DEPARTMENT OF JUSTICE

"Changes in Latitudes, Changes in Attitudes"*: Enforcement Cooperation in Financial Markets

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"A Discussion on Equity Market Structure"
MIT Golub Center for Finance and Policy

Washington, DC

June 22, 2020

Good afternoon. Thank you for hosting this discussion today. I'm pleased that we were able to reschedule this event, which was originally scheduled for April and at MIT, and that we now have the opportunity to engage in this important conversation. I am even more pleased to be joined today by my esteemed friends at the SEC, Chairman Jay Clayton and Director of the Division of Trading and Markets, Brett Redfearn.

The connection between the Antitrust Division and the SEC goes back many decades, at least as far as former Assistant Attorney General for the Antitrust Division Robert Jackson. One of my legal heroes, Jackson served as Special Counsel to the SEC before he joined the Department of Justice and then went on to a distinguished Supreme Court career.

Justice Jackson said something about the need for small government that makes me think of Jay. Jackson said that "I want to confine government activity to its narrowest limits because good administrators are so rare."[1] Chairman Clayton has proven himself that rare exception. We aspire to small government in part because leaders as talented and thoughtful as Chairman Clayton are so hard to come by. That has been borne out by Jay's exceptional performance as Chairman of the SEC over the last three years. During that time, he has led a number of important initiatives to ensure that securities and exchange markets continue to function fairly, properly and for the benefit of the public. In particular, he has spearheaded efforts to modernize regulation and oversight, focusing on transparency, leading to greater ability of the SEC to monitor markets in today's environment. As I will discuss in a moment, these efforts are critical to fostering a culture of competition in markets, a culture that leads to the consumer welfare benefits that competition provides.

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* Jimmy Buffet, *Changes in Latitudes, Changes in Attitudes* (ABC, 1977).

[1] Robert H. Jackson, Assistant U.S. Attorney General, The Philosophy of Big Business, before the American Political Science Association, Philadelphia, PA (Dec. 29, 1937), https://www.roberthjackson.org/wp-content/uploads/2015/01/Philosophy_of_Big_Busines.pdf.

Brett has proven a similarly valuable public servant in his service as the Director of the Division of Trading and Markets since October 2017. His expertise and background has been instrumental to the Commission's efforts to modernize its regulations and analyses. He has focused on how technological developments are altering patterns and behavior across the markets, and on how the Commission can best respond to ensure these developments remain positive.

Again, I'm very pleased to be here today to discuss the importance of competition and to hear more from Jay and Brett about their recent efforts to make securities and exchange markets more competitive.

Over the past few years, I have had the great privilege to work closely with Jay, Brett, and the dedicated SEC staff to bolster our respective agencies' missions and to further our separate but shared goals. While our agencies have different statutory mandates, we are aligned in that we primarily endeavor to ensure that the markets within our jurisdictions function efficiently and properly.

This is by no means an easy task. As our institutions have learned over decades—and as we have observed firsthand as enforcers—there are many complications that arise, forcing us to tackle thorny questions of how best to vindicate our laws on behalf of the public. Justice Jackson certainly recognized as much with respect to the antitrust laws. He explained to President Roosevelt that the antitrust laws "were as general as the ten commandments and about as well obeyed."[2]

[2] R. Hewitt Pate, Robert H. Jackson at the Antitrust Division, 68 Alb. L. Rev. 787, 795 (2005) (quoting Robert H. Jackson, Draft Autobiography 129 (Box 190, June-July 1944) (on file in the Robert H. Jackson Papers, Library of Congress, Manuscript Division)).

We face several challenges to achieving these goals today. Markets and data move more quickly now than ever before. To enforce our laws effectively, we likewise need to move quickly to monitor industry developments, to assess their effects, and to understand when intervention is required—and just as importantly, when it is not.

I'd like to begin today by discussing the importance of competition in promoting healthy markets.

Protecting competition is fundamental to the Antitrust Division's mission, guiding our analyses, decisions, and enforcement actions. It is similarly an important component of the SEC's mandate because competition offers numerous consumer benefits regardless of the underlying market. A regulatory scheme that omits competition considerations is likely to leave, as they say, money on the table, and consumers disadvantaged.

The great economist Friedrich Hayek recognized as much when he explained the importance of the price system of free markets as a mechanism for communicating disaggregated information.[3] He explained that "the ultimate decisions must be left to the people who are familiar with the[] circumstances."[4]

This reality underscores the importance of the SEC's recent efforts to review how various securities and exchange markets (and their corresponding services markets) are functioning today and, where there are flaws, to develop solutions that incorporate principles of competition. These retrospective assessments of the financial market structure also highlight the synergies that can arise from the SEC and the Antitrust Division working together more closely.

As an antitrust enforcer, ensuring that markets remain healthy is what I strive to do day in and day out. The Antitrust Division has broad jurisdiction over most industries in the economy.

