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SEC and DOJ Sign Memorandum of Understanding: Sidley

On June 22, the SEC and the DOJ Antitrust Division signed a [Memorandum of Understanding](#) (MOU) to foster cooperation and communication with respect to promoting competitive conditions in the securities industry.¹ Although the two enforcement agencies have worked together in recent years in relation to their respective enforcement responsibilities, this MOU is intended to foster even greater collaboration around law enforcement and regulatory matters.

SEC Chairman Jay Clayton and Antitrust Division Assistant Attorney General (AAG) Makan Delrahim announced the MOU at a conference hosted by MIT's Golub Center for Finance and Policy the day it was signed. AAG Delrahim's prepared remarks noted that the MOU contains two key provisions to facilitate interagency cooperation.² First, the MOU establishes a twice-annual meeting between the SEC and the Antitrust Division, which will involve discussions and reviews of law enforcement and regulatory matters affecting competition in the securities industry. Second, it establishes guidelines facilitating the exchange of relevant and useful information—including nonpublic legal, economic and technical analyses. The MOU does not identify the subject matters that are likely to see increased interagency attention, but at a minimum, we expect that the agencies' joint efforts in the recent LIBOR and municipal bonds investigations will inform the path forward.

The MOU is noteworthy given that the two agencies have not always coordinated on areas of shared interest. For example, in the *Credit Suisse v. Billing* decision in 2007, the Supreme Court noted that the SEC and the Antitrust Division took conflicting positions in lower courts regarding whether antitrust laws applied to certain allegedly anticompetitive conduct in the securities markets.³ The MOU appears aimed in part at avoiding this type of conflict when possible.

Since *Credit Suisse*, the agencies have increasingly cooperated in investigations of shared interest. A notable example is the collaboration on cases involving manipulation of LIBOR and other interest-rate benchmarks, which focused on brokers and traders who allegedly profited by colluding to manipulate the benchmark interest rates. AAG Delrahim spoke at an event late last year and expressly acknowledged the efficiencies from interagency cooperation during these investigations, including the coordination of interview requests and document demands, and echoed these sentiments in his remarks last Monday.⁴

In addition, the agencies have recently worked together on the municipal bonds (munibonds) investigations. The munibonds investigations focused on alleged conspiracies to rig the bidding process on munibond investment contracts, and during Monday's conference, AAG Delrahim noted that the Antitrust Division "worked closely with the SEC [during the investigations] — which also brought its own actions."⁵

At the MIT conference, Chairman Clayton provided additional guidance as to the likely areas of future collaboration. For example, he highlighted both agencies' recent efforts to improve the SEC rules governing access to market data—i.e., data that historically has been disseminated by one market-data consolidator (or aggregator), known as the SIP. The SEC recently proposed a rule that seeks to displace the SIP model with a model that improves competition by "(1) accommodat[ing] multiple competing consolidators, and (2) ... allow[ing] firms to process, or 'self-aggregate,' ...

market data feeds, in a way that is similar and consistent with the way in which firms self-aggregate proprietary data feeds today.”⁶ DOJ submitted a comment letter in support of the SEC’s proposed rule, commending the agency for seeking to introduce “greater competition and market forces into the collection, consolidation, and dissemination of market data for equities.”⁷ Chairman Clayton also noted that the new MOU could help the SEC benefit from the Antitrust Division’s views on theories of competitive harm as it works to determine whether the fees charged by exchanges for access to data are fair and reasonable.

In addition to these areas of potential collaboration, we expect that the MOU could further enhance collaborative efforts between the SEC and the Antitrust Division in the following areas:

- fraud in the merger and acquisition context, especially related to disclosures
- price-fixing conspiracies in a variety of financial contexts, including real estate, municipal securities and foreign currency exchange rates
- the role and conduct of exchanges and other trading venues
- the nature of certain fees charged by participants within the financial industry, including mutual fund advisory fees and hedge fund fees
- improving retail investors’ access to information about equities and equity derivatives traded in the OTC markets

There is little doubt that meetings between the agencies to discuss their respective enforcement dockets will result in new investigations by both agencies. Accordingly, companies and financial services firms should be mindful of the potential for additional investigations when dealing with either of these agencies and assess the potential for follow-on or parallel investigations.

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