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DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

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COMPETITION AND FINANCIAL MARKETS

-- Note by the United States --

This note is submitted by the Delegation of the United States to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 16-18 February 2009.

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1. In the United States, the federal antitrust laws generally apply to financial institutions in the same way as to other economic sectors, although special procedures, described below, apply to the review of bank mergers. This paper first discusses the Department of Justice's review of the competitive effects of bank mergers in the United States. It then describes the Department's merger and non-merger antitrust enforcement activity and competition advocacy efforts in the financial sector.

1. Review of Bank Mergers in the United States

1.1 Introduction

2. Since September 2008, financial markets in the United States and around the world have experienced significant turmoil. In 2008, 25 banks in the United States failed and, as of the end of the third quarter of 2008, 171 banks had been identified as "troubled."[1] In addition, since the beginning of October 2008, over 20 transactions have been addressed under the emergency provisions of the federal bank statutes that govern the mergers of banks and bank holding companies.[2]

3. Despite the current financial situation, more than 7,100 separately insured banking entities operate in the United States. More than 5,900 state and national banks operate as subsidiaries of about 4,900 bank holding companies. These bank holding companies collectively hold more than 98% of all bank assets in the nation and are regulated by the Board of Governors of the Federal Reserve System (Federal Reserve). About 1,200 banks operate independently of holding companies, but most of those are relatively small, each with less than $100 million in assets. While the bank holding companies are regulated by the Federal Reserve, their subsidiary banks, or banks independent of a holding company, may be regulated separately by one of the four federal bank regulatory agencies. Additionally, banks may have either a national or a state charter. National banks are regulated by the Office of the Comptroller of the Currency (OCC). At the state chartering level, banks may be divided into two groups. Nearly 900 of the state-chartered banks belong to the Federal Reserve System, and thus are regulated by the same bank regulatory agency that regulates the bank holding companies. However, the great majority of state banks, nearly 4,700 in all, are not members of the Federal Reserve System and are regulated jointly by the state bank regulatory agencies and the Federal Deposit Insurance Corporation (FDIC).[3] In addition to banks, thousands of thrifts[4] and credit unions[5] operate in the United States.

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1 Joe Adler, *Success with Failures*, American Banker, Dec. 29, 2008.

2 12 U.S.C. §§ 1828(c), 1842, and 1849(b).

3 See National Information Center at www ffiec.gov/nicpubweb/nicweb/nichome.aspx.

4 As of June 30, 2008, nearly 1,200 thrifts were operating in the United States. Thrifts originally were chartered as special purpose depository institutions, the primary function of which was to accept deposits and invest them in residential mortgages, thus encouraging home ownership. Similar to banks, thrifts may have either a federal or state charter. As a result of regulatory reform, the thrift industry broadened its functions, particularly in the area of commercial lending. Differences between a thrift and a commercial bank have thus narrowed in recent years, and references to the United States banking industry usually include both traditional banks and thrifts. The Office of Thrift Supervision (OTS) is the federal bank regulatory agency charged with supervising the national thrift industry.

5 In 1934, the United States Congress created the federal credit union system, made up of not-for-profit, member-owned depository institutions, to promote consumer thrift. Similar to banks, credit unions may have either a federal or state charter. Today, nearly 8,000 credit unions operate in the United States. Mergers of credit unions do not follow the procedures set forth in the federal bank statutes; rather, credit unions are subject to the reporting requirements of the Hart-Scott-Rodino Act that apply to other industries.

4. Antitrust review of bank mergers follows a different review process than that for most other industries in the United States. Bank mergers are subject to concurrent competitive review by either the Federal Reserve, the OCC, the FDIC, or the OTS, and by the U.S. Department of Justice's Antitrust Division (Department). During the recent financial market turmoil, the Department has worked closely with the federal bank regulators to provide expedited competitive review for emergency banking transactions, and to fashion appropriate remedies.

