Samuel N. Weinstein[1]

Financial Regulation in the (Receding) Shadow of Antitrust

There is widespread concern that a number of U.S. markets have become more concentrated and less competitive in recent years. This development suggests an enhanced role for antitrust enforcement to protect and promote competition in these markets. But there are limits on the anticompetitive conduct antitrust enforcers and private plaintiffs can reach, especially in regulated markets. Two Supreme Court cases from the 2000s, Verizon Communications v. Law Offices of Curtis V. Trinko *and* Credit Suisse v. Billing *appeared to enhance these restrictions, increasing the likelihood that regulation will displace antitrust entirely, especially in the financial sector. As a result, the job of confronting heightened concentration and reduced competition in financial services and other regulated markets may fall to sector regulators. These agencies are unprepared for the task and often are unwilling to undertake it. They have neither the resources nor personnel to enforce competition rules and such enforcement ranks low on their priority list. Competition in the financial markets (and other regulated markets) therefore may suffer. The stakes are high: increased concentration in financial markets harms consumers and may threaten systemic safety. This Article proposes a regulatory-design solution to the problem and focuses on Dodd-Frank's regulatory regime for the derivatives markets as a case-study. It argues that sector regulators should craft structural rules to protect competition in these markets—including ownership and governance restrictions on derivatives clearinghouses and exchanges—rather than solely relying on conduct rules and corrective measures taken ex post. The Article contends that increased reliance on regulatory responses to competition problems in regulated markets may (surprisingly) be beneficial from a competition standpoint and that these salutary effects may be enhanced when the products involved are potentially toxic, as is the case for some derivatives products. These conclusions are applied more broadly to other concentrated regulated markets.*

---

[1] Assistant Professor of Law, Benjamin N. Cardozo School of Law.

Competition is a central tenet of the American economic system. There is evidence, however, that a number of industries have become more concentrated and less competitive in recent years. In May 2016, the White House Council of Economic Advisors released an Issue Brief asserting that "competition appears to be declining in at least part of the economy."[2] President Obama issued an accompanying Executive Order, outlining steps to increase competition.[3] The *Economist* observed in 2016 that, "after a bout of consolidation in the past decade," commercial air travel in the United States "is dominated by four firms with tight financial discipline and many shareholders in common," and "[w]hat is true of the airline industry is increasingly true of America's economy as a whole."[4]

These concerns would suggest an enhanced role for antitrust law and for the antitrust enforcement agencies, which protect competition through merger control, investigations of anticompetitive conduct, and criminal enforcement.[5] There is persuasive evidence that the Federal Trade Commission and the Antitrust Division of the United States Department of Justice indeed have been more active in the past several years.[6] But there are limits on the anticompetitive conduct federal antitrust enforcers (and private plaintiffs) can reach, especially in regulated markets. This is due in part to two Supreme Court decisions in the 2000s that threatened to significantly shift the balance between regulation and antitrust enforcement. In *Verizon Communications v. Law Offices of Curtis V. Trinko* and *Credit Suisse v. Billing* the Court appeared to restrict the reach of antitrust in regulated markets, increasing the likelihood that courts will find that regulation displaces antitrust entirely, especially in the financial sector. A number of scholars raised significant concerns about the effects this shift might have on competition in regulated markets and recommended that courts read *Trinko* and *Credit Suisse* narrowly or otherwise limit their holdings. The antitrust enforcement

---

[2] Council of Economic Advisers Issue Brief, Benefits of Competition and Indicators of Market Power 1 (May 2016), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160414_cea_competition_issue_brief.pdf.

[3] President Barack Obama, Executive Order, Steps to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy (April 15, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/04/15/executive-order-steps-increase-competition-and-better-inform-consumers.

[4] *Too Much of a Good Thing*, THE ECONOMIST (March 26, 2016), https://www.economist.com/news/briefing/21695385-profits-are-too-high-america-needs-giant-dose-competition-too-much-good-thing

[5] While the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice share responsibility for merger enforcement and policing anticompetitive conduct, only the Antitrust Division can bring criminal prosecutions.

[6] *See, e.g.*, Alexei Alexis, *Merger Crackdown Part of 'Mixed' Obama Antitrust Record*, BLOOMBERG LAW, June 1, 2016 ("The Department of Justice challenged an average of about 17 mergers annually during the first six years of the Obama presidency, an increase of about 18 percent over Bush administration levels."); William McConnell, *Obama Administration Most Aggressive Ever in Regulating Mergers and Acquisitions*, THE STREET, April 28, 2016 ("Under President Obama, the FTC, DOJ and other regulatory bodies have challenged and blocked a higher proportion of U.S. deals than ever before."); *but see* Justin Elliott, *The American Way*, PROPUBLICA, Oct. 11, 2016 ("the reversal in the American-US Airways [merger] case was part of what antitrust observers see as a string of disappointing decisions by the Obama administration.")

agencies warned that these cases could reduce or eliminate their ability to protect competition in markets subject to regulation.[7]

Despite these worries, this Article's review of lower court decisions from the decade since *Credit Suisse* was decided shows that *Trinko* and *Credit Suisse* have had a surprisingly limited impact in many regulated markets. While defendants in a range of cases have relied on *Credit Suisse* and *Trinko* to seek antitrust immunity or argue that regulation is sufficient to protect competition, outside the financial sector courts have applied those cases narrowly to preserve antitrust's role. The story is different for cases involving the financial markets, where courts have been more willing to find implied antitrust immunity or that regulation otherwise supplants antitrust. As a result, it appears that the task of confronting heightened concentration and reduced competition in the financial sector increasingly will fall to the sector regulators, especially the U.S. Securities & Exchange Commission ("SEC"), and the U.S. Commodity Futures Trading Commission ("CFTC").

There is reason to believe that these agencies are not particularly effective at protecting competition. There are a number of explanations for this. In most cases, competition is not among the sector regulators' primary missions; many do not have sufficient competition expertise or adequate competition staff; and competition enforcement may clash with other agency priorities, such as preserving systemic soundness. Capture of sector regulators is also a concern and may reduce incentives for agencies to undertake actions against the best interests of bigger firms in regulated markets, including promoting competition from new entrants or smaller players. As a result, competition in financial markets may suffer as antitrust is displaced by regulations enforced by agencies poorly suited to the task of preserving and promoting competitive markets.

Declining competition in financial markets may present serious problems. Concentration in these markets increases the costs of doing financial business. Bid-ask spreads rise as a small group of banks dominates trading. More ominously, systemic soundness may be threatened as the biggest banks increase their market shares in financial products. Big banks may use their market power to create products that evade Dodd-Frank's safety requirements, especially in the derivatives markets. And, to the extent concentration is linked to the types of financial interconnectedness that leads to

---

[7] *See, e.g.*, David L. Meyer, Deputy Ass't Att'y Gen'l, Antitrust Division, U.S. Dept. of Justice, We Should not let the Ongoing Rationalization of Antitrust Lead to the Marginalization of Antitrust, Presented at the George Mason University Law Review 11th Annual Symposium on Antitrust (Oct. 31, 2007) at 17 (describing portion of *Credit Suisse* opinion as "remarkable" in its "implied confidence that, in the fact of some risk of antitrust courts creating false positives, antitrust should yield entirely without regard to the potential that SEC regulation might lead to false negatives from the perspective of competition, and without more of an attempt to hone the antitrust tools to minimize the potential for interference with SEC prerogatives."). Meyer also observed that, while he believed *Trinko* was decided correctly, Justice Scalia's *dicta* on the relationship between antitrust and regulation "arguably suggest a view of antitrust as an inherently costly double-layer of regulation and a drag on free markets rather than as an effective way of preserving them." *Id.* at 15.; The Role of Antitrust in Regulated Industries: Hearing before the H. Comm. on the Judiciary, Subcomm. on Courts & Competition Pol., 111th Cong. 11 (2010) (statement of the Federal Trade Commission by Howard A. Shelanski: Is There Life After *Trinko & Credit Suisse*?) ("the combined effect of *Credit Suisse* and *Trinko* is to make it more difficult than before for either private plaintiffs or public agencies to bring important antitrust cases in regulated sectors of the American economy [and] the heightened concerns about the high costs and questionable benefits of antitrust enforcement in regulated industries that motivate the Court's decisions in *Credit Suisse* and *Trinko* do not apply to public enforcement actions.")

financial contagion, lack of competition enforcement might increase the risk of another financial crisis.

