actual retail customers. It will focus on four key outcomes: communications, products and services, customer services, and price and value.

Although the FCA has confirmed that it does not currently intend to introduce a right of action for private individuals to sue firms for breaching the new consumer duty, the impact of the new duty should not be underestimated as it has the potential to significantly amplify firms' regulatory risk. Bearing in mind the FCA's wider transformation programme, the new consumer duty will introduce a new opportunity for the FCA to intervene and take action against firms and individuals that it considers to be falling short of the requisite standards.

The FCA's latest consultation closes on 15 February 2022 and the FCA will publish its final rules by 31 July 2022 (*see News brief "FCA fleshes out the new consumer duty: meaty changes ahead", this issue*). Firms are expected to have until 30 April 2023 to fully implement the new consumer duty. In light of this timing, while the FCA is unlikely to hold back in taking action against firms and individuals who fail properly to implement or comply with the consumer duty, these enforcement investigations will not start to materialise until at least 2023.

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The FCA also continues to prosecute money laundering offences under the Proceeds of Crime Act 2002. In doing so during 2021, it demonstrated a willingness to challenge the basis of a guilty plea through a Newton hearing (that is, a trial of fact on a plea before a single judge) to ensure that the individual's sentence properly reflected the severity of their offence.

Joint investigations and global settlements

Although the FCA is naturally associated with taking action against firms for financial crime-related issues, the PRA also has taken an interest in this area. In 2020, the FCA and the PRA both took enforcement action against a bank for financial crime issues: the PRA's justification for taking an interest in the matter was that a firm's failure to appropriately manage its financial crime risk can have a significant impact on a firm's safety and soundness.

International co-ordination between regulators and law enforcement agencies remains strong and on the rise. Reflecting the focus on financial crime by regulators and law enforcement agencies around the globe, in 2021 there was a number of significant co-ordinated global settlements involving regulated financial services firms relating to fraud, money laundering, bribery and corruption. This focus is unlikely to decrease in the future; if anything, it might be expected to intensify with an expected uptick in enforcement by US authorities, which can often drive enforcement activity in other jurisdictions.

CULTURE, GOVERNANCE AND INDIVIDUAL ACCOUNTABILITY

Although only 18% of the FCA's final notices issued to firms over the last two years have expressly referred to poor culture in a firm, or in a specific department function or team, this does not mean that the FCA and the PRA have gone quiet on this topic; far from it. Almost 40% of speeches given by representatives of the FCA during 2021 discussed culture, up from 36% in 2020, and the topic also featured in a number of consultation papers, discussion papers and policy statements published during 2021, most notably in the joint FCA, PRA and Bank of England discussion paper on diversity and inclusion in the financial services industry (*DP21/2, www.fca.org.uk/publications/discussion-papers/dp-21-2-diversity-and-inclusion-financial-sector-working-together-drive-change*).

Diversity and inclusion

The FCA set out its overarching intentions with regards to diversity and inclusion in three key speeches delivered in January and March 2021, which culminated with the FCA (together with the PRA and the Bank of England) outlining their specific aims in discussion paper DP21/2 (*www.fca.org.uk/publications/discussion-papers/dp-21-2-diversity-and-inclusion-financial-sector-working-together-drive-change*). The collective ambition of the FCA, the PRA and the Bank of England is to create safer and sounder firms with better internal governance and risk management, delivering products and services that meet the needs of their consumers. They see improving diversity and inclusion in the financial services industry as a key ingredient to achieving this ambition. Although DP21/2 recognises that the financial services industry has taken steps forward, the regulators are united in saying that there is much more to be done in order to create truly diverse and inclusive organisations that meet the diverse needs of customers.

Key areas that the authors anticipate the FCA and the PRA will be scrutinising over the coming months and years in relation to diversity and inclusion are as follows:

- The extent to which senior leaders are fostering an inclusive culture and a safe environment where employees can speak up.

- Board monitoring and challenge in relation to progress around diversity and inclusion, both in the firm's construct and in the way that it does business.

- Linking diversity and inclusion to the personal objectives of senior managers or variable remuneration awards (or both), to the extent that this is not already the case.

