

June 29, 2020

DOJ/SEC to Cooperate on Enforcement Matters

Antitrust Division and SEC Execute Memorandum of Understanding to Coordinate Efforts to Increase Competition in Securities Industry

SUMMARY

On June 22, 2020, the Department of Justice's Antitrust Division ("DOJ") and the Securities and Exchange Commission ("SEC") announced that they have executed an interagency Memorandum of Understanding ("MOU") to better coordinate their efforts to increase competition in the securities industry.¹ Although the DOJ and SEC previously have worked together on matters affecting competition in particular industry segments, the MOU represents the first time the two agencies have formalized regular communications designed to enhance their enforcement and regulatory actions. Coming on the heels of the SEC's increased focus on access to securities market data and the DOJ's high-profile investigations of large technology firms, the MOU may signal that both agencies will be increasing their scrutiny of market structure and information access in the securities business.

DOJ/SEC COOPERATION AND THE MOU

In public remarks announcing the MOU, the Assistant Attorney General in charge of the DOJ's Antitrust Division, Makan Delrahim, noted that the U.S. antitrust laws and the SEC's regulatory purposes "are aligned" in the sense that both agencies seek to ensure that securities markets "function efficiently and properly."² AAG Delrahim cited the DOJ's investigations of foreign currency exchange, interest rate benchmarks and municipal bonds as instances where cooperation with the SEC enhanced the DOJ's antitrust enforcement efforts notwithstanding the complexity of the underlying financial markets at issue.³ Nevertheless, AAG Delrahim stated that even greater coordination between the DOJ and SEC was needed because "[m]arkets and data move more quickly now than ever before," which means that the agencies

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“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.”⁴

The MOU between the DOJ and SEC seeks to satisfy the need for increased inter-agency cooperation. In particular, the MOU establishes periodic meetings among DOJ antitrust staff and SEC officials to facilitate the sharing of information of relevance to both agencies’ review of securities markets.⁵ AAG Delrahim emphasized that the MOU “creates a framework for our respective agencies to discuss and review law enforcement and regulatory matters affecting competition in the securities industry.”⁶

The MOU is also notable because it follows closely behind initiatives by both the DOJ and SEC concerning technology and information-intensive businesses. In 2019, the DOJ announced a broad-based antitrust “review of market leading online platforms,” noting that rapid innovations in “browsers, search, social media, and mobile technology” have prompted concerns that these new “platform operators are preventing disruption and preserving dominance” to the detriment of competition.⁷ Then, in February 2020, the SEC unveiled its proposal to modernize the infrastructure for the collection, consolidation and dissemination of market data that securities exchanges are required to make public.⁸ The SEC stated that its so-called “Market Data Proposal” was designed to increase the competitive significance of publicly available data concerning securities transactions by “reducing the current disparity in content and latency between” the public data and “the proprietary data products that some of the individual exchanges sell directly to market participants.”⁹

With both agencies focused on the competitive significance of data-driven businesses, it should not be surprising that the DOJ and SEC would themselves see the benefits of enhanced information sharing. By establishing regular communication between the agencies—as opposed to *ad hoc* coordination in discrete matters—the MOU seeks to increase the speed and effectiveness with which the DOJ and SEC can take action affecting competition in the securities industry. This may, in turn, result in greater scrutiny of securities exchanges and other providers of market-related data.

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ENDNOTES

- ¹ *Justice Department's Antitrust Division And The Securities And Exchange Commission Sign Historic Memorandum Of Understanding* (<https://www.justice.gov/opa/pr/justice-department-s-antitrust-division-and-securities-and-exchange-commission-sign-historic>) (June 22, 2020); *Securities and Exchange Commission and Justice Department's Antitrust Division Sign Historic Memorandum of Understanding* (<https://www.sec.gov/news/press-release/2020-140>) (June 22, 2020).
- ² DOJ Assistant Attorney General for Antitrust Makan Delrahim, *Changes in Latitudes, Changes in Attitudes: Enforcement Cooperation in Financial Markets* (<https://www.justice.gov/opa/press-release/file/1287716/download>) (June 22, 2020).
- ³ *Id.*
- ⁴ *Id.*
- ⁵ *Id.*
- ⁶ *Id.*
- ⁷ Deputy Attorney General Jeffrey A. Rosen Delivers Remarks on the Review of Market-Leading Online Platforms at the American Bar Association's 2019 Antitrust Fall Forum (<https://www.justice.gov/opa/speech/deputy-attorney-general-jeffrey-rosen-delivers-remarks-review-market-leading-online>) (Nov. 18, 2019).
- ⁸ *SEC Proposes to Modernize Key Market Infrastructure Responsible for Collecting, Consolidating, and Disseminating Securities Market Data* (<https://www.sec.gov/news/press-release/2020-34>) (Feb. 14, 2020).
- ⁹ *Id.*

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