

# Hot Topics Affecting the Financial Services Industry

## Developments in US and UK Financial Services Enforcement

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# DEVELOPMENTS IN THE UNITED STATES

# Emerging Enforcement Priorities of the Trump Administration

- Personnel Announcements

- On May 2, 2017, the Senate confirmed President Trump's nominee, Jay Clayton, to chair the Securities and Exchange Commission.
  - Recent news reports indicate that Chair Clayton is likely to name Steven Peikin and Stephanie Avakian to be Co-Directors of the Division of Enforcement.
- On March 14, 2017, President Trump nominated J. Christopher Ciancarlo, the Acting Chair of the Commodity Futures Trading Commission, to be the permanent chair.
  - James MacDonald has been appointed Director of the CFTC's Division of Enforcement.

# Emerging Enforcement Priorities of the Trump Administration

- Personnel Announcements (cont'd)
  - Many vacancies remain at the Department of Justice. However, Trevor McFadden has been named to lead the Fraud Section in the Criminal Division.
  - President Trump has nominated Sigal Mandelker to serve as Under Secretary of the Treasury for Terrorism and Financial Intelligence.

# Emerging Enforcement Priorities of the Trump Administration

“As we re-double our efforts to combat violent crime, we will still enforce the laws that protect American consumers and ensure that honest businesses aren’t placed at a disadvantage. This Department of Justice will continue to investigate and prosecute corporate fraud and misconduct; bribery; public corruption; organized crime; trade-secret theft; money laundering; securities fraud; government fraud; health care fraud; and Internet fraud, among others.”

U.S. Attorney General Jeff Sessions, April 24, 2017

# Emerging Enforcement Priorities of the Trump Administration

“The Department of Justice remains steadfast in its commitment to protecting our nation’s financial system, by thoroughly investigating and aggressively prosecuting fraud cases.”

U.S. Deputy Attorney General Rod Rosenstein, May 23, 2017

# Emerging Enforcement Priorities of the Trump Administration

“Today, I would like to address the suggestions from some that the Department of Justice no longer is interested in prosecuting white collar crime. I intend to dispel that myth.”

Acting PDAAG Trevor McFadden, April 20, 2017

- In a series of speeches about the FCPA, McFadden has emphasized:
  - Enthusiasm for continued FCPA enforcement
  - Focus on cooperation and voluntary compliance
  - Continued emphasis on individual accountability
  - International cooperation



# Enforcement Developments in U.S. Credit Markets

- Sales Practice

- *United States v. Jesse Litvak*, 808 F. 3d 160 (2d Cir. 2015)
- *United States v. Ross Shapiro et al.*, 15 Cr. 155 (D. Conn.)

- Marking of Positions

- Testimony in recent sales practice trial suggests federal investigation related to mis-marking of positions in structured credit products.



# DEVELOPMENTS IN THE UNITED KINGDOM

# Enforcement Against Senior Bankers

“Many people must bear collective responsibility for what happened, including governments and regulators as well as the boards of the banks themselves. But the fact that I am the only individual from HBOS to face investigation defies comprehension.”

Peter Cummings, ex Bank of Scotland Chief  
Executive of Corporate Lending – September 2012

# Enforcement Against Senior Bankers (cont'd.)

“The most culpable were let off”

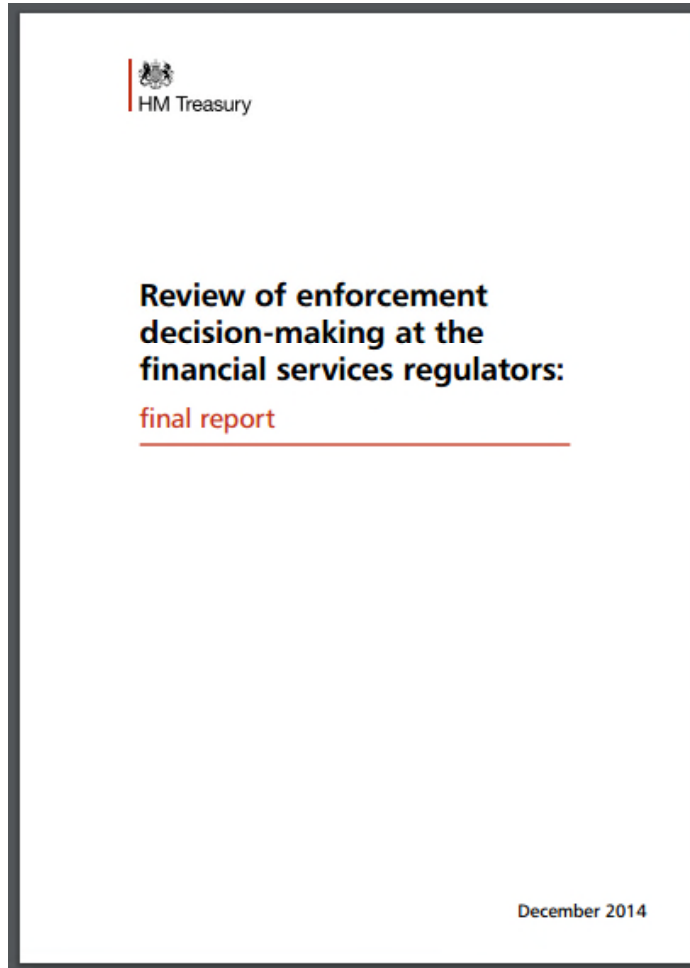
Clive Adamson, former FSA director of Supervision  
quoted in the Green report into HBSOS