- Considering whether approving an application for an individual to perform a senior manager role is conducive to the diversity of the relevant firm's senior management team, with the risk that the FCA and the PRA will start to challenge, or even decline, individual applications where they consider there to be insufficient diversity among their senior management team.

- Potential adverse fitness and propriety findings being made as a result of an individual's conduct with respect to diversity and inclusion issues. The FCA and the PRA have indicated that they may provide firms with further guidance on this topic in the future, as this is an area that many firms are already grappling with.

Aside from cases involving specific allegations of non-financial misconduct and firms' handling of those allegations, the authors do not predict that the FCA and the PRA will start to launch standalone enforcement investigations into diversity and inclusion issues in the near future. However, the FCA and the PRA are already incorporating these issues into their investigations and asking questions about whether a lack of diversity and inclusion contributed to an issue or breach arising. The authors anticipate that, in certain cases, these types of points may be included in final notices issued to firms and individuals, cited as root causes for breaches of regulatory requirements.

For example, the FCA may point to evidence of an environment in a firm where bullying is prevalent and tolerated as a root cause as to why employees did not escalate concerns or issues sooner or at all. Likewise, the FCA may explore whether a firm's lack of diversity at senior levels contributed to a poor business or risk decision.

Hybrid working

Although businesses have continued to fluctuate between hybrid working models and working from home in light of government guidance during the pandemic, the FCA has already started to make its views clear in terms of how firms should strike the right balance in relation to culture, governance and individual accountability in an environment where employees are working between the office and their homes (*see feature article "Homeworking in the wake of COVID-19: issues for employers", www.practicallaw.com/w-027-8073*).

The FCA has highlighted that it sees some potential benefits associated with hybrid working, mainly relating to employee wellbeing. However, the FCA has also warned firms that hybrid working potentially increases the risk of employees feeling isolated, may make employees feel as if they have fewer avenues to speak up and that firms may find it challenging to sustain their purpose

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and values if significant proportions of their workforces are regularly working from home.

The FCA has also made it clear that firms need to consider making more permanent changes to the way in which they oversee the activities of employees who are working remotely, given that hybrid working seems to be the preferred future model of working. This is an area that may feature in FCA and PRA enforcement investigations in the future in cases where an employee engages in misconduct while working remotely, as the relevant regulator may scrutinise whether that employee was adequately supervised and overseen.

Senior managers and certification regime

Enforcement action under the senior managers and certification regime (SMCR) remains modest. Although it is about to enter its sixth year and there are more than 70,000 senior managers operating in the UK, as at the end of the third quarter of 2021, the FCA had just over 20 senior managers under investigation. Most of these enforcement investigations are focused on suspected misconduct by the holders of three senior manager roles: executive directors, heads of compliance and chief executives. Interestingly, the FCA confirmed that over half of its current enforcement investigations into senior managers concern potential breaches of their regulatory obligations in relation to their firms' money laundering controls. Although this focus on financial crime complements the FCA's broader focus on that topic, it remains to be seen how many (if any) of these cases will result in enforcement action being taken against individual senior managers.

The number of open FCA investigations in relation to certified persons is lower still. As at the end of the third quarter of 2021, the FCA had fewer than 15 certified persons under investigation. These investigations also focus on a broad range of issues, including allegations of market manipulation, complaints handling, insider dealing, systems and controls failings, conflicts of interest and pension advice.

Non-financial misconduct

Since November 2020, the FCA has taken enforcement action against four individuals by banning them from the financial services industry following criminal convictions for serious sexual offences relating to conduct that took place outside the workplace (*see feature article "Non-financial misconduct: key lessons and themes", this issue*). One of these individuals challenged the FCA's intention to take enforcement action against him, which led to the FCA making public, and the Upper Tribunal dissecting, the FCA's approach to considering non-financial misconduct in an enforcement context (*Jon Frensham v The Financial Conduct Authority [2021] UKUT 0222 (TCC); www.practicallaw.com/w-032-7404*) (*see box "Frensham v The Financial Conduct Authority"*).