1.2 U.S. Banking Statutes and Antitrust Review of Banking Applications

5. Antitrust review of bank mergers in the United States is governed, in part, by various federal bank statutes, such as the Bank Holding Company Act (BHCA),[6] the Bank Merger Act (BMA),[7] and the Home Owners Loan Act.[8] Bank and bank holding company mergers are exempt from the merger review process under the Hart-Scott-Rodino (HSR) Act of 1976.[9] Instead, banks and bank holding companies must file with their relevant bank regulatory agency applications for approval of their proposed merger transactions. These applications are forwarded to the Department for competitive review.[10] Authority to approve or deny banking mergers rests with the bank regulatory agencies.

6. In most bank merger transactions, the bank regulatory agency responsible for the bank merger application is required to seek comments from the Department prior to approving the application. The Department has thirty days from receipt of an agency's request to review the competitive effects of a proposed merger and must comment formally on the application by issuing a report on the competitive factors.[11] After agency approval, the merging banks must wait thirty days after the date of approval before consummating the merger transaction.[12] Antitrust immunity from challenge under Section 7 of the Clayton Act accrues if the Department does not file a suit to challenge the transaction within the 30-day post-

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6 12 U.S.C. 1842, 1849.

7 12 U.S.C. 1828(c).

8 12 U.S.C. 1467a(e)(2).

9 15 U.S.C. § 18. Note that the procedures described here apply only to transactions involving bank depository institutions. The passage of the Gramm-Leach-Bliley Act in 1999 has allowed bank holding companies to own nonbank financial subsidiaries. Mergers of holding companies with both bank subsidiaries and nonbank financial subsidiaries are considered "mixed transactions" under the HSR Act. The nonbank component is subject to the reporting requirements of the HSR Act and its waiting periods. These HSR Act procedures also apply to acquisitions of financial companies (such as investment banks) that do not include a depository institution.

10 As between the Department and the U.S. Federal Trade Commission, the Department has exclusive jurisdiction to review bank mergers and acquisitions. 12 U.S.C. 1828(c), 1849.

11 See J. Robert Kramer II, *Antitrust Review in Banking and Defense*, Geo. Mason L. Rev., Vol 11, No.1, pg. 115, n. 23. 12 U.S.C. § 1828(c)(4). The Department reviews each proposed transaction and sends one of four competitive factors reports in response: (1) a "not significantly adverse" competitive factors report; (2) a "significantly adverse" letter; (3) a "conditional letter"; or (4) an "advisory report." The most recent "significantly adverse" letter was sent in 1999.

12 If the proposed transaction does not raise competitive concerns, the post-approval waiting period may be reduced to fifteen days with the concurrence of the Department.

approval waiting period.[13] If the Department files suit, consummation of the transaction is automatically stayed until a federal district court conducts a de novo review of the transaction.[14]

7. The BHCA governs mergers or acquisitions involving bank holding companies. Bank holding companies seeking approval under the BHCA file applications with the Federal Reserve. The competitive review procedures under the BHCA are similar to those under BMA, although the BHCA technically does not require the Federal Reserve to give the Department prior notification of a pending application, but rather requires only that the Federal Reserve provide to the Department a copy of its approval of the merger transaction. Nevertheless, because antitrust immunity attaches to these transactions after the specified post-approval waiting period, according to a long-standing practice between the agencies, the Federal Reserve follows the same procedures for applications filed under the BHCA as those set forth in the BMA.

8. Because of the concurrent review of bank mergers by the Department and the bank regulatory agencies, a significant level of inter-agency staff cooperation occurs on an ongoing basis. Initial review of the large number of bank merger applications received annually by the Department[15] is done through a "screening process." The screening process is described in detail in the *Bank Merger Competitive Review Screening Guidelines*,[16] jointly issued in 1995 by the Department, the Federal Reserve, and the OCC. The purpose of this screening is to identify proposed mergers that clearly do not have significantly adverse effects on competition and to allow them to proceed quickly. In investigating the competitive effects of both routine and expedited bank transactions, the Department applies the same federal antitrust laws and antitrust analysis that applies to other industries. Both bank and non-bank mergers are subject to competitive review under the Department's Merger Guidelines. The Department's competitive analysis is assisted by the availability of public information gathered by the bank regulatory agencies such as the FDIC Summary of Deposit data,[17] bank call reports,[18] small business loan origination data collected pursuant to the Community Reinvestment Act,[19] and Federal Reserve pre-defined geographic banking markets. These data sources allow the Department to evaluate the competitive effects of a merger transaction expeditiously. Because of the availability of this information, the bank merger review process is highly transparent and predictable.

