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The Transatlantic Impact of U.S. Securities Regulation and Enforcement in a New Era of Policing

SPEAKERS

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Overview

- Overview of Regulators and Agencies in the U.S. and UK
- Enforcement Priorities in the U.S.
- Enforcement Priorities in the UK
- Case Studies
 - Self-reporting
 - Cooperation
 - Whistleblowers
 - Remedies
 - Parallel investigations

Overview of Regulators and Agencies in the U.S. and UK

US Regulators and Agencies include

- US Securities and Exchange Commission (SEC)
- Commodities Futures Trading Commission (CFTC)
- U.S. Department of Justice (including the National Cryptocurrency Enforcement Team)
- State Regulators

UK Regulators and Agencies include

- The Bank of England (BoE)
- Prudential Regulatory Authority (PRA)
- Financial Conduct Authority (FCA)
- Specialist Regulators, including Payment Services Regulator (PSR)
- Serious Frauds Office and National Crime Agency
- European Banking Authority

Overview of Regulators and Agencies in the U.S. and UK

Current SEC Leadership



Gary Gensler
Chair
Since 2021
Term expires 2021



Hester M. Peirce
Commissioner
Since 2018
Term expires 2025



Elad L. Roisman
Commissioner
Since 2018
Term expires 2023



Allison Herren Lee
Commissioner
Since 2019
Term expires 2022



Caroline A. Crenshaw
Commissioner
Since 2020
Term expires 2024

Gurbir Grewal
Director
Division of Enforcement
Since July 26, 2021



Sanjay Wadwha
Deputy Director
Division of Enforcement
Since August 18, 2021

Enforcement Priorities in the U.S.

- Gensler speech at London City Week, [June 23, 2021](#)
- Market Abuse
 - Insider trading and frontrunning
 - 10b5-1 trading plans and internal controls
 - Data analytics to identify insider trading in family member accounts
- Recent litigated cases charging violations of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder
 - SEC charged employee of asset managers with frontrunning firm trades in accounts of close family members, [July 2, 2021](#)
 - SEC charged quantitative analyst for frontrunning trades of his employer firm using accounts in the name of his wife who uses a different last name, [September 23, 2021](#)
 - SEC charged compliance analyst at investment bank with trading in advance of corporate events involving employer's clients using accounts in name of parents, [September 29, 2021](#)
 - SEC charged individual for selling what he called “insider trading tips” on the dark web, [July 9, 2021](#)

Enforcement Priorities in the U.S.

- SPACs

“This year, there has been an unprecedented surge in SPACs, which provide an alternative to traditional initial public offerings (IPOs). As technology and markets evolve to challenge existing business models, it is important to think about how we protect investors and facilitate capital formation.

With SPACs, there are a lot of costs in between the companies and their investors. I think enhanced disclosures and other provisions can increase competition in this market.” – SEC Chair Gary Gensler, [Sept. 27, 2021](#)

- SEC and DOJ have brought recent SPAC-related enforcement actions under the antifraud provisions of the federal securities laws, and its focus on SPAC-related misconduct is expected to continue
 - SEC charged SPAC, its sponsor and CEO, and against the proposed merger target and its founder and CEO, for misleading claims about the target company’s technology, [July 13, 2021](#)
 - SEC and DOJ charged founder and former CEO of SPAC for false and misleading information about its products and technological accomplishments, July 29, 2021 ([SEC](#) and [DOJ](#))

Enforcement Priorities in the U.S.

- ESG
 - Concerns with “greenwashing,” which is the process of conveying a false image to investors that a product is ESG-friendly
 - Focus on disclosures by public companies and investment managers
 - Focus on compliance and proxy voting by investment managers
 - SEC launched an Enforcement ESG [Task Force](#) in March 2021 focused on developing initiatives to proactively identify ESG-related misconduct, and coordinate the effective use of resources, including through the use of sophisticated data analysis to mine and assess information and assess information across registrants, to identify potential violations

Resources

- <https://www.sidley.com/en/insights/podcasts/2021/the-enforcement-angle-secs-kelly-gibson>
- <https://www.sidley.com/en/insights/newsupdates/2021/08/environmental-social-and-governance-disclosures-in-proxy>
- <https://www.sidley.com/en/insights/newsupdates/2021/06/how-to-be-esg-a-private-funds-guide-to-esg-compliance>

Enforcement Priorities in the U.S.