Although the Upper Tribunal's judgment in Frensham is likely to have prompted the FCA to go back to the drawing board in terms of considering how it approaches similar cases in the future, this case is unlikely to be the last from the FCA about non-financial misconduct. In addition to bringing standalone cases against individuals who are found to have engaged in non-financial misconduct, the authors anticipate that the FCA will scrutinise how firms are investigating non-financial misconduct. Likewise, there may be opportunity for the FCA to introduce issues relating to non-financial misconduct into its enforcement investigations into more traditional regulatory issues; for example, looking at whether cultures where non-financial misconduct, such as bullying or harassment, are prevalent have contributed to the occurrence or continuation of regulatory breaches.

Whistleblowing

Both the FCA and the PRA continue to see whistleblowers as very valuable sources of information. Although, unlike their US equivalents, neither the FCA nor the PRA offer financial rewards to whistleblowers, both regulators continue to receive healthy numbers of whistleblower reports. For example, during 2020, the FCA received over 1,000 reports from whistleblowers, 26% of which led to the FCA taking action.

Towards the start of 2021, the FCA launched its "in confidence, with confidence" campaign, aimed at encouraging individuals working in the UK financial services industry to report potential misconduct directly to it (*see feature article "Whistleblowing and remote working: out of sight not out of mind", www.practicallaw.com/w-029-6537*).

Although the PRA has been less vocal than the FCA in this area, the PRA has taken

Frensham v The Financial Conduct Authority

The Financial Conduct Authority (FCA) proposed to ban Mr Frensham, a financial adviser, from the financial services industry as a result of him being convicted of attempting to meet a child following sexual grooming. Although Mr Frensham did not commit the offence at or through his work and it did not involve dishonesty, the FCA sought to prohibit him because he was no longer fit and proper as he lacked integrity.

Mr Frensham challenged the FCA's proposed ban before the Upper Tribunal claiming that the FCA had wrongly applied its fitness and propriety test in allowing irrelevant considerations to affect its judgement and failing to give sufficient regard to other relevant factors, including that the conduct had taken place outside the workplace and was not connected to his role as a financial adviser.

The tribunal upheld the FCA's decision overall and agreed that Mr Frensham was not fit and proper, but it did not agree with all aspects of the FCA's case (*Jon Frensham v The Financial Conduct Authority [2021] UKUT 0222 (TCC)*). The tribunal found that, although serious, Mr Frensham's criminal conviction alone would have been insufficient to warrant a finding that he was not fit and proper, and in doing so criticised the FCA for failing to "forge the necessary link" between Mr Frensham's criminal offence and his professional work.

The tribunal eventually agreed with the FCA that Mr Frensham was not fit and proper due to his conduct after he was arrested and charged with committing the criminal offence, including: his failure to notify the FCA that he had been arrested and remanded in custody in respect of the offence that led to his conviction, his failure to notify the FCA that a professional body had declined to renew his statement of professional standing and his lack of remorse for his actions.

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supervisory action against several firms for having inadequate whistleblowing controls. It is likely that the FCA or the PRA may take enforcement action against firms in this area in the future, either as a standalone topic or by highlighting a firm's inadequate whistleblowing controls or culture around speaking out as one of the reasons why an issue or problem was not escalated or reported more quickly or, indeed, at all.

MARKET ABUSE

The FCA's number of open market abuse investigations has been steadily decreasing since 2018/19. During this period the number of open market abuse investigations has fallen by approximately 40% to its lowest level since 2015/16.

Modest enforcement action

The amount of enforcement action for market abuse remains quite low given the high number of open FCA investigations in this area over the last few years. In the last two years, the FCA has taken enforcement action for market abuse in four cases, all involving quite different misconduct. These cases included spoofing cases involving market manipulation against a bank trader and a portfolio manager, a listed issuer giving a false and misleading impression of its debt and asset positions, and a former chief executive of a (different) listed issuer for market manipulation (*www.fca.org.uk/news/press-releases/fca-fines-and-prohibits-trader-market-abuse; www.fca.org.uk/news/press-releases/fca-fines-and-prohibits-hedge-fund-chief-investment-officer-market-abuse; www.fca.org.uk/news/press-releases/fca-publicly-censures-former-worldspreads-ceo-market-misconduct*).