# FSA/FCA Enforcement Annual Reviews



- We continued to focus on taking actions against individuals. We made some progress on our agenda of holding Significant Influence Functions (SIFs) in larger firms to account. (2012/2013)
- Seeking to ensure that senior management are held to account is a key priority for the FCA....We continue to improve and evolve our approach to these challenging cases based on our experience in recent years. (2013/2014)
- In enforcement, we continued our credible deterrence approach by attributing responsibility not just to firms, but also to individuals. (2014/2015)
- Seeking to ensure that senior management are held to account remains a key priority for the FCA. (2015/2016)

# FCA/PRA Enforcement Reviews



# Recommendations Taken Forward

- FCA should create a record of potential subjects of investigation, and assess each against referral criteria, recording reasons for the decision.
- FCA should maintain ongoing dialogue between supervision and enforcement, including quarterly meetings between supervision and enforcement at senior level (head of department) and on an ad-hoc basis.
- Updates between the FCA and PRA on enforcement investigations should generally involve representatives from the enforcement and supervisory teams of both regulators.

# UK – Senior Managers Regime



- March 2016 – introduction of Senior Managers Regime in the UK.
- UK banks must allocate overall responsibility to a Senior Manager for all activities (including non-regulated activities), business areas and management functions of the whole firm.
- Senior managers held accountable for compliance in their area of responsibility.
- Extension to all financial services firms in 2018.



# Section 66A Financial Services and Markets Act 2000



- The senior manager is guilty of misconduct if:
  - following a contravention by the firm,
  - the senior manager was at that time responsible for the management of any of the [firm]’s activities in relation to which the contravention occurred, and
  - The senior manager did not take such steps as a person in the senior manager’s position could reasonably be expected to take to avoid the contravention occurring (or continuing).

# SMR – Extra Territorial effect

- No ‘territorial limitation’ for the Senior Managers Regime.
- SMs are bound by the Conduct Rules regardless of where they are located.
- SMR extends to activities carried out from a branch outside UK.
- SMR applies to UK branches of overseas banks.
- SMR imposes obligations on firms and SMs to disclose appropriately any information of which the UK regulators would reasonably expect notice (Principle 11, SC4).

# Examples



- New York-based senior manager with overall responsibility for equities trading within a UK branch of a US bank.
- New York-based senior manager with overall responsibility for corporate investments within a UK wholesale bank.
- New York-based chair of a risk committee of a UK subsidiary of a US retail bank.
- New York-based head of New York branch of UK bank.

# Senior Managers Regime

“What I like about the senior managers regime is that it focuses on the people who can make a difference, the senior management and it is top down rather than bottom up, which seems to start the inquiry into firm culpability in the right place.”

Mark Steward – FCA Director of Enforcement and  
Market Oversight

# Serious Fraud Office – Vive la Différence

- S.7 Bribery Act 2010 - Failure of commercial organisations to prevent bribery.
- S.46 & s47 Criminal Finances Act 2017 – Failure to prevent facilitation of (UK and foreign) tax evasion.

“A failure to prevent economic crime” offence would significantly increase the prosecutors’ reach in those cases where a company should be held to account for the conduct of persons associated with it.”