- Cybersecurity
 - Recent Cyber Sweep
 - Charges against [eight firms](#) for cybersecurity policies and procedures failures, August 30, 2021

“The SEC’s orders against each of the firms finds that they violated Rule 30(a) of Regulation S-P, also known as the Safeguards Rule, which is designed to protect confidential customer information. The SEC’s order against [certain investment adviser respondents finds that they] violated Section 206(4) of the Advisers Act and Rule 206(4)-7 in connection with their breach notifications to clients. Without admitting or denying the SEC’s findings, each firm agreed to cease and desist from future violations of the charged provisions, to be censured and to pay a penalty.”
 - Charges against [public company](#) for internal control failures under Rule 13a-15(a) of the Securities Exchange Act of 1934, June 15, 2022

“The Securities and Exchange Commission today announced settled charges against real estate settlement services company ... for disclosure controls and procedures violations related to a cybersecurity vulnerability that exposed sensitive customer information”
- Payment for Order Flow, Gamification, and Meme Stock Trading
 - SEC [Report](#) on Equity and Options Market Structure Conditions in Early 2021, October 18, 2021

Additional resources

<https://www.sidley.com/en/insights/newsupdates/2021/06/sec-announces-settled-charges-against-first-american-for-cybersecurity-disclosure-controls-failures>

Enforcement Priorities in the U.S.

- Crypto Assets

“Make no mistake: It doesn’t matter whether it’s a stock token, a stable value token backed by securities, or any other virtual product that provides synthetic exposure to underlying securities. These platforms — whether in the decentralized or centralized finance space — are implicated by the securities laws and must work within our securities regime.” – [SEC Chair Gary Gensler, July 21, 2021](#)

- Short selling

“At the center of January’s market events was significant short selling of a number of the meme stocks. While FINRA and the exchanges currently publish or make available certain short sale data, Congress directed the SEC under the Dodd-Frank Act to publish rules on monthly aggregate short sale disclosures. In addition, Dodd-Frank provided authority to the SEC to increase transparency in the stock loan market. I’ve directed SEC staff to prepare recommendations for the Commission’s consideration on these issues.” – [SEC Chair Gary Gensler, May 6, 2021](#)

- October 18, 2021 [Statement](#) of Staff Report on Equity and Options Market Structure Conditions in Early 2021 identified concerns around the transparency and related market dynamics of short selling
- SEC has launched Rule 105, Reg M sweeps

Additional Resources

- <https://datamatters.sidley.com/enhanced-focus-on-digital-asset-intermediaries-by-sec-congress-and-state-securities-regulators>
- <https://www.sec.gov/about/offices/ocie/risk-alert-091713-rule105-regm.pdf>

Enforcement Priorities in the U.S.

- AML/BSA
 - AML Act 2020
 - FinCEN government priorities
 - Corruption
 - Cybercrime
 - Foreign and Domestic Terrorist Financing
 - Fraud
 - Transnational Criminal Organization Activity
 - Drug Trafficking Organization Activity
 - Human Trafficking
 - Proliferation Financing

Additional Resources

- <https://www.sidley.com/en/insights/newsupdates/2021/congress-rings-in-the-new-year-with-substantial-changes-to-antimoneylaundering-laws>
- <https://www.sidley.com/en/insights/newsupdates/2021/07/fincen-issues-governmentwide-priorities-for-antimoney-laundering-and-counterterrorist>

Enforcement Priorities in the U.S.

- Disqualification waivers
- Cooperation
- Use of remedies
- Admissions
- Efficient investigations
 - Sweeps
 - Wells meetings
 - Formal orders
- Gatekeepers
- Recordkeeping

Enforcement Priorities in the UK – The FCA Business Plan 2021

The FCA Business Plan 2021 published on 14/07/2021 explains how the FCA sees its future role and priorities, how it intends to deliver them and how it will measure its performance.

New CEO, Nikhil Rathi, aims to make the FCA a forward-looking, proactive, regulator.

“We have 2 key tasks – to make markets work better and to stop and prevent serious misconduct that leads to harm.”