9. While the Department conducts a separate and independent competitive review, Department staff routinely provides to the bank regulatory agencies updates on our analysis, our conclusions, and the bases for the conclusions, as well as its proposed resolution of any anticompetitive effect. The Department also may consult with the bank regulatory agencies on timing and invite the agencies to have a joint meeting with the merging parties to discuss a proposed merger.

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13 12 U.S.C. §§ 1828(c), 1842, 1849(b).

14 12 U.S.C. §§ 1828(c), 1842(c). The BMA and the BHCA require the appropriate bank regulatory agency to consider the probable competitive effects of proposed mergers and to deny approval for those that threaten competition, unless the probable anticompetitive effects of the transaction are clearly outweighed by the probable effects on the convenience and needs of the community to be served.

15 Antitrust Division Workload Statistics FY 1998-2007 can be found at http://www.usdoj.gov/atr/public/workstats.htm.

16 The Bank Merger Competitive Review Screening Guidelines may be found at http://www.usdoj.gov/atr/public/guidelines/6472.htm.

17 http://www3 fdic.gov/sod//sodMarketBank.asp?barItem=2

18 Reports of Condition and Income, known as "call reports," contain quarterly financial data on the institution. *See* http://www.fdic.gov/regulations/resources/call/crinst/callinst2008_Dec html.

19 12 U.S.C. 2901 et. seq.; see http://www ffiec.gov/craadweb/aggregate.aspx.

1.3 Role of Competitive Review During Financial Industry Crisis

10. The U.S. framework for the competitive review of bank mergers enables the application of antitrust analysis to transactions involving the merger of financially troubled institutions. The BMA and the BHCA each provide two procedures for expedited competitive review of banking transactions.[20] Under the first procedure, if a transaction is deemed an "emergency,"[21] the Department has ten days to provide a report on the competitive factors of the transaction and the proposed transaction may be consummated five days after the date of approval by the bank regulatory agency.[22] Under the second, if one of the merging institutions is at risk of "probable failure,"[23] the bank regulatory agency may act immediately; in such a case, the transaction may be consummated immediately upon approval by the bank regulatory agency.[24] The bank regulatory agency determines whether a merger transaction involves an "emergency" or a "probable failure" and, therefore, whether it requires expedited competitive review.[25]

11. Because of the availability of large volumes of information and data from public sources, the bank application screening system, and the announced principles for the competitive review of bank mergers, the Department and the bank regulatory agencies are able to conduct expedited, but effective, competitive reviews of bank merger transactions. These processes have been in place for years and they continue to be employed even when the number of bank transactions are classified as emergencies or probable failures is increasing.

12. In the recent wave of banking consolidations, most of the transactions, such as the acquisition of Wachovia Corporation by Wells Fargo & Company, involved the merger of the financial holding companies and were approved under the emergency provisions of the BHCA with a five-day post-approval waiting period. The Department received prior notification, conducted an expedited competitive review, and provided comments to the bank regulatory agency prior to approval of the application.[26] Although the emergency provisions of the BHCA have been invoked for numerous transactions during the current economic difficulties, there are also a wide range of transactions for which the banking regulators play a prominent facilitating role, including a financing role, involving weak banks. For example, the recent acquisition of National City Corporation by PNC Financial Services Group Inc. did not implicate the expedited review procedures. In connection with that acquisition, the Department, along with the Federal Reserve, imposed a significant remedy: the divestiture of 61 local bank offices with deposits totaling $4.1 billion.[27]

13. All parties involved in the banking industry benefit from the transparency of the competitive review process, the availability of reliable public information, and the close working relationship between the Department and the bank regulatory agencies. As a result of these factors, antitrust review of U.S. bank mergers continues to be relevant and effective even in times of financial industry crisis.

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20 12 U.S.C. 1828(c)(6), 1849(b)(1).

21 The term "emergency" appears in the BMA and the BHCA but is not defined. Id.

22 Id.

23 The term "probable failure" appears in the BMA and the BHCA but is not defined. Id.

24 Id.

25 Id.

26 For those transactions that have a non-bank portion subject to the reporting requirements of the HSR Act, the Department also received and reviewed the HSR notifications.