David Green Director - SFO

# SFO – Corporate Successes

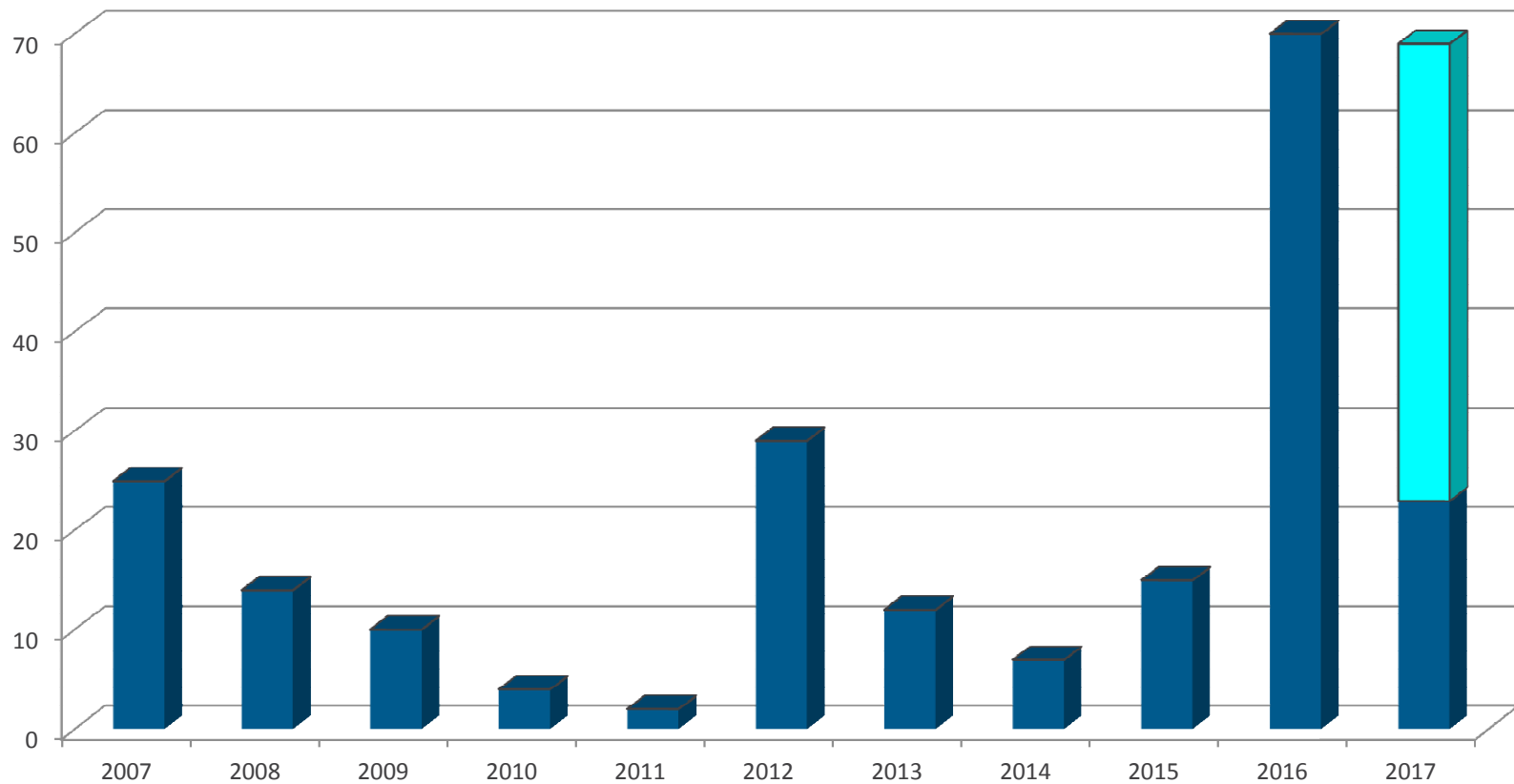


- February 2016 – Sweett Group plc - £2.25m
- November 2015 – Standard Bank Plc – US\$32m + DPA
- July 2016 - “XYZ Ltd” - £6.5m + DPA
- January 2017 – Rolls Royce - £497m + DPA
- April 2017 – Tesco Stores Ltd + DPA - £129 + concurrent FCA settlement providing £85m redress

# FCA – Change of Process

- Management involvement and oversight.
- More investigation and more investigations.
- Changes to the settlement process – fewer settlements?
- Focus on individuals, financial crime, market abuse.
- More emphasis on redress.