The stakes are high and effective solutions have yet to emerge. Scholars have proposed judicial, legislative, and agency-reform approaches to protecting competition in regulated markets, but none of these methods have proved successful in the financial sector. This Article addresses the problem from a regulatory-design perspective and asks, given *Trinko* and *Credit Suisse*, how Congress and financial sector regulators should structure regulations and rulemakings in light of antitrust's diminished role in regulated markets. The Article focuses on Dodd-Frank's regulatory regime for the derivatives markets as a case study. These markets are among the financial system's largest and most important.[8] Their notional size, which has ranged in recent years from between $500 and $700 trillion dollars, is many times larger than the entire world economy.[9] And these markets continue to grow.[10] They pose both competition issues and significant systemic risks. Commentators have described the derivatives markets as "[t]he greatest risk of all" and "[t]he world's scariest story."[11]

The derivatives markets are widely recognized to have been major contributors to the financial crisis.[12] One of Dodd-Frank's central goals was to ensure that most derivatives transactions are centrally cleared (thereby reducing systemic risk) and traded on exchanges (reducing pricing opacity and promoting competition).[13] The increased significance of derivatives clearinghouses and exchanges in this new regulatory scheme raises the danger that the firms controlling these entities could exclude derivatives-trading rivals who need access to complete their swaps. This Article

---

[8] The notional value of derivatives worldwide was pegged at $684 trillion in mid-2008, while their gross market value ("the cost of replacing all existing" derivatives contracts) was $20.4 trillion. Bank for Int'l Settlements, Monetary and Economic Department, OTC derivatives market activity in the first half of 2008 1 (November 2008). Those figures were $553 trillion and $15.5 trillion in mid-2015. Bank for Int'l Settlements, Statistical Release, OTC Derivatives Statistics at end-June 2015 2 (November 2015). Notional value refers to the face value of the contracts. Gross market value "provides a more meaningful measure of amounts at risk than notional amounts." *Id.* These markets are "immense" and the "growth of derivatives usage over the last two decades has been rapid." Rangarajan K. Sundaram, *Derivatives in Financial Market Development* ii (Feb. 2103), http://pages.stern.nyu.edu/~rsundara/papers/RangarajanSundaramFinal.pdf.

[9] *See e.g.*, Steve Denning, *Big Banks and Derivatives: Why Another Financial Crisis is Inevitable*, FORBES (JAN. 8, 2013), https://www.forbes.com/sites/stevedenning/2013/01/08/five-years-after-the-financial-meltdown-the-water-is-still-full-of-big-sharks/#127b1dd23a41.

[10] *See* Mayra Rodríguez Valladares, *Derivatives Markets Growing Again, with Few New Protections*, NEW YORK TIMES (MAY 13, 2014), https://dealbook.nytimes.com/2014/05/13/derivatives-markets-growing-again-with-few-new-protections/.

[11] Michael Sivy, *Why Derivatives may be the Biggest Risk for the Global Economy*, TIME (MAR. 27, 2013), http://business.time.com/2013/03/27/why-derivatives-may-be-the-biggest-risk-for-the-global-economy/; Denning, *supra* note 9.

[12] *See, e.g.*, Financial Crisis Inquiry Commission, T*he Financial Crisis Inquiry Report* xxiv ("[w]e conclude that over-the-counter derivatives contributed significantly to this crisis"), http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_conclusions.pdf; U.S. Commodity Futures Trading Commission, *Dodd-Frank Act* (derivatives, "which have not previously been regulated in the United States, were at the center of the 2008 financial crisis."), http://www.cftc.gov/LawRegulation/DoddFrankAct/index.htm.

[13] *See, e.g.*, U.S. Commodity Futures Trading Commission, *Dodd-Frank Act* ("standardized derivatives will be moved into central clearinghouses to lower risk in the financial system" and "[i]nstead of trading out of sight of the public, standardized derivatives will be required to be traded on regulated exchanges or swap execution facilities"), http://www.cftc.gov/LawRegulation/DoddFrankAct/index.htm.

argues that sector regulators should craft structural rules to protect and promote competition in the derivatives markets, such as clearinghouse and swap execution facility ("SEF") ownership and governance restrictions, rather than solely relying on conduct rules and corrective measures taken ex post. Dodd-Frank required the CFTC and SEC to adopt rules governing clearinghouses and SEFs, which might include ownership and governance limits on those entities, if the agencies determined that such rules were "necessary or appropriate to improve the governance of, or to mitigate systemic risk, promote competition, or mitigate conflicts of interest in connection with" swap dealers' business with a clearinghouse or SEF.[14] In 2010, the CFTC and SEC issued proposed rules including such ownership and governance limits, but those rules have not been finalized.[15] The Department of Justice subsequently commented on the proposed rules and argued that they should do more to ensure that big banks do not dominate clearinghouses and SEFs. Several financial services firms and their advisors countered that limits on big-bank ownership of clearinghouses and SEFs were unnecessary, would make it difficult to form and govern such entities, and would (perversely) lead to reduced competition in derivatives trading and clearing. Further, they asserted that any concerns about anti-competitive restrictions on access to clearing or exchanges should be assuaged by the conduct restrictions Dodd-Frank placed on clearinghouses and SEFs.

Considering the reduced role of antitrust in financial markets, this Article argues that ownership and governance restrictions on clearinghouses and derivatives trading platforms are an appropriate regulatory-design response to the competitive risks big-bank control of these bottlenecks poses. Such limits should serve to protect competition among derivatives dealers, but also may promote competition among clearinghouses and exchanges. Even if there is room for only one clearinghouse and exchange in each derivatives sector, competition for the market should benefit consumers. The Article explores whether changes to the structure of the financial regulatory agencies are necessary, including creating competition bureaus within these agencies and hiring expert personnel. Further, it contends that increased reliance on regulatory responses to competition problems in regulated markets may (surprisingly) turn out to be beneficial from a competition standpoint, in light of the challenges government and private plaintiffs face in antitrust suits based on refusal to deal or essential facilities claims. The potential salutary effects of a shift toward regulatory responses to competition problems in such markets are enhanced when the products or services in question are potentially toxic, as is the case for some derivatives products. As with markets for tobacco products, the lower prices, increased output, and enhanced innovation that are the sole goals of current antitrust law likely are not the optimal outcomes for the derivatives markets. With structural protections playing the antitrust role in these markets, sector regulators may be better able to focus on reducing output and "innovation" as appropriate, a systemic soundness goal that is much more consistent with these regulators' expertise and priorities. Many of the Article's conclusions regarding the derivatives markets can be applied more broadly to other regulated markets where regulation threatens to displace antitrust.

---

[14] 15 U.S.C. §§ 8323, 8343.

[15] U.S. Commodity Futures Trading Commission, Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities Regarding the Mitigation of Conflicts of Interest, 75. Fed. Reg. 63732; Securities & Exchange Commission, Ownership Limitations and Governance Requirements for Security-Based Swap Clearing Agencies, Security-Based Swap Execution Facilities, and National Securities Exchanges with Respect to Security-Based Swaps under Regulation MC, https://www.sec.gov/rules/proposed/2010/34-63107.pdf.

The Article proceeds in five Parts. Part I addresses the function of antitrust in regulated markets and the impact *Credit Suisse* and *Trinko* have had on that function; Part II details the derivatives markets' role in the financial crisis and Congress's response—Dodd-Frank—and it explores Dodd-Frank's relationship to the antitrust laws; Part III analyzes the sector regulators' ability and willingness to enforce competition rules in the absence of antitrust enforcement; Part IV makes the case for a regulatory-design approach to protecting competition in financial markets, relying on ex ante structural rules with conduct restrictions as a backstop. It argues that a shift toward regulation may turn out to be beneficial for competition in these markets and that competition rules should be different for potentially toxic products, like derivatives; Part V concludes.

I. The Role of Antitrust in Regulated Markets

There is a well-developed body of case law addressing the reach of the antitrust laws in regulated markets. Supreme Court decisions from the 1960s and 1970s stressed that regulation should displace antitrust only rarely. These cases held that antitrust law may not apply in situations where there is a "plain repugnancy" between antitrust and a regulatory regime[16] or where Congress has put in place a "pervasive regulatory scheme for controlling"[17] the conduct in question. In *Trinko* and *Credit Suisse*, the Court appeared to relax its standards for barring antitrust enforcement on the basis of a regulatory scheme. These cases seemed to suggest that antitrust will play a diminished role in regulated markets, especially the financial markets.

A. Decisions Limiting Implied Immunity

In a series of mid-twentieth century cases, the Court found that implied antitrust immunity should be rare. It cautioned in *United States v. Philadelphia National Bank* that "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions."[18] That case addressed whether the Bank Merger Act of 1960, which required the banking agencies to consider competitive factors in approving bank mergers, immunized those transactions from federal antitrust challenges. Rejecting that contention, the Court stated that in passing the Act Congress did not "embrace the view that federal regulation of banking is so comprehensive" that antitrust enforcement "would be either unnecessary, in light of the completeness of the regulatory structure, or disruptive of that structure."[19]

Decided the same year as *Philadelphia National Bank, Silver v. New York Stock Exchange* explored the extent to which the antitrust laws applied to securities exchanges regulated under the Securities and Exchange Act of 1934. Plaintiff Silver operated two securities trading firms, neither of which was a member of the New York Stock Exchange ("NYSE"). To compete in this business, Silver's companies secured direct private telephone wires to securities firms. These firms applied to the NYSE for approval of the connections, receiving temporary approval soon thereafter. Subsequently, without providing Silver notice, the NYSE determined to disapprove the connections and Silver was cut off. Silver received no explanation for the decision from the NYSE. He sued the

[16] Gordon v. New York Stock Exchange, 422 U.S. 659, 682 (1975).
[17] Otter Tail Power Co. v. United States, 410 U.S. 366, 374 (1972).
[18] United States v. Philadelphia National Bank, 374 U.S. 321, 350-51 (1963).
[19] *Id.* at 352.