Consumer Priorities

- Enabling consumers to make effective investment decisions
- Strengthen the rules for firms that approve financial promotions
- Inform consumers about high-risk investments and what is and is not protected
- Ensure consumer credit markets work well
- Borrowers are to be treated fairly and be able to get affordable products that meet their needs.
- Stamp out poor practice and encourage competition by monitoring how firms support customers in financial difficulty and take action where needed

Enforcement Priorities in the UK

Payment Services

“The payments services sector continues to evolve rapidly, which we hope will give both consumers and smaller businesses a wide variety of safe payment services. But innovation in this sector, such as cryptoassets, carries risks.”

The FCA is concerned about the pandemic’s impact on the financial strength of payment services firms. It will conduct proactive reviews of firms' arrangements and safeguarding audits to raise standards of safeguarding and wind-down planning, identifying at-risk firms as a priority.

Cryptoassets

Regulatory Action against and Consumer Warning against investing in cryptoassets

“Be wary of adverts online and on social media promising high returns on investments in cryptoasset or cryptoasset-related products. Most firms advertising and selling investments in cryptoassets are not authorised by the FCA. This means that if you invest in certain cryptoassets you will not have access to the Financial Ombudsman Service or the Financial Services Compensation Scheme if things go wrong. While we don’t regulate cryptoassets like Bitcoin or Ether, we do regulate certain cryptoasset derivatives (such as futures contracts, contracts for difference and options), as well as those cryptoassets we would consider ‘securities’. A firm must be authorised by us to advertise or sell these products in the UK – check our Register to make sure the firm is authorised. You can also check our Warning List of firms to avoid.”

Enforcement Priorities in the UK

Wholesale markets priorities

- Now the UK has left the EU, the FCA will tailor rules better to suit UK markets, while maintaining high and internationally consistent standards at least equivalent to those in the EU
- The FCA intends to finalise listing rules for SPACs in Q3 202 and further Listing Rule proposals before the end of calendar year 2021
- It will continue amending the listing rules to support the Government's 'Roadmap' towards mandatory Task Force on Climate-Related Financial Disclosures (TCFD)-aligned disclosures across the economy
- It will continue to work with the Treasury on legislative and FCA rule changes to simplify the complex rules around pre- and post-trade transparency in securities and derivatives markets
- Firms and markets must complete an orderly transition away from sterling LIBOR to alternative risk-free rates, treating customers fairly throughout
- May require firms to publish the most commonly used sterling and yen LIBOR settings on a 'synthetic' basis, under new powers in the 2021 Financial Services Act
- The FCA will work with the PRA and Bank of England to monitor the progress of firms' transition plans. It will also continue to support collective action by market participants to move business formerly concentrated on LIBOR to SONIA and other risk-free rates
- The FCA will continue to *"closely coordinate with overseas authorities"* around transition for both new business and dealing with legacy issues

Enforcement Priorities in the UK

Tackling market abuse and financial crime

- The FCA will continue to allocate significant resource to monitor the transactions in financial instruments reported to it
- It will assess Suspicious Transaction and Order Reports
- It will obtain intelligence from whistleblowers on financial crime or fraud

Enforcement Priorities in the UK

Improving asset management and non-bank finance

- Asset managers to manage liquidity in funds to avoid unnecessary risks
- Increased supervision of whether asset managers present the environmental, social and governance (ESG) properties of funds fairly, clearly and in ways that are not misleading
- Identification of funds that are outliers to their peers to understand why, and work with the fund Authorised Fund Manager and Depositary to take action where needed

Enforcement Priorities in the UK

Diversity and inclusion

“Diversity and inclusion can reduce groupthink, encourage debate and innovation and thereby improve outcomes. Evidence shows a positive relationship between financial performance and gender and ethnic diversity in executive teams. Both we and financial services firms need to better represent the society we serve.”

Environmental, Social and Governance (ESG)

- Financial services and markets are central to the UK’s transition to a low carbon economy
- New disclosure rules for asset managers, life insurers and FCA-regulated pension schemes

International priorities

“International cooperation with other supervisors and global standard-setting bodies is more important than ever. We will cooperate so firms can’t avoid regulation by taking advantage of different countries’ rules.”