During the same period, the FCA also announced charges against four individuals for criminal insider trading in two separate cases, had two insider trading convictions upheld by the Court of Appeal and secured confiscation orders totalling almost £5.5 million in relation to a previous insider trading prosecution (*www.fca.org.uk/news/press-releases/fca-commences-criminal-proceedings-against-brothers-insider-dealing-and-fraud; www.fca.org.uk/news/press-releases/insider-dealing-convictions-upheld-court-appeal; www.fca.org.uk/news/press-releases/fca-commences-criminal-proceedings-against-two-insider-dealing; www.fca.org.uk/news/press-releases/insider-dealer-walid-choucair-ordered-pay-3.9million-confiscation; www.fca.org.uk/news/press-releases/fca-secures-1-6m-confiscation-order-against-richard-baldwin*).

Towards the end of 2021, the FCA published a flurry of warning notice statements stating its intention to take enforcement action against several individuals for market abuse (market manipulation and unlawful disclosure of inside information) indicating that it has a healthy pipeline of cases in this area (*www.fca.org.uk/publication/warning-notices/warning-notice-statement-21-1.pdf; www.fca.org.uk/publication/warning-notices/warning-notice-statement-21-3.pdf*). This proposed enforcement action is being challenged by the individuals involved, so it is uncertain when more information will be made public about these cases.

An area that the authors anticipate that the FCA will continue to focus on in relation to market abuse, including from an enforcement perspective, is personal account dealing. The FCA has said that it has observed significantly higher levels of personal account dealing since the onset of the COVID-19 pandemic. The authors predict that this trend will lead not only to probes about potentially suspicious personal account dealing conducted by individuals, but also trigger further scrutiny of firms' controls in this area, as well as how firms' monitor and take action in relation to any failure by employees to adhere to these controls.

Suspicious transaction and order reports

The FCA saw a 25% drop in the number of suspicious activity and order reports (STORs) that it received during 2020 in comparison to the number of STORs that it received in 2019 (*www.practicallaw.com/w-029-3381*). This drop was foreshadowed by the FCA's Director of Market Oversight in 2020, who reported that the FCA had seen lower numbers of STORs filed in the early stages of the pandemic. There was a suggestion around this time that these lower numbers of STORs were, in part, attributable to firms having significant backlogs of STORs to file, although this does not appear to have been the case based on the FCA's published STOR figures.

OPERATIONAL RESILIENCE AND CYBER SECURITY

Although the COVID-19 pandemic has not resulted in the wave of operational resilience incidents within the financial services industry that some anticipated, the pandemic has, inadvertently, served as a real-life test of firms' operational resilience arrangements.

Many firms are focused on the fast-approaching initial deadline for implementing the new FCA and PRA rules relating to operational resilience, which are due to come into force on 31 March 2022 (*www.bankofengland.co.uk/prudential-regulation/publication/2018/building-the-uk-financial-sectors-operational-resilience-discussion-paper*). Although these rules will come into force in stages over the next few years, there will be some thorny issues and interpretation questions for both regulators and firms. While firms will currently be looking at a number of these issues as part of their implementation projects, it is likely that some issues and questions will come to a head when the time comes for enforcement.

The FCA and the PRA maintain a strong interest in firms' data and cyber security arrangements, with much of their recent commentary in this area primarily focused on the different and increased risks posed by remote and hybrid working arrangements, as well as the increase in general cyber security threats brought about by the pandemic. Although there has been no recent FCA or PRA enforcement in this area, given how vocal the regulators have been about their expectations and concerns relating to this topic, it is perhaps only a matter of time before enforcement actions arise. Enforcement is likely to relate to a mixture of legacy issues, as well as newer issues that emerged and weaknesses that were identified during the pandemic or issues that the FCA and the PRA have identified through their routine supervision and testing of firms.

FINTECH AND CRYPTOASSETS

In its most recent business plan for 2021/22, the FCA confirmed that delivering fair value for consumers in the digital age remains an important priority. This is reflected in the FCA's consumer priorities for 2022 and beyond (*see News brief "FCA business plan for 2021/22: rising to the challenge", www.practicallaw.com/w-032-0401*). The FCA's desired outcome for digital markets is for consumers to be able to choose from products that meet their needs at a competitive quality and price, but also for digital innovation and competition to support greater value for

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consumers. At the same time, the FCA is keen that consumers fully understand the risks involved when they engage with financial services online.

