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## **SEC and DOJ Antitrust Division to Increase Collaboration on Rulemaking and Investigations: Pepper Hamilton**

On June 22, the Department of Justice Antitrust Division (the Division) and the Securities and Exchange Commission (SEC) announced a first-of-its-kind Memorandum of Understanding (MOU) between the two agencies. The MOU was announced by Assistant Attorney General Makan Delrahim during “A Discussion on Equity Market Structure,” hosted by the MIT Golub Center for Finance and Policy.<sup>1</sup> SEC Chairman Jay Clayton was also in attendance.

While the MOU itself has not been released, AAG Delrahim explained that the MOU establishes a framework for the Division and the SEC “to continue regular discussions and review law enforcement and regulatory matters affecting competition in the securities industry, including provisions to establish periodic meetings among the respective agencies’ officials.” The MOU also “provides for the exchange of information and expertise the agencies believe to be potentially relevant and useful to their oversight and enforcement responsibilities, as appropriate and consistent with applicable legal and confidentiality restrictions.”

### **Increased Collaboration on Rulemaking**

AAG Delrahim detailed recent work undertaken by both the SEC and the Division to bring enforcement efforts up to date. The SEC has primarily been focused on rulemaking activity, with a specific eye toward market data infrastructure and proxy voting rules. The first proposed rule, titled “Market Data Infrastructure” (commonly known as the “Market Data Proposal”), focuses on securities information processors, referred to as SIP Data, and exchange-specific Prop Data products. The rules governing content and distribution of SIP Data were implemented in the late 1970s, and technological changes have led to a shifting competitive landscape. The Division submitted a public comment on the Market Data Proposal, praising the SEC’s efforts to “address potential shortcomings and to improve the regulatory system through modernization and the explicit introduction of competition.” The Division concluded that the Market Data Proposal would lower the barriers to market entry, thus enhancing competition in the market.

The second rule AAG Delrahim highlighted is titled “Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice” (commonly known as the “Proxy Rules Proposal”). The goal of this proposed rule, according to the SEC, is to “help ensure that investors who use their proxy voting advice receive more accurate, transparent, and complete information on which to make their voting decisions.” Again, the Division submitted a public comment in support of the SEC’s proposed rule and noted that “competition is well-served when consumers have better access to better information.”

AAG Delrahim then addressed the Division’s own efforts to keep regulations updated and relevant. He pointed to the 2018 launch of the Judgment Termination Initiative, which involves the review of close to 1,300 legacy judgments dating back nearly 70 years that “remain on the books unchanged for decades despite material changes to the competitive landscape brought upon by technological developments.” The Division has been reviewing these settlements and either terminating or

modifying them as appropriate. To date, courts have terminated nearly 800 legacy judgments.

While specific details are lacking, it appears that the MOU will formalize regular meetings at which the Division and the SEC will continue to identify regulations and legacy judgments that, because of technological advances and the passage of time, are ripe for an update. The formalization of their partnership may lead to an increase in activity from both agencies in this arena.

### **Closer Coordination in Investigations**

AAG Delrahim also noted that the exchange of information and expertise between the agencies allowed for enforcement actions in complex markets, and he specifically pointed to recent investigations in the markets for foreign currency exchange, interest rate benchmarks, and municipal bonds. In the foreign exchange 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.” Five major banks entered guilty pleas, two former traders also pleaded guilty, and another trader was convicted as a result of this investigation. The Division also prosecuted both banks and traders in connection with a scheme to manipulate the London Interbank Offered Rate (LIBOR). The LIBOR investigation resulted in six corporate convictions of banks and eight individual convictions. Finally, in the municipal bonds investigation, the Division worked closely with the SEC to convict one financial services firm and 17 individuals. The SEC brought its own civil actions as a result of this investigation.

AAG Delrahim’s focus on these complicated finance-related investigations in connection with this announcement portends even closer cooperation through the MOU between the Division and the SEC to prosecute bad actors in this industry. Indeed, shortly after these remarks, The Wall Street Journal reported that the MOU may lead to antitrust scrutiny of the fees charged by stock exchanges for market data.<sup>2</sup> Chairman Clayton specifically noted that “many Wall Street firms had complained about the cost of data” and that the Division “could help the SEC determine whether exchanges’ data fees are subject to competition.”

### **Takeaways**

While the agencies have not provided specific details on what the future holds, AAG Delrahim’s comments on the recent cooperation between the Division and the SEC provide several clues for what lies ahead:

- Expect both the Division and the SEC to continue to evaluate rules and regulations that may be outdated due to technological advances and shifting competitive landscapes.
- Both the Division, through the Judgment Termination Initiative, and the SEC, through the Market Data Proposal, have shown a willingness to respond to industry concerns as it relates to updating regulations. The Market Data Proposal appears to have its origins in complaints from Wall Street firms. If there are specific regulations you believe may be in need of updating, consider proactively reaching out to the agencies.
- Both agencies appear ready to share information more frequently, increasing the likelihood of investigations, particularly in the financial services markets.
- Given the increased cooperation, expect to see more parallel investigations from the Division and the SEC.

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### **Endnotes**

1 "Changes in Latitudes, Changes in Attitudes," Enforcement Cooperation in Financial Markets, Makan Delrahim, June 22, 2020, <https://www.justice.gov/opa/press-release/file/1287716/download>.

2 Dave Michaels & Alexadner Osipovich, "SEC, Justice Department to Scrutinize Exchanges' Market-Data Business," The Wall Street Journal, June 22, 2020, <https://www.wsj.com/articles/sec-justice-department-to-scrutinize-exchanges-market-data-business-11592864481>.

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