# FCA Insider Trader Investigations Started



Source: Bloomberg/FCA



# FCA – Change of Process

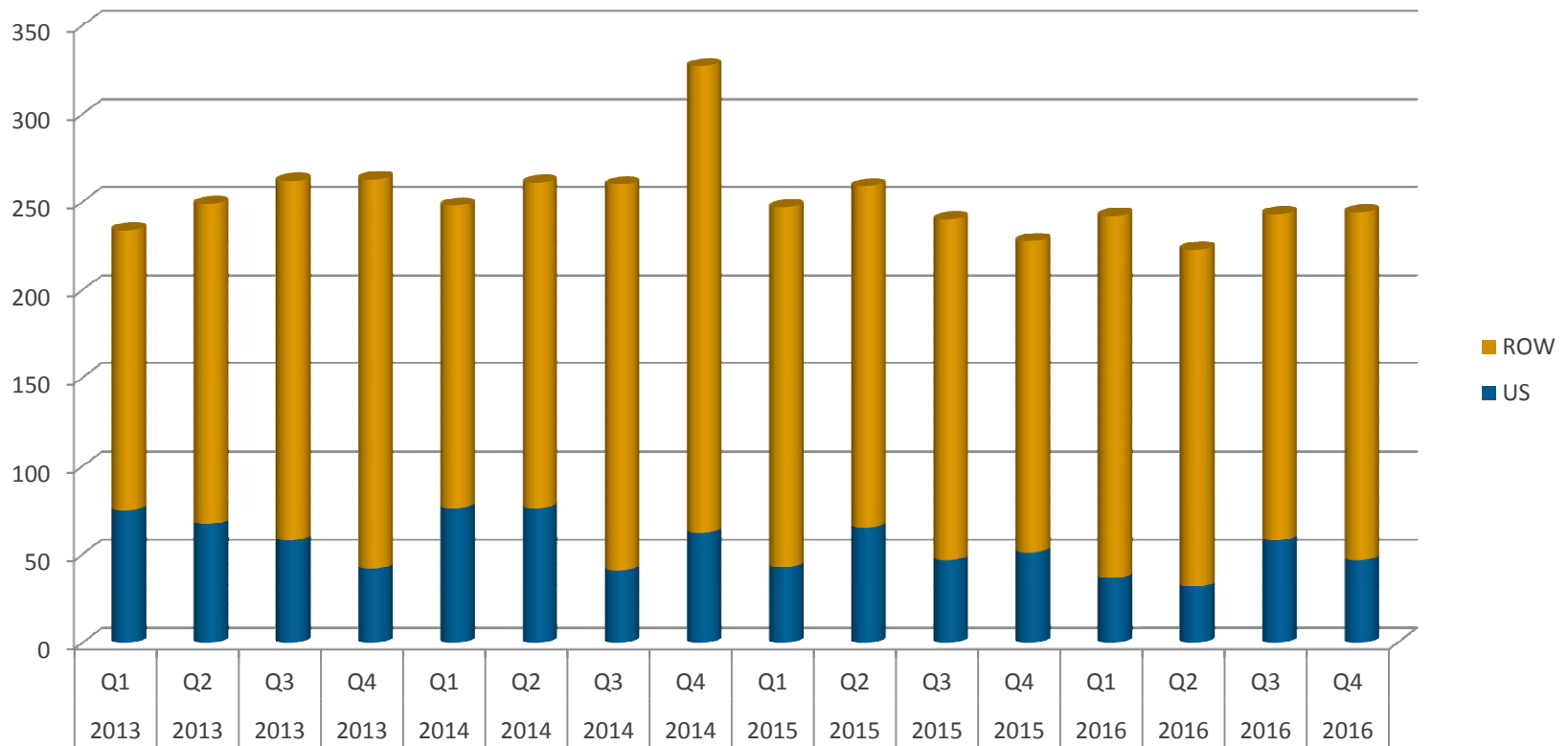
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# INTERNATIONAL INVESTIGATIONS

# International Investigations

FCA Incoming Requests for Information



- *Re The RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch) (8 December 2016):
  - Interview notes prepared by external lawyers and non-lawyer RBS employees during RBS's internal investigation in response to two SEC subpoenas relating broadly to RBS's sub-prime exposures; and
  - Interview notes prepared by RBS's in-house lawyers during its internal investigation into allegations made by a former employee.

# *Re The RBS Rights Issue Litigation* - Judgment

- Lex fori applied
- Legal advice privilege confined to advice between lawyer and client - employees of RBS are not the client (*applying Three Rivers DC v Bank of England [2003] EWCA Civ 474*)
- Lawyers' working papers are privileged, but...
- A verbatim transcript of an interview is not privileged

# *SFO v Eurasian Natural Resources Corporation Ltd* [2017] EWHC 1017 (QB) (08 May 2017)

- A criminal investigation by the SFO is not adversarial litigation for privilege purposes – it is a preliminary step before any decision to prosecute is taken.
  - ENRC had planned to cooperate with the SFO.
  - Prosecution only becomes a real prospect once it is discovered that there is some truth in the accusations, or at the very least that there is some material to support the allegations of corrupt practices.
  - No evidence to show that the purpose of the internal investigation had anything to do with the conduct of future criminal proceedings.

# Internal Investigations – UK Perspective

- Only lawyer-client communications likely to be privileged.
- Notes of interviews are unlikely to be privileged.
- Is there a need to make a written or taped record of employee interviews?
- Can you incorporate the report of an interview into a note of advice?
- But beware of cases where “cooperation” is important.
- Consider providing investigation report to UK regulators under limited waiver of privilege.

# Cross-Border Investigations – Bear Traps and Potential Pitfalls



Consider legal and regulatory position of overseas jurisdiction where:

- Need to obtain evidence, documents or data from abroad
- Potential for investigation by overseas regulators
- Potential for overseas litigation
- Involvement of individual subject to overseas regulation or employment contract
- Your institution or group company is subject to overseas regulation



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