27 *See* http://www.usdoj.gov/atr/public/press_releases/2008/240315 htm.

2. Antitrust Enforcement and Advocacy Related to the Financial Markets

14. During the past decade, the Department has taken numerous antitrust enforcement actions in financial markets. As a general matter, the Department approaches these matters and issues as it would act in other sectors of the economy. However, certain issues recur frequently in antitrust analysis of financial markets, including network effects, two-sided markets, and a heightened potential for vertical foreclosure. The Department's efforts have included investigations of potential anticompetitive effects of both proposed transactions and participant conduct, as well as dialogue and coordination with other federal agencies charged with regulating financial markets. Some of the more notable examples of the Department's enforcement activities and advocacy with other agencies are described below.

2.1 Recurring issues in the antitrust analysis of financial markets

15. Financial markets often exhibit strong network effects. One example is the tendency of trading in any particular financial instrument to become concentrated on a single exchange. The more traders that trade on a particular exchange, the less costly it is to trade on that exchange, as search costs are reduced and increased competition for trades reduces prices. Such network effects have been overcome in some financial markets where regulatory policy has facilitated competition among exchanges. Consequently, network effects need not pose an insurmountable barrier to competition. In some instances parties have argued that network effects are so strong that a market presents a 'natural monopoly' and that the proper policy is to regulate the monopolist firm, rather than to protect competition by, for example, price and access regulation. The Department generally has not found these arguments persuasive.

16. Financial markets often are two-sided, with intermediaries serving two distinct user groups that need each other. (A common example is credit card networks, which serve both issuing banks (and through them, consumers) and merchants.) It is not uncommon for a particular transaction or conduct to affect the market on the one side adversely but to have beneficial effects in the other market. These issues have arisen during the Department's review of mergers between financial exchanges, for example, which bring buyers and sellers together to provide each with information and execution services. For example, in reviewing First Data Corporation's acquisition of Concord EFS, Inc., a PIN debit competitor, the Department determined that the potential adverse effects on merchants, in the form of higher interchange fees, outweighed the benefits the parties claimed would result from the combined firm's greater scale, including pricing and innovation benefits.[28] Accordingly, the Department obtained a court order requiring an appropriate divestiture.

17. Another recurring issue in the Department's work concerning financial markets is vertical integration. Vertical issues have been a central part of the Department's analysis of futures exchanges and clearinghouses, for example, including the Chicago Mercantile Exchange's (CME) acquisition of the Chicago Board of Trade (CBOT). Common ownership of an exchange and a clearinghouse can have the effect of amplifying network effects and making it more difficult for potential exchange competitors to enter the market. The Department has addressed this concern recently in a comment we submitted to the Treasury Department, discussed below.

18. Finally, the issue of transparency is often more important in financial markets than in some others. For example, the widespread dissemination of quote and trade information is necessary for financial markets to function efficiently. For this reason the securities laws of the United States, such as the Securities Act of 1933, 15 U.S.C. §§ 77a *et seq*, ensure that investors in regulated securities will have

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28 *U.S. v. First Data Corporation* (D.D.C. 2004); complaint: http://www.usdoj.gov/atr/cases/f201400/201400 htm; final judgment: http://www.usdoj.gov/atr/cases/f204100/204107 htm.

access to certain fundamental information before making investment decisions. Consistent with these goals, the Department has sought to promote transparency and to limit unilateral and collective action that would have the effect of inhibiting transparency, for example through the advocacy and enforcement efforts described below.

19. The Department frequently communicates and coordinates with financial regulatory agencies, such as the Securities and Exchange Commission (SEC), the Commodities and Futures Trading Commission (CFTC), and the Federal Reserve (FED). In the course of its investigations, the Department routinely seeks and obtains waivers to inform regulatory agencies of matters within their purview, share statutorily protected information with other regulatory agencies, and solicit their views on the matters before the Department.[29] Sensitive to regulatory policy objectives, the Department works to harmonize enforcement of the antitrust laws with other financial regulation.