[3] 6 Friedrich A. Hayek, The Use of Knowledge In Society, 35 AM. ECON. REV. 519, 526-27 (1945).
[4] *Id*. At 524.

What we review at any given time can range from a proposed merger of fintech firms, to conduct by trade associations attempting to establish industry rules or guidelines, to bid rigging schemes compromising public procurement processes, or chickens! In any of these situations, our goal is to safeguard consumers by protecting the competitive process and by ensuring an environment conducive to competition.

The presence and perseverance of competition forces firms to engage in activities that benefit consumers, or they will be driven from the market. These activities include competition on price, on quality, service and, very importantly, on innovation. Firms that fear losing their market position—or that are fighting to enhance their position—are more likely to engage in these activities that benefit consumers. For example, they are more likely to invest in research and development to introduce new products or services better suited to consumer needs, seek out ways to streamline their production processes, enhance the quality of their offerings, and pursue other means of making their products and services more desirable. These effects are evident across industries: competition benefits consumers whether the market at issue is health insurance, air travel, or securities.

This is one of the many reasons why the SEC's work to modernize its regulations is so valuable. The SEC has been listening to concerns from market participants regarding inflection points where competition may be absent or diminished today. In response, the SEC has engaged in rigorous reviews of these concerns and the industries at issue in order to ascertain whether the much-needed competition is, in fact, lacking and to craft a more viable path forward where one is needed.

These efforts have led to a few of recent rulemaking actions that the Division has had the opportunity to comment on publicly. The proposed rule most directly relevant to our discussion

today is entitled *Market Data Infrastructure*, also commonly known as the "Market Data Proposal."[5] The Market Data Proposal is designed to enhance the current market data infrastructure by reducing the existing disparity in content and latency between market data consolidated by securities information processors, referred to as SIP Data, and exchange-specific Prop Data products. Since the rules for the content and distribution of SIP Data were initially implemented in the late 1970s, technological progress and other innovations in the financial services industry have contributed to a shifting competitive landscape, altering the needs of industry participants. The SEC has identified, for instance, an increased need for more granular market information offered via lower-latency feeds—needs which are underserved by today's SIP Data.

The Antitrust Division, in its public comments on the Market Data Proposal, commended the SEC's efforts to address potential shortcomings and to improve the regulatory system through modernization and the explicit introduction of competition. The Division often reviews regulatory rules of other agencies and provides its analysis as to the competitive effects. This is done as part of our competition advocacy function. The Market Data Proposal contemplates changes intended to lower the barriers to market entry—which can impair competition by protecting incumbents from new rivals—by enhancing the granularity, reducing latency, and improving the dissemination of market data.

Reducing entry barriers and improving the quality of and access to inputs, such as information, are classic means of enhancing competition. A regime that incorporates these concerns, among others, helps advance consumer welfare.

[5] Market Data Infrastructure, 85 Fed. Reg. 16,726 (Mar. 24, 2020) (to be codified at 17 C.F.R. pt. 242).

The Antitrust Division also commented on the procompetitive effects of the SEC's proposed rule, *Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice*, also commonly known as the "Proxy Rules Proposal."[6] As the Commission explains, this proposal is designed to "help ensure that investors who use proxy voting advice receive more accurate, transparent, and complete information on which to make their voting decisions." This proposed rule is likewise designed to update regulations to better fit the modern landscape and to lead to healthier competition.

These issues are not entirely new. When Justice Jackson was Assistant Attorney General, he expressed his concern for situations where "competition has been virtually eliminated by . . . the clever corporate politician with a pocket full of proxies . . ."[7] While the details of the markets have changed, the point that competition in corporate governance drives competition in the markets remains relevant.

The Division's comment on the Proxy Rules Proposal explained that competition is well-served when consumers have better access to better information. The comment also cautioned that introducing or increasing regulatory burdens can impair competition by increasing costs which, in turn, can disproportionately affect smaller firms or reduce the likelihood of new entry. Examining these kinds of tradeoffs is critical to crafting regulations that successfully promote competition. I am pleased to see that the Commission deliberately has included such analysis in its rulemakings, including the Market Data and Proxy Rules Proposals, and am grateful the Commission has been receptive to the Division's comments in its process. I think we both

[6] Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice, 84 Fed. Reg. 66518 (Dec. 4, 2019) (to be codified at 17 C.F.R. pt. 240).
[7] Jackson, s*upra* note 1.

subscribe to the belief that this exchange of ideas helps lead to better outcomes for American consumers and the markets.

Efforts of this kind, that keep regulations updated and relevant, are paramount. A necessary condition to fostering competition is keeping pace with market developments and responding in a timely manner to changes in the market, both positive and negative. Often, this means ensuring that the rules and regulations governing the underlying market are working in conjunction with competitive forces, not against them.