Exchange under sections 1 and 2 of the Sherman Act and prevailed on these antitrust claims in the district court. The Second Circuit reversed that holding, finding that the NYSE's actions were within its general authority "as defined by the 1934 Act," with the result that its conduct was immune from antitrust attack because it was "exercising a power which it is required to exercise by the" Act.[20]

The issue before the Supreme Court was whether the 1934 Act "created a duty of exchange self-regulation so pervasive as to constitute an implied repealer of our antitrust laws."[21] The Court observed that removing Silver's direct connections to the securities firms would, standing alone, plainly constitute a per se section 1 violation.[22] The "difficult problem" in this case was reconciling "the antitrust aim of eliminating restraints on competition with the effective operation of a public policy contemplating" that securities exchanges' self-regulation may have "anticompetitive effects in general and in specific applications."[23] Because the 1934 Act did not include an express antitrust exemption, the Court concluded that immunity "must be discerned as a matter of implication, and '(i)t is a cardinal principle of construction that repeals by implication are not favored.'"[24] The Court held that "[r]epeal is to be regarded as implied only if necessary to make the" 1934 Act "work, and even then only to the minimum extent necessary."[25] Searching for an "analysis which reconciles the operation of" both the 1934 Act and the antitrust laws, "rather than holding one completely ousted," the Court focused on the Commission's lack of jurisdiction to "review particular instances of enforcement of exchange rules."[26] In its view, this lack of jurisdiction meant "that the question of antitrust exemption does not involve any problem of conflict or coextensiveness of coverage with the agency's regulatory power."[27] Indeed, because the Commission lacked jurisdiction to review the relevant conduct, there was "nothing built into the regulatory scheme which performs the antitrust function of insuring that an exchange will not in some cases apply its rule" to harm competition.[28] The Court reasoned that "particular instances of exchange self-regulation" may "fall within the scope and purposes" of the 1934 Act, thereby providing a defense to an antitrust claim, but denying Silver the connections without explanation or opportunity to contest the decision was not justifiable under the Act.[29]

Other related Supreme Court case law suggests that the antitrust laws may not apply when Congress has put in place a "pervasive regulatory scheme" governing the conduct in question.[30] In *Otter Tail Power Co. v. United States*, the Court found no antitrust immunity where Congress had "rejected a pervasive regulatory scheme for controlling the interstate distribution of power in favor of voluntary commercial relationships."[31] It observed that where commercial relationships "are

---

[20] Silver v. New York Stock Exchange, 373 U.S. 341, 346-47 (1963).
[21] *Id.* at 347.
[22] *Id.*
[23] *Id.* at 349.
[24] *Id.* at 357.
[25] *Id.*
[26] *Id.* at 357.
[27] *Id.* at 358.
[28] *Id.*
[29] *Id.* at 361.
[30] Otter Tail Power Co. v. United States, 410 U.S. 366, 374 (1972).
[31] *Id.*

governed in the first instance by business judgment and not regulatory coercion, courts must be hesitant to override the fundamental national policies embodied in the antitrust laws."[32]

Despite the limits *Philadelphia National Bank, Silver,* and *Otter Tail* placed on implied antitrust immunity, the Supreme Court in a number of subsequent cases found such immunity for certain conduct based on a conflict between the antitrust laws and a regulatory regime.[33] In *Gordon v. New York Stock Exchange*,[34] the Court concluded that the antitrust laws were impliedly repealed as to conduct involving commission rates stock exchanges fixed, because the rates were under the active supervision of the Securities and Exchange Commission, which had approved them at the relevant time. Relying on *Philadelphia National Bank*, the *Gordon* Court cautioned that "[r]epeal of the antitrust laws by implication is not favored and not casually to be allowed. Only where there is a 'plain repugnancy between the antitrust and regulatory provisions' will repeal be implied."[35] Citing *Silver*, the Court further held that implied antitrust immunity should apply only '"if necessary to make the [regulatory scheme] work, and even then only to the minimum extent necessary."'[36] Nonetheless, the *Gordon* court determined that implied repeal was necessary in that case to "make the Exchange Act work as it was intended."[37] It relied on three factors in making this determination: statutory authorization for SEC regulation of the practice in question; a long history of actual SEC regulation; and continued congressional approval of the SEC's regulatory role.[38]

B. *Credit Suisse* and *Trinko* — Tipping the Balance toward Regulation?

In 2007, the Court again applied these *Gordon* factors in analyzing whether implied antitrust immunity extended to certain conduct of underwriters of initial public offerings ("IPOs"). *Credit Suisse Securities v. Billing*[39] involved a putative class action alleging that investment banks had violated the antitrust laws by, among other actions, tying (requiring customers who wanted to participate in attractive technology IPOs also to buy other securities) and laddering (requiring purchasers of IPO securities also to purchase the same securities in the aftermarket at a higher price). The Court announced a four-factor test for finding "sufficient incompatibility" between the securities and antitrust laws "to warrant an implication of preclusion": "(1) the existence of regulatory authority under the securities laws to supervise the activities in question; (2) evidence that the responsible

---

[32] *Id.*

[33] For a detailed discussion of the relationship between regulation and antitrust enforcement and the impact of the *Trinko* and *Credit Suisse* cases on that relationship, *see* Howard A. Shelanski, *The Case for Rebalancing Antitrust and Regulation*, 109 MICH. L. REV. 683 (2011).

[34] 422 U.S. 659 (1975).

[35] *Id.* at 682 (quoting United States v. Philadelphia National Bank, 374 U.S. 321, 350-51 (1963)).

[36] *Id.* at 683 (quoting Silver v. New York Stock Exchange, 373 U.S. 341, 357 (1963)).

[37] *Id.* at 691.

[38] *Id.* at 735. *United States v. National Association of Securities Dealers, Inc.*, 422 U.S. 694 (1975), decided the same day as *Gordon*, held that certain agreements relating to trading in mutual funds, which otherwise would have been per se illegal under the Sherman Act, were immune from antitrust scrutiny due to the SEC's authority under the Investment Company Act of 1940 to permit them. The Court also held that certain other related conduct merited implied immunity from the antitrust laws due to the SEC's "pervasive" regulatory authority over that conduct under the 1940 Act and the Maloney Act. It stated that "maintenance of an antitrust action for activities so directly related to the SEC's responsibilities poses a substantial danger that appellees would be subjected to duplicative and inconsistent standards" and that this was "hardly a result that Congress would have mandated." *Id.* at 735.

[39] 551 U.S. 264 (2007).

regulatory entities exercise that authority; [] (3) a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct . . . [; and] (4) that . . . the possible conflict affected practices that lie squarely within an area of financial market activity that the securities law seeks to regulate."[40]

The Court's analysis focused on the third factor, whether application of both the antitrust and securities laws to the conduct in question would create a risk of conflicting outcomes or guidance. Although there appeared to be no present conflict between the antitrust and securities laws on the facts of this case—the Court assumed for purposes of argument that the securities laws forbade the conduct in question—,[41] the Court was concerned that, absent antitrust immunity for the relevant practices, in future cases the SEC and courts applying the antitrust laws might reach conflicting outcomes. It reasoned that the expert regulatory agency is better equipped than a court to draw the "fine securities-related lines" required to analyze conduct in these markets and therefore the SEC should have sole authority in this area.[42] To allow an antitrust suit against the underwriter conduct in question would in the Court's view "threaten serious harm to the efficient functioning of the securities markets," which, along with the requirement that the SEC take into account competition when making policy,[43] indicated "a serious conflict" between the securities and antitrust laws.[44]

Credit Suisse appeared to sanction a broad approach to implied antitrust immunity in the securities markets and, potentially, in regulated markets more generally. In the absence of a specific antitrust savings clause, it seems likely that a court applying *Credit Suisse* might find implied antitrust immunity where (1) a challenged practice is clearly under active regulatory supervision and (2) allowing antitrust suits against the challenged practice *might* result (in the case at hand or in a future case involving similar conduct) in inconsistencies between court decisions and the regulatory agency's approach. Professor Shelanski has argued that the *Credit Suisse* opinion "went beyond prior implied immunity cases by precluding even antitrust claims that are based on legitimate antitrust principles, consistent with the securities laws, and not even potentially repugnant to the regulatory scheme, where the underlying conduct is so similar to regulated conduct" that a court might in a future case mistakenly confuse the two and "create a conflict with regulatory authority."[45]

The Supreme Court also addressed the tension between regulation and the antitrust laws in *Verizon Communications v. Law Offices of Curtis V. Trinko*.[46] That case involved a refusal-to-deal claim brought in the context of the Telecommunications Act of 1996. The 1996 Act contained a sweeping

[40] *Id.* at 275-76.
[41] *Id.* at 279.
[42] *Id.* at 282.
[43] 15 U.S.C. §77b(b) ("Whenever pursuant to [the Securities Act of 1933] the Commission is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.")
[44] *Id.* at 283-84. The majority opinion also dismissed Justice Thomas's assertion in dissent that the general savings clauses found in the relevant securities laws were sufficient to preserve the application of the antitrust laws in this setting. *Id.* at 275.
[45] Shelanski, *supra* note 33, at 707-08 (2011).
[46] 540 U.S. 398 (2004).