2.2 Enforcement efforts

2.2.1 Thomson-Reuters

20. In May, 2007, Thomson Corp. and Reuters Group PLC announced plans to merge, combining the second- and third-largest financial data providers in the world. Working closely with the European Commission, the Department investigated the likely effects of the merger in the markets for information used by participants in a variety of financial markets. The Department examined the prospect of vertical integration and the effects the transaction would likely have in two-sided markets, where the parties stood between suppliers and users of different sorts of data.

21. In February, 2008, the Department filed a complaint[30] to block the merger, together with a proposed consent decree that addressed the Department's competition concerns by requiring the divestiture of assets in three financial data markets: fundamentals data (basic data reflecting public companies' financial performance); estimates data (aggregate data reflecting analysts' expectations for the performance of public companies); and aftermarket research reports (comprising analyst research about particular public companies). The decree was entered on June 17, 2008, and the fundamentals divestiture assets were sold to FactSet while the estimates and aftermarket research divestiture assets were sold to Standard & Poor's.

2.2.2 Spider Options

22. Prior to 2005, no exchange listed options on the very popular exchange traded fund (ETF) tied to the Standard & Poor's (S&P) 500 index (Spiders). An exchange traded fund is an investment vehicle traded on stock exchanges, much like stocks. An ETF holds assets such as stocks or bonds and trades at approximately the same price as the net asset value of its underlying assets, usually an index, over the course of the trading day. The absence of options on the Spider ETF was unusual, in light of the large volume of trading in Spiders for which Spider options would be an attractive hedge. On several occasions in the 1990s various parties asked the SEC to address the question of whether index creators have intellectual property rights in their indices that would permit them to limit or proscribe the listing of options on Spiders and similar financial instruments. The SEC declined to address the issue.

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[29] Absent waivers, confidentiality restrictions of the Hart-Scott-Rodino Antitrust Improvements Act and the Antitrust Civil Process Act would prohibit the Department from sharing with another agency information obtained in an investigation.

[30] *United States v. Thomson Corp.* (D.D.C. 2008); complaint: http://www.usdoj.gov/atr/cases/f230200/230281 htm; final judgment: http://www.usdoj.gov/atr/cases/f234200/234243 htm.

23. In 2004, the Department opened an investigation into the absence of Spider options. Shortly thereafter, in January, 2005, the Options Clearing Corporation decided to act as a guarantor of Spider options for the International Securities Exchange and agreements between S&P and certain options exchanges to maintain the status quo with respect to Spider options were abrogated. Within a few days, every options exchange was listing Spider options, which quickly became one of the most actively traded options of any kind in the market. With the multiple listing of Spider options, the Department was able to close its investigation.

2.2.3 Options

24. The Options case[31] involved an agreement among the four options exchanges not to list option contracts listed on any other exchange, but for a brief one-day window when the option was first listed for trading. The agreement frustrated a 1990 SEC decision to encourage options trading on multiple exchanges because of the benefits to investors of exchange competition, specifically, narrower spreads. In the course of authorized implementation negotiations, and unbeknownst to the SEC, the exchanges agreed to procedures designed to effectively frustrate the SEC's policy objectives.

25. The Department opened an investigation after hearing stories of the "gentleman's agreement" regarding multiple listing. The Department brought the matter to the attention of the SEC, which also opened an investigation. Soon thereafter, the gentlemen's agreement broke down, resulting in the widespread multiple listing of almost all equity options.

26. The Department and SEC shared evidence and collaborated in designing relief. Both agencies eventually and simultaneously reached a settlement with the exchanges, with the Department's lawsuit and SEC's action against the exchanges made explicitly interdependent. Through active cooperation on the part of the agencies, the SEC instituted major regulatory changes that substantially reduced the cost to investors to trade equity options. The consent decree accepted by the options exchanges and approved by the court, in addition to precluding any agreement constraining an exchange's freedom to list options, required structural changes in the markets to eliminate the mechanisms the exchanges used to enforce their agreements.