At the Antitrust Division, we have experienced this need firsthand. It arises across our spectrum of cases, from merger reviews to conduct investigations and litigation, and is relevant even to our settlements. The rapid pace at which many industries move affects how we craft settlements today to ensure their ongoing viability wherever possible. It also is the motivation behind an initiative we announced two years ago, our Judgment Termination Initiative, involving the review of close to 1300 "legacy" judgments, many dating back over 70 years, that remain on the books and unchanged for decades despite material changes to the competitive landscape brought upon by technological developments.

Through this initiative, the Division has been systematically reviewing all settlements, analyzing how they affect markets today, and terminating or modifying them as appropriate. Since I first announced the program in the spring of 2018, courts have terminated nearly 800 such legacy judgments. What this initiative highlights is that regulations that may have fostered competition effectively decades ago may not be doing so today. The state of technology has changed and, as a result, market forces may have shifted such that regulations that once worked no longer do—and worse, actually may be distorting competition in undesirable ways.

The SEC's recent rulemakings are, similarly, the result of revisiting and updating older, obsolete regulations, and they play an equally important role in halting any such distortions.

More and more frequently, the industries we review are shifting and evolving at a heightened pace. This makes frequent reviews and close monitoring more important than ever. If we don't, we risk the regulations themselves preventing effective competition and ultimately hurting consumers. While efforts to stay ahead of evolving industries, including the financial markets, may be challenging, these challenges are by no means novel. Complicated, sophisticated industries require rigorous analysis. Fortunately for consumers, the Division and the SEC have decades of experience conducting exactly this type of analysis.

The Antitrust Division, for instance, has investigated and prosecuted collusion in the markets for foreign currency exchange, interest rate benchmarks, and municipal bonds.

In the foreign exchange or "FX" investigation, banks and individuals were charged for coordinating their currency trades to manipulate benchmark exchange rates to increase their profits. They were also charged for agreeing to withhold bids or offers to avoid moving the exchange rate in a direction adverse to open positions held by their co-conspirators.

This investigation led to a number of pleas, fines, and a conviction. Five major banks entered into guilty pleas, two former traders also entered into guilty pleas, and another trader was convicted late last year.

Together with our other law enforcement partners, the Antitrust Division also prosecuted banks and traders for their participation in a scheme to manipulate the London Interbank Offered Rate, also known as the LIBOR rate. The LIBOR rate has been a critical benchmark tied to trillions of dollars in derivatives, loans, mortgages and other financial products. The LIBOR investigation resulted in six corporate convictions of banks and eight individual convictions.

In the municipal bonds investigation, the Division worked closely with the SEC—which also brought its own actions. The Antitrust Division's investigation resulted in one financial services firm and seventeen individuals being convicted, as well as restitution, penalties, and disgorgement from four other financial institutions that entered into non-prosecution agreements.

While the underlying markets in these cases were complex, that complexity was not an impediment to successful prosecution under the federal antitrust laws. Likewise, the complexity of securities and exchange markets has not prevented the SEC from successfully prosecuting violations of securities laws and ensuring that these markets continue to serve the public. Indeed, the SEC's decades-long commitment to understanding and regulating securities markets allows the Commission to navigate these complicated spaces and to keep pace with their evolving landscapes today.

As our discussion today highlights, preserving competition in securities and exchanges markets is critical to realizing consumer benefits. Recognizing this, the Division and the SEC have put a renewed focus on our relationship in recent years, sharing insights and expertise, and identifying opportunities to work together to achieve enhanced outcomes.

To that end, I'm extremely pleased that we are announcing today an important Memorandum of Understanding between the SEC and the Antitrust Division of the Department of Justice. This MOU is the first of its kind, as far as we know, between our agencies and institutionalizes our current strong working relationship. The MOU establishes a regular means of communication by providing for periodic meetings among our agencies' officials that will allow for enhanced sharing of information, insights, and experiences.

The MOU creates a framework for our respective agencies to discuss and review law enforcement and regulatory matters affecting competition in the securities industry. We expect

this MOU will lead to even more robust, comprehensive analyses incorporating both competition and securities laws concerns. I look forward to participating in this ongoing relationship, which I am confident will result in stronger, healthier markets to the benefit of American consumers and Entrepreneurs.

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Let me finish where I started, with the importance of the free markets. When the Antitrust Division works with industry regulators, we may sound like a broken record in promoting competition. But it's just that important, and just that pervasive in its value.

Milton Friedman articulated it well. Remarking on the education system late in his life, he explained: "The only solution is the same solution as we found everywhere else—which is competition. The essence of an effective television industry, an effective telephone industry, an effective computer industry, or an effective mail delivery industry—you name it—is competition."[8] I believe that's true, as well, for the securities industry.

Thank you to MIT and to Chairman Clayton for the opportunity to be with you today.

[8] George A. Clowes, *The Only Solution is Competition: An Exclusive Interview with Milton Friedman*, Heartland (Dec. 1, 1998), https://www.heartland.org/news-opinion/news/the-only-solution-is-competition-an-exclusive-interview-with-milton-friedman?source=policybot (quoting Friedman).