antitrust savings clause, which the Court conceded precluded antitrust immunity.[47] But the majority opinion stated in *dicta* that, absent this savings clause, the enforcement scheme the Act created would have been "in some respects . . . a good candidate for antitrust immunity, to avoid the real possibility of judgments conflicting with the agency's regulatory scheme 'that might be voiced by courts exercising jurisdiction under the antitrust laws.'"[48] The Court also observed that, in determining whether there is a duty to deal, "one factor of particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm. Where such a structure exists, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny."[49] The majority opinion explained that, "[j]ust as regulatory context may in other cases serve as a basis for implied immunity, it may also be a consideration in deciding whether to expand the contours of section 2."[50] *Trinko*, therefore, can be read to suggest that the existence of a regulatory scheme should militate against extending antitrust liability to claims that are not supported by clear precedent.[51] Professor Shelanski has pointed out a number of problems with the *Trinko* Court's guidance for determining a regulatory regime's impact on whether a court should recognize an antitrust claim. He noted that the Court was silent on the key issue of whether a "competition-focused regulation has to correspond closely to the conduct at issue and be actively enforced or whether its mere existence on the books is sufficient to forestall aggressive antitrust claims."[52] He also observed that the "Court's distinction between novel and established antitrust claims is porous."[53]

C. The Impact of *Credit Suisse* and *Trinko*—More Bark than Bite

In the wake of these decisions, there was understandable concern among antitrust enforcers and scholars that *Credit Suisse* and *Trinko* would severely limit the effectiveness of the antitrust laws in regulated markets. Professors Stacey Dogan and Mark Lemley wrote in 2009 that these cases "have fundamentally altered the relationship between antitrust and regulation, placing antitrust law in a subordinate relationship that, some have argued, requires it to defer not just to regulatory decisions, but perhaps even to the silence of regulatory agencies in their areas of expertise."[54] In 2010, Professor Shelanski, then Deputy Director for Antitrust in the Bureau of Economics at the Federal Trade Commission, testified before the House Judiciary Committee, Subcommittee on Courts and Competition Policy, that "the combined effect of *Credit Suisse* and *Trinko* is to make it more difficult than before for either private plaintiffs or public agencies to bring important antitrust cases in regulated sectors of the economy."[55] More recent scholarship has continued to stress the

---

[47] *Id.* at 406. The 1996 Act's antitrust savings clause provides that "nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." 47 U.S.C. § 152 (2012). The Court held that this clause "bars a finding of implied immunity." 540 U.S. at 406.
[48] *Id.* (citations omitted).
[49] *Id.* at 412.
[50] *Id.*
[51] *See* Shelanski, *supra* note 7 at 11 ("After *Trinko*, therefore, the presence of regulatory authority over a competition-related matter may make it more difficult for a plaintiff to pursue an antitrust challenge to the same conduct if the antitrust claim in any way exceeded the clear boundaries of antitrust precedent.").
[52] Shelanski, *supra* note 33 at 702.
[53] *Id.* at 704.
[54] Stacy L. Dogan & Mark A. Lemley, *Antitrust Law and Regulatory Gaming*, 87 TEX. L. REV. 685, 685-86 (2009).
[55] Shelanski, *supra* note 7 at 1.

transformational nature of the *Trinko* and *Credit Suisse* decisions. Professor Justin Hurwitz has argued that these cases, along with a third, non-antitrust case, *American Electric Power Co. v. Connecticut*, "can be read together as advancing a very broad regulatory displacement standard for federal antitrust claims in fields subject to regulation."[56]

While their language certainly suggested a potential sea change in antitrust's role in regulated markets, it is not at all clear that *Trinko* and *Credit Suisse* have fundamentally altered the balance between antitrust and regulation. In the decade since these cases were decided, lower courts have been cautious about expanding the scope of implied antitrust immunity or otherwise barring antitrust claims on the basis of a regulatory regime, especially outside the securities context.

The reach of *Credit Suisse* and the extent to which it might apply to other regulatory settings, including other financial services sectors, was unclear from the start. Even before the case was decided, there was a history of courts finding antitrust immunity in the securities markets.[57] The *Credit Suisse* Court noted that there is "an unusually serious legal line-drawing problem" with distinguishing conduct the SEC permits or encourages (which should enjoy immunity) from conduct the SEC prohibits.[58] Extensive securities-law experience likely is required to tell the two apart—experience the Court was concerned antitrust courts lack.[59] It seemed that whether a court would apply *Credit Suisse* to conduct governed by other regulatory regimes would depend on whether it determined that the relevant regime shared the characteristics of securities regulation the *Credit Suisse* Court emphasized.

To date, *Credit Suisse's* impact on litigated cases appears limited. Courts have proved reluctant to apply its principles outside the securities law context and have rejected claims of antitrust immunity in a variety of markets involving numerous regulatory regimes, including natural gas transportation and storage services, regulated under the Federal Energy Regulatory Commission's (FERC) regulatory regime,[60] provision of natural gas, regulated under the Commodity Exchange Act,[61] transpacific airline travel, regulated under "Air Services Agreements" between Japan

---

56 Justin (Gus) Hurwitz, *Administrative Antitrust*, 21 GEO. MASON L. REV. 1191, 1193 (2014). *See also*, Robert A. Jablon, Anjali G. Patel, Latif M. Nurani, *Trinko and Credit Suisse Revisited: The Need for Effective Administrative Agency Review and Shared Antitrust Responsibility*, 34 ENERGY L.J. 627, 631 (2013) ("Taken together, *Trinko* and *Credit Suisse* have a flavor that courts should be more restrained in antitrust application in regulated industries and more deferential to agencies."). Jablon, Patel, and Nurani also correctly observe that "the conclusions of *Trinko* and *Credit Suisse's* antitrust deference to regulatory agencies may be a significant overstatement of the decisions' scopes." *Id.* at 635.

57 *See, e.g.*, Gordon v. New York Stock Exchange, 422 U.S. 659 (1975); United States v. National Association of Securities Dealers, Inc., 422 U.S. 694 (1975).

58 551 U.S. 264, 279 (2007).

59 *Id.* at 282 ("antitrust courts are likely to make unusually serious mistakes in this respect….")

60 Energy Marketing Services, Inc. v. Columbia Gas Transmission Corp., 639 F. Supp. 643, 647-52 (S.D. W. Va. 2009) ("[T]his Court agrees with Plaintiffs that FERC's regulatory oversight does not involve the same level of risk of conflict with antitrust laws as the SEC's regulatory oversight did in *Credit Suisse*.").

61 In re Western States Wholesale Natural Gas Antitrust Litigation, 661 F. Supp. 2d 1172, 1183 (D. Nev. 2009) ("Rather than find the antitrust laws completely ousted, the Court concludes that . . . the antitrust laws and the CEA are reconcilable, as both preclude such conduct and no legal line drawing requiring particular regulatory expertise will be required . . ..").

and the United States and other nations as well as Japanese law,[62] and provision of race horses, regulated under the Interstate Horseracing Act.[63] In the transpacific air travel case, the court observed that "the implied preclusion doctrine arose in the context of securities law" and while defendants "cite[d] to one case applying the doctrine outside of the securities context . . . application outside of that context is indisputably rare."[64]

Even within the financial sector, courts in some cases have declined to apply *Credit Suisse*. For example, a district court rejected a claim of implied immunity in an antitrust case brought against private equity firms for allegedly colluding in purchasing companies as part of leveraged buyouts.[65] The court determined that because these transactions were not subject to the securities laws, there was no conflict with antitrust.[66] Another court declined to find implied antitrust immunity in a case involving alleged bid rigging and price fixing of municipal derivatives, which were subject to Internal Revenue Service ("IRS") regulations.[67] The court observed that while the IRS had "authority to regulate the issuance of municipal derivatives," that authority did not "extend to supervision of 'all the activities in question.'"[68] In addition, the IRS had "not regularly exercised its legal authority to regulate the collusive price-fixing and bid-rigging practices" alleged in the case and, indeed, had referred certain bid-rigging allegations to the Department of Justice's Antitrust Division.[69] Further, the court determined there was no conflict between the IRS regulations and private antitrust enforcement against the alleged conduct.[70] In a case discussed in more detail below, the court in *In re Credit Default Swaps Antitrust Litigation* rejected defendants' argument that the Dodd-Frank statutory scheme grants implied antitrust immunity to conduct regulated under its derivatives title.[71] The court relied on Dodd-Frank's antitrust savings clause, which it found "disarms defendants' argument that Dodd-Frank implicitly repealed the antitrust laws in this context."[72]

While courts so far have been reluctant to apply *Credit Suisse* outside the securities context, they have relied on the decision to find antitrust immunity in some cases involving the securities laws. In *Electronic Trading Group v. Banc of America Securities*, the Second Circuit determined that the securities laws precluded application of the antitrust laws in a case involving alleged price fixing of

---

62 In re Transpacific Passenger Air Transportation Antitrust Litigation, 2011 WL 1753738 at *17 (N.D. Cal. 2011) (noting that "application of" *Credit Suisse* "outside the securities context" is "indisputably rare" and determining that the court "is unwilling to extend a doctrine so far beyond its original purpose.")

63 Churchill Downs Inc. v. Thoroughbred Horsemen's Group, LLC, 605 F. Supp. 2d 870 (W.D. Kentucky 2009) ("Because *Credit Suisse* dealt with a hedge fund and securities laws, it is not directly applicable here." And, although "its principles are instructive . . . [t]he Court finds no such clear repugnancy between the IHA and the antitrust laws here.")