2.2.4 Nasdaq. U.S. v. Alex Brown & Sons[32]

27. It involved a quoting convention among Nasdaq[33] dealers which had the effect of maintaining dealer spreads for retail trades in many important Nasdaq stocks at 25 cents a share, or a quarter-point. The quoting convention was an agreement among the dealers on the Nasdaq exchange to quote their bid and asking price for important stocks at quarter-point intervals. Dealers who broke the convention by quoting in intervals smaller than a quarter-point (such as one-eighth point) were harassed and boycotted until they changed their quotes to conform to the convention. As a result of this agreement, the difference between the best dealer's bid price and the lowest asking price (also known as the "spread") was at least one-quarter of a point. Absent the "convention" many of the stocks would have traded at much smaller spreads, which would have led to decreased dealer profits. Tapes of dealer conversations also revealed

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31 *U.S. v. American Stock Exchange, LLP* (D.D.C. 2000); complaint: http://www.usdoj.gov/atr/cases/f6400/6468 htm; final judgment: http://www.usdoj.gov/atr/cases/f201200/201201 htm.

32 *U.S. v. Alex Brown & Sons, Inc.* (S.D.N.Y. 1996); complaint: http://www.usdoj.gov/atr/cases/f0700/0740 htm; order: http://www.usdoj.gov/atr/cases/f0700/0741 htm; *see also* 963 F.Supp. 235 (S.D.N.Y. 1997), aff'd 153 F.3d 16 (2d Cir. 1998).

33 Nasdaq is an electronic venue for trading stocks, where dealers post prices at which they are willing to buy and sell.

hundreds of instances when a few dealers conspired to manipulate trading in particular stocks for brief periods of time. This anticompetitive conduct occurred despite active, intensive regulation by the SEC and ongoing oversight by the National Association of Securities Dealers (NASD) in its quasi-governmental role. The NASD is a self-regulatory organization responsible for regulation of all securities firms that do business with the public and of The NASDAQ Stock Market, Inc. The NASD's rules and actions are subject to review by the SEC.

28. The Department was prompted to investigate this matter by the May 1994 publication of an academic research paper on the Nasdaq markets. The study identified unusual quoting behavior and asserted that the only plausible explanation for the pattern was dealer collusion. The Department's case resulted in a consent decree that, in addition to prohibiting similar conduct in the future, put in place antitrust compliance and monitoring practices that acted to deter any repetition of the conduct. In addition, information gathered by the Department persuaded the SEC that anticompetitive conduct was occurring, leading to enforcement action against the NASD, numerous dealer firms, and individuals for securities law violations. More importantly, the SEC initiated a rulemaking proceeding to change order-handling practices that facilitated the misconduct. The Department filed comments relating to the likely impact of proposed changes on the competitiveness of the market, given the conduct it had uncovered. The rule changes adopted by the SEC dramatically changed the market structure and, combined with the end of the convention, resulted in annual reductions in equity trading costs of tens of billions of dollars.

2.2.5 Salomon & Steinhardt Short Squeeze Investigations

29. The Department's *Salomon* and *Steinhardt-Caxton* investigations[34] involved conspiracies between dealers and hedge funds to coordinate their trading in specific U.S. Treasury notes in order to limit the supply of those notes in the secondary trading market and the availability of those notes for use in the lending market. Despite the regulation of the markets by both the SEC and the Federal Reserve, both sets of conspirators significantly affected trading in the instruments.

30. The Department assumed a leading role in the investigations because of its early effort and success at uncovering the conduct. To the extent permitted by confidentiality requirements, the Department shared information obtained from the parties with the SEC and the Federal Reserve and facilitated their investigations, through the U.S. Attorney for the Southern District of New York, of the same conduct. There were particular advantages in pursuing the conduct in question as an antitrust violation. For example, while the conduct raised novel issues under the securities laws, it easily was defined under the antitrust laws as an agreement adversely affecting competition and was thus a more straightforward case than it might have been as a regulatory matter. Also, the antitrust laws permitted remedies that more fully compensated injured parties. In the *Salomon* matter, pursuant to the asset forfeiture provision of the Clayton Act, $55 million was paid to the U.S. Treasury. The consent decrees entered in these matters resolved the concerns of all the government agencies with interest in the conduct.

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34 *U.S. v. Steinhardt Management Company, Inc.*, (S.D.N.Y. 1994); complaint: http://www.usdoj.gov/atr/cases/f0800/0823 htm; final judgment: http://www.usdoj.gov/atr/cases/f0800/0821 htm; *United States of America Against Certain Property Owned by Salomon Bothers, Inc.*, 57 Fed. Reg. 29743 (D.O.J. 1992).