The ever-growing popularity of technology-enabled products has transformed the way in which consumers engage with financial services, but has also prompted questions as to the role that technology should play in the design and delivery of those services. For example, algorithmic methods are already used to assess creditworthiness and affordability for consumer lending products. The increasing sophistication and interactivity of user interfaces has also served as a catalyst for the "gamification" of financial services, an issue on which the FCA has already expressed concern. The key question being asked by the FCA, as well as other international regulators, is what level of regulation and what level of supervision should apply to firms delivering their services exclusively or mostly online. This includes scrutiny of the platforms that are intermediating these services.

The UK authorities have begun targeted regulatory scrutiny of particular products and services. For example, the Woolard Review into change and innovation in the unsecured credit market recommended that the "buy now pay later" sector should be brought within the regulatory perimeter (*www.fca.org.uk/publication/corporate/woolard-review-report.pdf*). The FCA and the Treasury have also suggested further extending the SMCR to e-money and payment firms, as well as financial markets infrastructures.

Although substantial enforcement action is yet to be taken in relation to fintech, it is a sector under increasing regulatory scrutiny and one in relation to which it would be reasonable to expect the FCA to flex its enforcement muscles relatively early on if it identifies a significant risk of, or actual, customer harm (*see feature article "Fintech: key issues for operating fintech businesses", www.practicallaw.com/9-639-9305*).

In the meantime, the FCA appears to be focusing on tightening the authorisations gateway for fintech firms, with it approving only 4% of applications that it received from cryptoasset businesses during 2021 to register with it in its capacity as the anti-money laundering and counter-terrorist financing supervisor of UK cryptoasset businesses under the 2017 Regulations. The FCA has publicly stated that a significantly high number of cryptoasset businesses are not meeting the required standards under the 2017 Regulations, which has led to an unprecedented number of businesses withdrawing their applications for registration.

Initial enforcement action in relation to cryptoasset service provider is likely to be focused on UK firms that have failed to register with the FCA. However, it is only a matter of time until the FCA starts to scrutinise cryptoasset firms that have registered, but are found to have inadequate financial crime controls or to have facilitated money laundering.

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SUSTAINABILITY DISCLOSURES AND PLEDGES

There has been a notable shift in attitudes among investors, particularly retail investors, when it comes to their desire to put environmental, social and governance (ESG) matters at the heart of investment decisions. The FCA recognises that if the financial services sector is to respond effectively to this growing demand and help encourage positive change across the economy, then investors need high-quality information and need to be able to trust firms to deliver on their promises.

At COP26, the FCA's chief executive introduced the FCA's strategy for positive

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change, which focuses on, among other things, building trust in the market for ESG products and ensuring transparency along the value chain (*see News brief "Reflections on COP26: a long path ahead", www.practicallaw.com/w-033-4735*). On the same day, the FCA released its discussion paper DP21/4 on sustainability disclosure requirements and sustainable investment labels, which gives some insight into its intentions (*www.fca.org.uk/publication/discussion/dp21-4.pdf*). A specific listing rule requiring premium-listed companies' annual reports to include information about climate-related financial disclosures that they have made has already come into force (*www.practicallaw.com/w-030-7199*). This requirement was extended to apply to standard-listed companies from 1 January 2022 (*see "Listing Rules: FCA policy statement on climate-related disclosures", Bulletin, Securities and Corporate Finance Regulation, this issue*). The FCA has publicly stated that it will be prepared to take action against any listed companies that fail to comply with this requirement, especially if a listed company is found to have disseminated false or misleading information that is likely to cause harm to investors.

This risk of enforcement action is just one part of a broader suite of enforcement risks that firms face in relation to ESG. For example, in summer 2021, the FCA published a summary of its findings on the impact of presenting investment funds as sustainable on consumer investment decisions and the mis-selling risks that are associated with it (*www.fca.org.uk/insight/sustainable-investing-objective-gradings-greenwashing-and-consumer-choice*). This was followed by the FCA introducing new rules for asset managers from 1 January 2022 to increase transparency about how they are managing climate-related risks and opportunities so as to enable clients and consumers to make considered investment decisions (*www.practicallaw.com/w-032-0252*). Although the first disclosures under these new rules are not due to be made until June 2023, this is an area to which the authors expect the FCA to pay close attention with a view to sending clear messages to the market, whether through further supervisory work or enforcement action, as part of its broader ESG strategy.

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