64 In re Transpacific Passenger Air Transportation Antitrust Litigation, 2011 WL 1753738 at *17 (N.D. Cal. 2011).

65 Dahl v. Bain Capital Partners, LLC, 589 F. Supp. 2d 112, 116 (D. Mass. 2008) ("Unlike *Billing,* this is not a case of pre-emption. All four factors of *Billing* are not satisfied applying the facts at hand.")

66 *Id.* at 116 ("Private equity LBOs do not lie within an area of the financial market that the securities laws seek to regulate as their *private,* as opposed to public, nature leaves them untouched by the securities laws.")

67 Hinds County, Mississippi v. Wachovia Bank N.A., 700 F. Supp. 2d 378 (S.D.N.Y. 2010).

68 *Id.* at 403 (quoting Credit Suisse v. Billing, 551 U.S. 264 (2007)).

69 *Id.* at 404.

70 *Id.*

71 2014 WL 4379112 (S.D.N.Y. 2014).

72 *Id.* at 17.

borrowing fees for short sales of certain securities.[73] The court found that all four *Credit Suisse* factors were satisfied in this case: short selling is "within the heartland of the securities business";[74] the SEC had the authority to supervise the relevant activities; it was actively regulating those activities; and "antitrust liability would create actual and potential conflicts with the securities regime."[75] The SEC permitted prime brokers who set the borrowing fees to communicate with one another about the availability and price of securities, a practice which antitrust liability might chill. This was the actual conflict. The potential conflict was linked to the chance that the SEC might decide to directly regulate the borrowing fees.[76]

Because the primary available evidence regarding *Credit Suisse's* reach is judicial decisions in litigated cases, it is difficult, if not impossible, to determine the case's impact on the number of antitrust claims brought in regulated markets. It certainly is possible that some plaintiffs, including federal and state enforcement agencies, have determined not to assert certain claims because they anticipated the relevant conduct would be found immune based on *Credit Suisse*. We likely never will know the extent to which that might have happened. Nonetheless, the outcomes of cases applying *Credit Suisse* to date should in many contexts reduce or eliminate any reluctance plaintiffs might have had based on that case to bring antitrust claims in regulated markets.

Like judicial treatment of *Credit Suisse*, a number of lower courts have applied *Trinko* narrowly when addressing antitrust claims, relying on it primarily as part of the refusal-to-deal body of case law, rather than citing its language about the intersection of antitrust and regulation. In *Astro Tel, Inc. v. Verizon Florida LLC*, a district court held that while *Trinko* "forestalls antitrust claims based on refusals to deal with a competitor" it does not prevent a plaintiff "from bringing antitrust claims based on other valid antitrust theories" such as "monopolization, tying, and price squeezing."[77] The Tenth Circuit held in *Buccaneer Energy (USA) Inc. v. Gunnison Energy Corp.* that *Trinko* applied only to unilateral refusals to deal, not concerted action—in this case a group refusal to allow a new competitor access to a jointly owned pipeline system at a reasonable price. In *Nobody in Particular Presents, Inc. v. Clear Channel Communications, Inc.*, plaintiff, a concert promoter, alleged that defendant, a radio station owner that also had a rock promotion business, had violated the essential facilities doctrine by denying rock radio advertising and promotional support to non-affiliated promoters. The district court found that *Trinko* "actually supports [plaintiff's] claim under the essential facilities doctrine" and rejected defendant's summary judgment motion on that claim.[78] It determined that defendant's conduct bore a "striking resemblance to the refusal to deal in *Aspen*

---

73 588 F.3d 128 (2d Cir. 2009).

74 *Id.* at 134.

75 *Id.* at 137.

76 Even in the securities context, some courts applying *Credit Suisse* have declined to find implied antitrust immunity. In *Pennsylvania Ave. Funds v. Borey*, 569 F. Supp. 2d 1126 (W.D. Wash. 2008), the court found that the SEC did not have regulatory authority to prevent bidders from rigging bids in a contest for corporate control, and therefore there was no implied antitrust immunity on the basis of the securities laws. This decision viewed *Credit Suisse* as having narrowed implied antitrust immunity as compared to an earlier Second Circuit decision, *Finnegan v. Campeau Corp.*, 915 F.2d 824 (2d Cir. 1990), which had found implied antitrust immunity in a case involving similar collusive conduct.

77 2012 WL 1581596 (M.D. Fl. 2012). *See also* Viamedia Inc. v. Comcast Corp. 2016 WL 6568074 (N.D. Ill. 2016) (holding that *Trinko* bars refusal to deal claim, but not tying and exclusive dealing claims).

78 *Nobody in Particular Presents, Inc. v. Clear Channel Communications, Inc.*, 311 F. Supp. 2d 1048, 1113 (D. Colo. 2004).

Skiing," which the *Trinko* Court agreed was actionable.[79] And it contrasted the *Trinko* situation, where the Federal Communications Commission ("FCC") compelled access to Verizon's network, with the fact that "no government agency is compelling Clear Channel to allow access to its airwaves."[80] The court concluded that "[a]ntitrust law is the only mechanism by which Clear Channel's behavior may be policed."[81]

In *In re Remeron Antitrust Litigation*, a New Jersey district court rejected defendant's assertion, based on *Trinko*, that the Federal Drug Administration's regulation of patent listings in the Orange Book barred plaintiffs' antitrust claim based on defendant "late-listing" its patent.[82] The court observed that, in contrast to the Telecommunications Act of 1996, "which is a complete regulatory scheme that grants regulators significant power to enforce rules and issue penalties, . . . FDA regulators have (and choose to exert) significantly less authority over Orange Book listings."[83] Accordingly, the court determined that there "exist[ed] no regulatory scheme so extensive as to supplant the antitrust laws" in this case and therefore *Trinko* did not bar plaintiff's antitrust claims.[84] In litigation challenging the proposed merger of health insurance providers Aetna and Humana, defendants relied on *Trinko's* language regarding the relationship between regulation and antitrust to argue that "[t]he [r]egulatory [s]cheme governing Medicare Advantage Plans [p]recludes [t]he [p]ossibility [o]f [a]nticompetitive [b]ehavior" post-merger.[85] While the court agreed (also citing *Trinko*) that "the government's regulation of Medicare Advantage remains relevant," it rejected defendants' contention that the regulatory scheme eliminated the possibility of anticompetitive effects arising from the proposed merger,[86] because the relevant regulations were "not 'designed to deter and remedy anticompetitive harm.'"[87] In its opinion explaining its order blocking the merger, the court carefully examined the Center for Medicare and Medicaid Services' ("CMS") regulations and CMS's enforcement of those regulations and found that it "perceive[d] little ability in CMS to prevent the merged firm from increasing its prices or reducing benefits."[88]

This review of lower court interpretations of *Credit Suisse* and *Trinko* shows that their impact on antitrust immunity and liability has not been as dramatic as most feared. This body of case law also reveals a confusing and disjointed approach to antitrust enforcement in regulated markets, especially the financial markets. One cause of this confusion is the disparate use of antitrust savings clauses in regulatory statutes. Dodd-Frank contains an antitrust-specific savings clause, but the Securities Act of 1933 and the Securities Exchange Act of 1934 do not.[89] As a result, the district

---

[79] *Id.* at 1113.
[80] *Id.* at 1114.
[81] *Id.*
[82] In re Remeron Antitrust Litig., 335 F. Supp. 2d 522 (D.N.J. 2004).
[83] *Id.* at 530.
[84] *Id.* 531.
[85] Defendants' Proposed Findings of Fact, Conclusions of Law, and Post-Trial Brief at 127, U.S. v. Aetna Inc. & Humana Inc., No. 1:16-cv-1494 (D.D.C. Jan. 5, 2017). Defendants cited the *Trinko* Court's admonition that "'[a]ntitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue,' including 'awareness of the significance of regulation.'" *Id.* at 128 (quoting Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 411 (2004)).
[86] U.S. v. Aetna Inc., et al., 2017 WL 325189 at *33 (D.D.C. 2017).
[87] *Id.*
[88] *Id.* at *36.
[89] Both the Securities Act of 1933 and the Securities Exchange Act of 1934 contain non antitrust-specific savings clauses. Section 16 of the Securities Act of 1933 states that "the rights and remedies provided by this

court in *In re Credit Default Swaps Antitrust Litigation* found no antitrust immunity for claims involving conduct regulated by Dodd-Frank's derivatives title, despite the *Credit Suisse* Court finding such immunity for conduct regulated under the securities laws. Are the distinctions that must be drawn in determining whether antitrust enforcement might impinge on financial regulation—the "fine securities-related lines" the *Credit Suisse* court referred to—any less difficult to manage in the derivatives markets than they are in the securities markets? That seems doubtful. Whether an antitrust savings clause is incorporated into a regulatory statute likely has more to do with when that statute was enacted and the legislative and political process surrounding that enactment than with considerations of the relative merits of antitrust enforcement in different types of regulated markets.