Fraud strategy

- Proactive surveillance and monitoring, with clear prioritising so that the FCA can intervene more quickly and decisively to remove fraudsters who are FCA-supervised from the financial services system

Enforcement Priorities in the UK

Financial resilience and resolution

- Better awareness of those firms most likely to fail to reduce the harm from their failure
- When firms fail, to ensure they do so in an orderly way
- Targeting interventions at firms with weak financial resilience and those whose failure is likely to cause material harm
- Ensure the compensation framework remains appropriate and proportionate

Operational resilience

- Firms should be operationally resilient against disruption to minimise the harm caused to consumers and markets
- Conduct assessments of firms' progress in implementing the new operational resilience requirements and identify areas for improvement
- Assess how able firms are to remain within their impact tolerances

Case Studies

- Case study 1: You are a UK-based firm registered with the SEC/CFTC and get a subpoena from the SEC/CFTC.
- Case study 2: You are a U.S. firm registered with the FCA and get a request from the FCA.
 - What is your first step?
 - What can you expect?
 - What's the timeline for a U.S. investigation?
- Key stages of an investigation
 - Opening of an inquiry or investigation
 - Obtaining a Formal Order of Investigation, which gives staff authority to subpoena witnesses, among other things
 - Document discovery through voluntary requests or subpoenas
 - Witness testimony or interviews
 - According to the SEC's Division of Enforcement [2020 Annual Report](#), the median time it took the staff to file an enforcement action in 2020 was 21.6 months, which was a five-year best, and 34 months for financial fraud and issuer disclosure cases
 - Wells notices
 - Closing of an investigation – Enforcement action (negotiated settlement or litigation) or termination without action

Additional Resources

[SEC's Enforcement Manual](#)

Case Studies – Key Differences and Parallel Investigations

Key Differences

- Self-reporting
 - Cooperation
 - Whistleblower incentives
 - Remedies
- SEC’s Division of Enforcement [2020 Annual Report](#)
 - Cooperation credit in recent enforcement actions
 - Provided significant cooperation during the investigation amid challenges posed by the pandemic, including travel restrictions, work from home orders, and office closure; taken into consideration in imposing a penalty ([September 24, 2020](#))
 - Imposed no penalty because firm self-reported the conduct and took prompt steps to remediate the violations. ([September 20, 2020](#))
 - Whistleblower awards totaling \$175 million to 39 individuals
 - SEC Whistleblower protections against retaliation under [Section 922](#) of the Dodd-Frank Act, and against actions taken to impede reporting under Commission [Rule 21F-17\(a\)](#)

Case Studies – Key Differences and Parallel Investigations

“Enforcement cooperation is among the top priorities of the SEC's international program. Technological advances have facilitated the movement of capital across borders and increased opportunities for investors. This progress has also enhanced the ability of those who prey on investors to transfer assets abroad or base their scams and fraudulent activities overseas. As a consequence, international cooperation among securities regulators is vital to effective resolution of international enforcement investigations.” - SEC International Enforcement Assistance [Website](#)

- Parallel investigations
 - How they might arise
 - Coordination challenges
- Memorandum of Understanding between the SEC and FCA, [March 29, 2019](#)

“Exchange of Information. To supplement informal consultations, upon written request, each Authority intends to provide the other Authority with assistance in obtaining information not otherwise available to the Requesting Authority and, where needed, interpreting such information relevant to ensuring compliance with the laws and regulations of the Requesting Authority.”
- Transfer of personal data across borders
 - Administrative arrangement for the transfer of personal data between the FCA and SEC, [April 29th, 2020](#)
 - UK Information Commissioner’s Office (ICO) open letter in context of SEC examinations, [September 11, 2020](#)

Presenters' Biographies



Stephen L. Cohen

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STEPHEN L. COHEN is the global co-leader of the Regulatory and Enforcement practice. He advises clients on a comprehensive range of government and internal investigations, enforcement-related litigation, whistleblower complaints, cyber breaches and regulatory and compliance issues, including clients seeking to strengthen corporate governance and compliance programs. Stephen joined Sidley in 2017 after twelve years at the Securities and Exchange Commission, most recently serving as Associate Director in the Enforcement Division where he earned the Distinguished Service Award, the agency's highest honor. He oversaw hundreds of investigations involving broker-dealers, investment advisers, exchanges, securities offerings, insider trading and a range of public company and accounting issues. The Society of Corporate Compliance and Ethics presented Stephen with its 2017 International Compliance & Ethics award, recognizing him for his significant contributions to the compliance and ethics profession. Stephen is a *Chambers*-ranked member of Sidley's global Securities Enforcement and Regulatory practice, which received the 2019 *Chambers USA* Award for Financial Services Regulation, and was named the "Law Firm of the Year" for Securities Regulation in 2020 and 2017 by *U.S. News – Best Lawyers*.