2.3 Competition advocacy efforts

2.3.1 Treasury Comment

31. On January 31, 2008, the Department submitted a comment[35] to the Department of the Treasury in furtherance of Treasury's review of the competitiveness of United States capital markets. The comment was prepared to assist Treasury in its evaluation of the different regulatory structures overseeing securities and futures products, the intermediaries that trade them, and the exchanges on which they are traded. The Department recommended that Treasury carefully review whether the current regulatory structure for interest rate futures transactions could be improved in a manner that would facilitate entry by new exchanges, allowing more vigorous competition. More specifically, the Department stated that the control exercised by futures exchanges over clearing services – both where positions in a futures contract are held ("open interest") and where positions may be treated as fungible or offset with positions held in contracts traded on other exchanges ("margin offsets") – have made it difficult for exchanges to enter and compete in the trading of financial futures contracts. The Department suggested that if greater head-to-head competition for the exchange of futures contracts could develop, greater innovation in exchange systems, lower trading fees, reduced tick size, and tighter spreads, all leading to increased trading volume, would likely follow.

32. The Department's position was informed by its previous reviews of mergers of equity exchanges, options exchanges and futures exchanges. In particular, six months prior to submitting its comments to Treasury, the Department had declined to challenge the merger of the Chicago Merchantile Exchange (CME) and the Chicago Board of Trade (CBOT), two of the largest future exchanges in the United States, after an extensive investigation.[36] Prior to the merger, while the exchanges operated separately as venues for trading different financial products, the CME's clearinghouse already cleared all of the trades on both exchanges. By clearing almost all financial futures trades in the United States, CME's customers received the benefits of network effects in clearing. Specifically, CME was able to recognize offsetting positions futures traders held in specific futures contracts, or offsetting positions in contracts with a high risk correlation, thereby minimizing the trader's margin obligation, *i.e.*, the collateral that the trader had to deposit to cover credit risk. The Department's determination that the transaction would not have anticompetitive effects was based, in part, on its conclusions that the products offered by CME and those offered by CBOT were not close substitutes and that neither firm was likely to introduce products directly competitive with the other's established products. However, the Department also concluded that entry into futures markets is difficult, as reflected by various failed efforts by well established exchanges with substantial resources. In the context of the CME/CBOT investigation, the Department did not address the separate issue of whether the regulatory structure could be improved in a manner that would facilitate entry, or whether current regulatory policy may render such entry more difficult than necessary, because of regulatory approvals of the current structure. As described above, those issues were instead addressed in the Department's comments to Treasury.

2.3.2 NRSRO Comments

33. In March 1998, the Department filed a comment with the SEC in the context of SEC rule changes, then under consideration, to help ensure that securities ratings were credible and accurate.[37] Securities ratings are issued by Nationally Recognized Statistical Ratings Organizations (NRSROs), effectively the only firms that can issue securities ratings for many uses in the United States. The

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35 *See* http://www.usdoj.gov/atr/public/comments/229911.htm.

36 *See* www.usdoj.gov/opa/pr/2007/June/07_at_422.html.

37 *See* www.usdoj.gov/atr/public/press_releases/1998/212587.htm.

Department urged the SEC to modify its proposed rules for securities ratings agencies so that new rating agencies could more easily enter the market, thereby increasing competition. For example, one provision in the proposed rules would have required a ratings agency to be recognized as an issuer of credible and reliable ratings by the predominant users of ratings in the United States before being recognized as a NRSRO. The Department was concerned that this provision could protect incumbent firms from additional competition and could prevent well-capitalized firms with reputations for quality financial analysis from entering the market. The Department also recommended that the SEC require ratings agencies, when providing ratings of securities offerings that were not requested by the issuer of the securities, to disclose that fact. The recommendation reflected a concern that certain NRSROs had issued unsolicited ratings to punish issuers for not utilizing their services. The later enactment of the Credit Rating Agency Reform Act of 2006, 15 U.S.C.A. § 78o-7 (2006), included many of the reforms recommended in the Department's 1998 comment letter.