Given this uncertain legal landscape, how should courts and agencies approach antitrust enforcement in regulated markets, particularly the financial markets? The goal should be to craft immunity rules that can be applied sensibly across markets. And when regulation displaces antitrust, as appears sometimes will be the case in the financial sector, how can competitive markets be ensured? These questions arose when Congress enacted a new regulatory structure for the derivatives markets with the passage of the Dodd-Frank Act in 2010. The history and continuing development of this regulatory regime is a useful vehicle for understanding how the (receding) shadow of antitrust in financial markets might affect competition and systemic safety in those markets and what can be done about it.

II. Derivatives, the Financial Crisis & Dodd Frank

In 2008, the Federal Reserve Bank of New York and the U.S. Treasury stepped in to rescue American International Group, Inc. ("AIG"), once the world's largest insurance company, at the cost of $161 billion. AIG was brought down by what was at the time a little-known subsidiary, AIG Financial Products Corporation ("AIGFP"). While best known for its standard insurance products, including property and casualty, commercial, and life insurance, AIGFP had involved its parent in another, less well-understood insurance-type business: credit default swaps ("CDS"), a form of financial derivative. When the bill came due on AIGFP's CDSs, AIG faced a liquidity crisis and neared collapse. The Financial Crisis Inquiry Commission concluded that "AIG failed and was rescued by the Government primarily because its enormous sales of credit default swaps were made without putting up initial collateral, setting aside capital reserves, or hedging its exposure — a profound failure in corporate governance, particularly its risk management practices."[90] Another

---

subchapter shall be in addition to any and all other rights and remedies that may exist in law or in equity." 15 U.S.C. §77p(a). And Section 28 of the Securities Exchange Act of 1934 contains essentially the same language. 15 U.S.C. §78bb(a). In his *Credit Suisse* dissent, Justice Thomas argued that these broad savings clauses were sufficient to defeat implied immunity and preserve plaintiffs' antitrust causes of action. He reasoned that while "Congress may have singled out antitrust remedies for special treatment in some statutes, it is not precluded from using more general savings provisions that encompass antitrust and other remedies." Credit Suisse v. Billing, 551 U.S. 264, 289 (2007) (Thomas, J. dissenting). Writing for the majority, Justice Breyer rejected this argument, noting that the United States had presented it in *Gordon v. New York Stock Exchange* and "the Court, in finding immunity, necessarily rejected it." *Credit Suisse*, 551 U.S. at 275. Justice Breyer also stated that the parties had not raised in the lower courts arguments based on the general savings clauses and, while one party had made this argument before the Supreme Court, the Court declined to consider it. *Id.*

[90] National Commission on the Causes of the Financial and Economic Crisis in the United States, THE FINANCIAL CRISIS INQUIRY REPORT 352 (2011), https://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf

type of financial derivative, mortgage-backed securities ("MBS"), was the primary cause of the collapse of Bear, Stearns.[91] Lehman Brothers' huge derivatives portfolio threatened financial destruction to Lehman's many counterparties when the firm collapsed in 2008.[92]

Little known and little understood at the time, financial derivatives played a leading role in causing the worst financial crisis since the Great Depression. Regulation of derivatives became a pressing policy problem, one that Congress addressed in the Dodd-Frank Act.

A. A Hidden Threat

Derivatives are a category of investment vehicles whose value is determined by reference to (hence, derived from) an underlying asset, such as bonds, stocks, mortgages, or commodities. Common types of derivatives include options,[93] swaps,[94] forward contracts,[95] and futures contracts.[96] Parties typically enter derivatives contracts to hedge risk or to speculate on an underlying asset.[97] The derivatives market is huge: the notional value of derivatives worldwide was pegged at $684 trillion in mid-2008, while their gross market value ("the cost of replacing all existing" derivatives contracts) was $20.4 trillion;[98] those figures were $553 trillion and $15.5 trillion in mid-2015.[99]

Before the financial crisis, derivatives were traded both on exchanges and over the counter.[100] Common derivatives species, such as standard options and futures, often were traded on regulated exchanges, such as the Chicago Mercantile Exchange and the Chicago Board of Trade.[101] In these types of transactions, the exchange served as the go-between for the contracting parties.

---

[91] William Ryback, *Case Study on Bear Stearns* 7-8 (Bear Stearns hedge funds "made up of complex derivatives backed by home mortgages" failed "as subprime funds lost nearly all their value" and "Bear Stearns' reputation was irreparably damaged."), http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/02BearStearnsCaseStudy.pdf.

[92] *See* Michael J. Fleming & Ansari Sarkar, FEDERAL RESERVE BANK OF NEW YORK, THE FAILURE RESOLUTION OF LEHMAN BROTHERS ("Creditors filed about $1.2 trillion of claims against the Lehman estate . . . which was party to more than 900,000 derivatives contracts at the time of bankruptcy."), https://www.newyorkfed.org/medialibrary/media/research/epr/2014/1412flem.pdf.

[93] Options are "contracts that allow, but do not require, one or both parties to obtain certain benefits under certain conditions." Marc Levinson, THE ECONOMIST GUIDE TO FINANCIAL MARKETS (2010) at 218.

[94] Swaps are contracts which allow parties to exchange obligations or risks. Interest-rate swaps, for example, are contracts to exchange interest-payment obligations; currency swaps are contracts to exchange interest-payment streams in different currencies. *Id.* at 222.

[95] A forward contract is "an agreement to set a price now for something to be delivered in the future." *Id.* at 221.

[96] Futures contracts are a standardized type of forward contract traded on exchanges.

[97] Rena S. Miller, CONG. RESEARCH SERV., CONFLICTS OF INTEREST IN DERIVATIVES CLEARING 2 (2011) ("The different types of derivative financial instruments are used for the same broad purposes—hedging business risks and taking on risk in search of speculative profits").

[98] Bank for Int'l Settlements, Monetary and Economic Department, OTC derivatives market activity in the first half of 2008, at 1 (November 2008).

[99] Bank for Int'l Settlements, Statistical Release, OTC Derivatives Statistics at end-June 2015, at 2 (November 2015). Notional value refers to the face value of the contracts. Gross market value "provides a more meaningful measure of amounts at risk than notional amounts." *Id.*

[100] Over-the-counter transactions are entered directly by the trading parties, rather than via an exchange.

[101] *See* Frank D'Souza, Nan S. Ellis & Lisa M. Fairchild, *Illuminating the Need for Regulation in Dark Markets: Proposed Regulation of the OTC Derivatives Market*, 12 U. PA. J. BUS. L. 473, 481-82 (2010).

The CFTC regulated these exchanges, while the SEC regulated exchanges on which stock options were traded. Contracts traded on exchanges were settled by clearinghouses, which served as intermediaries between buyers and sellers and settled trades.[102]

Less common derivatives species, like forwards and swaps, were likely to be traded over-the-counter pre-crisis.[103] This meant that most exotic derivatives contracts were entered directly by the counterparties and were not traded on exchanges or cleared by third-party entities. As a result, these transactions were unregulated; the financial oversight agencies had little visibility into the size of the market for these types of contracts or the risks they entailed.

One species of unregulated derivatives contract became the poster child for the damage the derivatives markets did during the financial crisis: the credit default swap. These contracts originated as a form of insurance against a borrower's default on an obligation. A lender making a significant loan can enter a contract with a third party under which the lender makes regular premium payments in return for the third party's guarantee to cover the lender's loss should the borrower default. In this context, CDS allow lenders to hedge their risks, which is typically good for the economy: by spreading their risk to additional parties, lenders may be able to make more loans.[104]

But CDS also became a vehicle for speculation, particularly for betting against the solvency of underlying assets. In this scenario, parties other than the original lender(s) would enter a CDS contract that would pay out if the underlying asset defaulted. It was this form of speculation that, combined with a boom in structured mortgage-backed securities, created the toxic mix from which the financial crisis emerged. Housing prices soared in the early 2000s.[105] Mortgage rates were relatively low and banks typically did not enforce strict borrowing standards.[106] Part of the reason for banks' laxity was that many of them were reselling their mortgages to be packaged with other mortgages into investment vehicles called collateralized debt obligations ("CDOs").[107] These mortgage-backed securities carried different levels of risk, depending on the characteristics of the underlying mortgages. Even sophisticated investors had trouble assessing the risk of investing in

---

102 Clearinghouses act as "the buyer to every seller's clearing member and the seller to every buyer's clearing member." ICE, *How Clearing Works*, https://www.theice.com/publicdocs/How_Clearing_Works.pdf. The clearinghouse "becomes the central counterparty to the trade, thereby guaranteeing financial performance of the contract." *Id.*

103 *See* D'Souza, Ellis & Fairchild, *supra* note 101 at 482.

104 *Id.* at 477 (CDS "allow banks to transfer credit exposure to counterparties … which allows banks to lend more money.")

105 National Commission on the Causes of the Financial and Economic Crisis in the United States, THE FINANCIAL CRISIS INQUIRY REPORT 84 (2011) ("With the recession over and mortgage rates at 40-year lows, housing kicked into high gear—again.")

106 *Id.* at 84, 187 ("Lax mortgage regulation and collapsing mortgage-lending standards and practices created conditions that were ripe for mortgage fraud.")