While at the SEC, Stephen oversaw domestic and international enforcement activities involving accounting and disclosure fraud, auditor misconduct, the Foreign Corrupt Practices Act, insider trading, registered and unregistered securities offerings, market abuses, broker-dealers, investment advisers and other regulated entities.



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RANAH L. ESMAILI is a partner at Sidley's office in Washington, D.C. and a member of the firm's global Securities Enforcement and Regulatory practice. Ranah's practice focuses on representing private fund and other asset managers in regulatory and government investigations, and providing compliance advice and counseling.

Ranah joins Sidley from the U.S. Securities and Exchange Commission's (SEC) Enforcement Division, where she served as Assistant Director of the Asset Management Unit within the Division of Enforcement. As Assistant Director, Ranah oversaw investigations relating to the activities of hedge funds, private equity funds, venture capital funds, registered investment companies, separately managed accounts, and their investment advisers.

During her tenure at the SEC, Ranah brought significant and groundbreaking enforcement actions, including first-ever enforcement actions against a digital asset hedge fund manager, and a mutual fund adviser for undisclosed conflicts related to securities lending recall practices. Ranah also supervised an enforcement action resulting in one of the SEC's largest-ever hedge fund settlements. Ranah also developed and led sweeps and initiatives focused on asset management industry practices, including on issues related to securities lending and ESG disclosures.



Sara George

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SARA GEORGE has a wealth of experience in UK and international regulatory and criminal investigations. She represents corporations and individuals against allegations of involvement in regulatory contraventions and criminal offences, including market abuse, insider dealing, money laundering, cybersecurity breaches, fraud, corruption and bribery. She is also frequently called upon to advise firms on misconduct issues and reputational management.

Sara advises in international criminal and regulatory investigations involving the Securities and Exchange Commission (SEC), the Commodity Futures Trading Commission (CFTC) and the U.S. Department of Justice (DOJ) and in cases brought by European regulators, police forces and the Serious Fraud Office (SFO). Previously a criminal barrister, she also has extensive experience of advocacy before the Financial Services Tribunal, the Regulatory Decisions Committee of the Financial Conduct Authority (FCA), the Crown Court and the Court of Appeal.

Sara is a former prosecutor for the Financial Services Authority (FSA) and brought the first criminal prosecution by the FSA against a director for misleading the market (*Regina v. Rigby and Bailey*), the first Listing Rule contravention, numerous market abuse cases and refusals of authorization.

A leading individual in *Chambers UK* 2021 for both Financial Crime and Financial Services, sources describe Sara as "A super smart, super savvy, super efficient lawyer." Sara has also been recognized in *Best Lawyers* 2022 for Financial Services.



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LEONARD NG is a member of the firm's Executive Committee and co-head of the UK/EU Financial Services Regulatory group. Based in the London office, Leonard advises a wide range of global financial institutions on complex UK/EU financial services regulatory issues. He has particular experience in advising clients on operating under the regulatory framework established after the last financial crisis, and more recently on Brexit, sustainable finance/ESG, and crypto-asset regulation. Leonard is a past member of the Board of the Managed Funds Association (MFA), the global trade association for hedge funds, and is a frequent speaker at industry conferences.

In addition to UK and EU regulatory matters, Leonard has extensive experience in advising clients on the international regulatory capital framework, as well as assisting EU-based clients assess the implications of U.S. financial services legislation in conjunction with colleagues in Sidley's offices in the U.S.

Leonard has received acknowledgement from numerous industry ranking guides, including *Chambers UK*, *IFLR1000*, *Best Lawyers*, *The Legal 500 UK* and *Who's Who Legal*.

In February 2019, Leonard was honored with the "Outstanding Contribution Award" which was presented at *The Hedge Fund Journal Awards*.

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