107 Eric S. Belsky & Nela Richardson, *Understanding the Boom and Bust in Nonprime Mortgage Lending*, Working Paper, Harvard University, Joint Center for Housing Studies (2010) ("[a]t the peak, the lion's share of nonprime loans was sold into the secondary market and subsequently bundled into securities, with most 'structured' so that a significant share of the issued classes received high credit ratings."), http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/ubb10-1.pdf

these CDOs, because it was difficult to know exactly how risky the underlying mortgages were.[108] Credit rating agencies proved unhelpful, as they often gave AAA ratings to what turned out to be very risky assets.[109]

When the housing bubble burst in 2007, and prices began to fall, many borrowers who had secured mortgages without adequate collateral or proof of income began to default.[110] The mortgage-backed securities which held these mortgages quickly surrendered value and investors lost their stakes.[111] Further, investors who had entered CDS based on these failed mortgage-backed securities were now due payment. Counterparties that did not have the funds to meet these obligations were overwhelmed. Some of the most significant derivatives-dealing firms and investment banks, including AIG and Bear Stearns, failed or had to be bailed out, in large part because of their exposure to CDS or mortgage-backed securities.[112]

CDS and mortgage-backed securities helped turn what might have been merely a nasty housing market correction into a global financial crisis. They were the connective tissue that spread the contagion from housing to the larger financial system. As a result, when Congress determined to respond to the crisis with financial reform legislation, unregulated derivatives were squarely in the crosshairs.

B. Congress Responds

Before the financial crisis, over-the-counter swaps were exempt from CFTC and SEC regulation.[113] The primary goal of Dodd-Frank's derivatives reforms was to ensure that the vast majority of swaps be centrally cleared by clearinghouses, which would be required to maintain

---

108 Yaw Owusu-Ansah, *What Went Wrong? Examining Moody's Rated CDO Data*, Working Paper 3 (2016) ("[g]iven the size and complexity of the collaterals . . . in the CDO deals, it was costly for investors to independently price and evaluate all the assets in the collateral pool. . . . As such, investors relied on the ratings given by the rating agencies to assess their credit risks and also make their investment decisions."), http://www.columbia.edu/~yao2103/wp1.pdf.

109 *See,* John P. Hunt, *Credit Rating Agencies and the "Worldwide Credit Crisis": The Limits of Reputation, the Insufficiency of Reform, and a Proposal for Improvement*, 2009 COLUM. BUS. L. REV. 109, 120 (2009) ("observers have criticized rating agencies sharply . . ." asserting that "the rating agencies did a poor job of assessing the default risk of CDOs and other instruments based on subprime" residential mortgage-backed securities.")

110 *Id.* at 122.

111 *See* OFFICE OF THE SPECIAL INSPECTOR GENERAL FOR THE TROUBLED ASSET RELIEF PROGRAM, EMERGENCY CAPITAL INJECTIONS PROVIDED TO SUPPORT THE VIABILITY OF BANK OF AMERICA, OTHER MAJOR BANKS, AND THE U.S. FINANCIAL SYSTEM 2 (Oct. 5, 2009), https://www.sigtarp.gov/Audit%20Reports/Emergency_Capital_Injections_Provided_to_Support_the_Viability_of_Bank_of_America.pdf; Ryback, *supra* note 91 at 7-8 (Bear Stearns hedge funds "made up of complex derivatives backed by home mortgages" failed "as subprime funds lost nearly all their value" and "Bear Stearns' reputation was irreparably damaged."), http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/02BearStearnsCaseStudy.pdf.

112 *See* D'Souza, Ellis & Fairchild, *supra* note 101 at 491 ("CDO losses represented 94% of AIG's total loss"); Ryback, *supra* note 91 at 8 (Bear Stears' reputation "irreparably damaged" by failure of hedge funds invested in mortgage-backed securities).

113 *See* Commodities Futures Modernization Act, 7 U.S.C. §§ 1a(13), 2(d) (exempting over-the-counter swaps from CFTC oversight); Gramm-Leach-Bliley Act of 1999, 15 U.S.C. § 77-b1(a), (b)(1) (exempting security-based swaps from SEC oversight).

sufficient capital reserves to cover any defaults and impose strict margin requirements.[114] Further, swaps subject to the central clearing requirement would have to be traded on exchanges or swap execution facilities. Ideally, these measures would mean that, rather being executed over the counter, as they had been pre-crisis, most swaps now would be exchange traded, centrally cleared, and regulated.

Accordingly, Section 723 of Dodd-Frank's derivatives title states that "[i]t shall be unlawful for any person to engage in a swap unless that person submits such swap for clearing to a derivatives clearing organization."[115] It also requires that "swaps subject to [this] clearing requirement" be executed "on a board of trade designated as a contract market" or "on a swap execution facility."[116] Section 763 contains parallel requirements for securities-based swaps, which the SEC regulates under the Dodd-Frank framework.[117]

This new regulatory regime transformed the swaps markets from a predominantly bi-lateral, decentralized, over-the-counter system, to a centralized framework in which most swaps must be exchange-traded and centrally cleared. In doing so, the derivatives title created potential competitive bottlenecks. In most cases, swaps dealers need clearinghouse and exchange access to compete in these markets. If that access is denied, competition may suffer. As a result, the swaps markets post-Dodd-Frank bear a strong resemblance to other regulated markets which rely on shared facilities. In such markets, firms controlling the bottleneck can disadvantage downstream rivals by denying them access to the facility.[118] A classic example of this problem is the railroad terminal facilities at issue in *United States v. Terminal Railroad Association*.[119] An association of railroads controlled the only existing bridge over the Mississippi in St. Louis and its members agreed that no other railroads could join their group, making it impossible for new competitors to enter the market for railroad service through the city. The Supreme Court found that this arrangement violated both sections 1 and 2 of the Sherman Act and ordered the defendants to reorganize their association to provide for the admission of additional railroads on just and reasonable terms, which would place new members

---

114 *See. e.g.*, Letter from Timothy F. Geithner, Secretary of the Treasury, to the Hon. Harry Reid (May 13, 2009) ("To contain systemic risks, the C[ommodity] E[xchange] A[ct] and the securities laws should be amended to require clearing of all standardized derivatives through regulated central counterparties (CCPs)"); Press Room, U.S. Dep't of the Treasury, Regulatory Reform Over-the-Counter (OTC) Derivatives (May 13, 2009) ("Objectives of Regulatory Reform of OTC Markets . . . The Commodity Exchange Act (CEA) and the securities laws should be amended to require clearing of all standardized OTC derivatives through regulated central counterparties (CCP): CCPs must impose robust margin requirements and other necessary risk controls and ensure that customized OTC derivatives are not used solely as a means to avoid using a CCP.")

115 Pub. L. 111-203, 124 Stat. 1675 (2010) (codified in scattered sections of the U.S.C.).

116 *Id.* at 1681.

117 *Id.* at 1762 ("It shall be unlawful for any person to engage in a security-based swap unless that person submits such security-based swap for clearing to a clearing agency. . .."); *Id.* at 1767 ("With respect to transactions involving security-based swaps subject to the clearing requirement . . ., counterparties shall—(A) execute the transaction on an exchange; or (B) execute the transaction on a security-based swap execution facility . . ..").

118 *See* Robert Pitofsky, Donna Patterson & Jonathan Hooks, *The Essential Facilities Doctrine under U.S. Antitrust Law*, 70 ANTITRUST L. J. 443, 447 ("numerous lower courts have found the essential facilities doctrine potentially applicable in those extraordinary circumstances when one firm uses its control over a bottleneck to eliminate actual or potential competitors.")

119 224 U.S. 383 (1912).

"upon a plain of equality in respect of the benefits and burdens" with the association members.[120] Exchange-trading and central-clearing requirements create the same types of anticompetitive risks as the privately controlled railroad bridge in *Terminal Railroad*.

Dodd-Frank's drafters were aware of these risks and they built competitive safeguards into the derivatives title to mitigate them. To prevent clearinghouses from disfavoring trades not executed on affiliated exchanges, the law specifies that "[t]he rules of a derivatives clearing organization . . . shall . . . provide for non-discriminatory clearing of a swap … executed bilaterally or on or through the rules of an unaffiliated designated contract market or swap execution facility."[121] And, in reviewing swaps to determine whether they should be required to be cleared, the CFTC and SEC must "take into account . . . [t]he effect on competition, including appropriate fees and charges applied to clearing."[122]

The law also empowered the CFTC and SEC to promulgate rules regarding conflicts of interest in big-bank ownership and governance of clearinghouses and SEFs. It specified that no more than 180 days after Dodd-Frank was enacted, the agencies "shall adopt rules which may include numerical limits on the control of, or the voting rights with respect to" any clearinghouse, SEF, or board of trade "by a bank holding company . . . with total consolidated assets of" $50 billion or more, "a nonbank financial company" supervised by the Federal Reserve Board, swap and security-based swap dealers, "major swap participants" or "major security-based swap participants."[123] The CFTC and SEC were required to adopt such rules if they determined that they were "necessary or appropriate to improve the governance of, or to mitigate systemic risk, promote competition, or mitigate conflicts of interest in connection with" swap (or security-based swap) dealers' business with a clearinghouse, contract market, or SEF in which a dealer "has a material debt or equity investment."[124] Dodd-Frank required the agencies, in adopting such rules, to "consider any conflicts of interest arising from the amount of equity owned by a single investor . . . and the governance arrangements" of any clearinghouse, swap (or security-based swap) execution facility, or board of trade designated as a contract market.[125] The CFTC and SEC promulgated proposed conflicts-of-interest rulemakings in October 2010, but they have not been finalized.[126] These rulemakings are discussed in detail below.

The CFTC also adopted rules governing access to DCMs and SEFs. In its rulemaking on DCMs, the CFTC required that they provide "members, persons with trading privileges, and independent software vendors with impartial access to [their] markets and services" and that they employ "access criteria that are impartial, transparent, and applied in a non-discriminatory

---

120 *Id.* at 411. The Court also required the plan of reorganization to provide for access to the facilities on just and reasonable terms to railroads that did not want to join the association.
121 Pub. L. 111-203, 124 Stat. 1675, 1676 (2010) (codified in scattered sections of the U.S.C.).
122 *Id.* at 1677 (CFTC), 1763 (SEC).
123 *Id.* at 1695 (CFTC); 1796-97 (SEC).
124 *Id.* at 1695, 1797.
125 *Id.*
126 Commodities Futures Trading Commission, Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities Regarding the Mitigation of Conflicts of Interest, 75 Fed. Reg. 63,732 (Oct. 18, 2010); U.S. Securities & Exchange Commission, Ownership Limitations and Governance Requirements for Security-Based Swap Clearing Agencies, Security-Based Swap Execution Facilities, and National Securities Exchanges with Respect to Security-Based Swaps under Regulation MC, 17 CFR Part 242 (Oct. 14, 2010).

manner."[127] Further, the CFTC required DCMs to "establish and impartially enforce rules governing denials, suspensions, and revocations" of access privileges.[128] The SEC proposed a similar rule for security-based SEFs, but it has not been finalized. That rule would have required security-based SEFs to "[e]stablish fair, objective, and not unreasonably discriminatory standards for granting impartial access to trading" on a facility.[129] Unlike the CFTC rules, the SEC proposal would have required that security-based SEFs allow access to all registered security-based swap dealers, major security-based swap participants, and brokers. The only discretion security-based SEFs would have had would have been over eligible contract participants.

In addition to these regulatory measures regarding access to key derivatives market facilities, Dodd-Frank's drafters also sought to preserve antitrust's role in protecting competition in the financial markets. It is unclear, however, whether and to what extent those protections extend to the derivatives markets.

C. Dodd-Frank and the Antitrust Laws

Dodd-Frank's relationship to the antitrust laws is governed by the Act's text—which explicitly addresses antitrust both in its general provisions and in the derivatives title—and by the implied immunity case law discussed above.

The Act contains a comprehensive antitrust savings clause:

> Nothing in this Act, or any amendment made by this Act, shall be construed to modify, impair, or supersede the operation of any of the antitrust laws, unless otherwise specified.[130]

This provision is similar to the antitrust savings clause in the Telecommunications Act of 1996 that was at issue in *Trinko*, with the addition of the phrase "unless otherwise specified."[131] The Act does not explicitly state which of its sections might "modify, impair, or supersede" the antitrust laws. Representative John Conyers, who was Chairman of the House Judiciary Committee during Dodd-Frank's drafting, and a Dodd-Frank conferee, asserted that the antitrust savings clause "applies to the entire Act," and that the "phrase 'unless otherwise specified'" in the clause "refers only to . . . four specific provisions" in the Act "that explicitly modify the operation of those specified provisions of the antitrust laws in specified ways."[132] The four provisions he referred to include two

[127] 77 Fed. Reg. 36701. The CFTC promulgated a similar rule for SEFs. It required that SEFs grant access using criteria "that are impartial, transparent and applied in a fair and nondiscriminatory manner." 78 Fed. Reg. 33587 (2013). In its commentary on the rule, the CFTC noted that "impartial access requirements will eliminate a potential impediment to participation, resulting in a more competitive market." *Id.* at 33,573.
[128] *Id.*
[129] 76 Fed. Reg. 11060.
[130] 12 U.S.C. 5303.
[131] The antitrust savings clause in the Telecommunications Act of 1996 states that: "Except as provided in paragraphs (2) and (3), nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." 47 U.S.C. § 152.
[132] 156 CONG. REC. E1347 (daily ed. July 15, 2010) (speech of Rep. John Conyers, Jr.). Representative Conyers also asserted that an antitrust savings clause is "merely a reinforcement of the well-established principle" that, because the antitrust laws are fundamentally important to the American system of free competition, "there is a strong presumption against their normal operation being superseded by some other

that "explicitly shorten[]" the "standard pre-merger waiting period under section 7A of the Clayton Act" and two that ensure an HSR exemption is not triggered by the Act's requirement that regulatory agencies review certain types of transactions.[133]

Nonetheless, the Derivatives title contains several sections that arguably supersede the antitrust laws by adding what appear to be limited antitrust exemptions. These "antitrust considerations" sections state that, "[u]nless necessary or appropriate to achieve the purposes of this Act," certain organizations operating in the derivatives markets, including derivatives clearinghouses and exchanges "shall not—(A) adopt any rule or take any action that results in any unreasonable restraint of trade; or (B) impose any material anticompetitive burden."[134] The introductory clause appears to offer an antitrust exemption to actors who can show that suspect conduct is "necessary or appropriate" to fulfilling the Act's goals.[135]

This interpretation was rejected, however, by the district court in *In re Credit Default Swaps Antitrust Litigation*.[136] That case was a class action brought on behalf of persons who bought CDS from or sold CDS to defendant banks. Plaintiffs alleged that as certain CDS transactions became standardized, the major derivatives dealers feared they would lose control over what had been a captured market in which they garnered supracompetitive bid-ask spreads. To preserve their advantage, plaintiffs claimed the dealer-defendants took measures to ensure that an electronic exchange for CDS trading did not emerge. These measures included restricting dissemination of pre- and post-trade pricing information required for establishing an exchange and attempting to foreclose non-dealer-defendants from transacting with inter-dealer brokers, intermediaries that could access buy or sell prices and match those offers with another dealer.[137]

In 2008, nascent derivatives clearinghouses and exchanges appeared ready to transform the derivatives markets.[138] The transparency these entities promised to offer threatened to reduce the supracompetitive bid-ask spreads the dealer-defendants had enjoyed. Citadel LLC ("a leading investor in the CDS market") and CME Group (which operated "the world's foremost derivatives marketplace") planned to open the Credit Market Derivatives Exchange ("CMDX"), which would "be generally open to dealers, banks, and institutional investors" and would allow customers and dealers to "trade directly."[139] This exchange would have "excluded Dealer-Defendants as intermediaries in many CDS transactions and made real-time pricing information available to investors."[140] Plaintiffs alleged that as "CMDX was poised to enter the market, Dealer-Defendants conspired to shut it down."[141] They "agreed not to deal with CMDX or any other clearing platform

statutory scheme." *Id.* He cited to *Credit Suisse*, among other cases, for the proposition that the antitrust laws "are superseded only 'where there is a plain repugnancy between the antitrust and regulatory provisions.'" *Id.*

133 *Id.*

134 7 U.S.C. § 6s(j)(6); 15 U.S.C. § 78o-10(j)(6).

135 Representative Conyers argued that these "Antitrust Considerations" clauses do not create an antitrust exemption. He asserted that a firm's determination not to adhere to the antirust considerations, because it "believes pursuing them itself is inconsistent with its other obligations under the relevant securities or commodities law . . . does not alter the application of the antitrust laws." *Id.*

136 *In re Credit Derivatives Antitrust Litig.*, 2014 WL 4379112 (S.D.N.Y. 2014).

137 *Id.* at *2-*3.

138 *Id.* at *3-*4.

139 *Id.* at *3.

140 *Id.*

141 *Id.* at *4.

that might allow CDS trading" and "to clear almost all transactions" though ICE Clear Credit, a clearinghouse they controlled.[142] Plaintiffs further claimed that the dealer-defendants used their position on ICE Clear Credit's risk committee to "limit changes to the" OTC derivatives market by imposing rules "restricting participation in ICE . . . to prevent a transition to exchange trading."[143] The dealer-defendants also prevailed upon Markit, a privately held financial information company, and ISDA, a financial trade association for the derivatives markets, not to provide licenses to data and a standardized "Master Agreement" necessary to run an exchange platform.[144] They did this by "leveraging their status as Markit's and ISDA's largest customers," plaintiffs claimed, and through their positions on the boards of both organizations.[145] After successfully causing CMDX to drop its plans for an exchange, the dealer-defendants began to join the CME clearinghouse, on the condition that they would control CME's risk committee. Plaintiffs alleged that the dealer-defendants used the captured risk committee to freeze CME's ability to clear trades. They contended that the dealer-defendants' conduct harmed them by "keeping the market opaque, preventing competition, and maintaining inflated bid/ask spreads."[146]

In moving to dismiss the class action complaint, one of defendants' arguments was that "Dodd-Frank precludes application of the antitrust laws" to accused conduct post-enactment of the Act.[147] They asserted that the derivatives title's "antitrust considerations" clauses were an exception to the Act's antirust savings clause.[148] The court disagreed, finding that "[r]ather than explicitly modifying the antitrust laws, . . . the antitrust considerations provisions impose a duty to avoid taking actions that could have antitrust implications, even if those actions fall short of actually violating the antitrust laws."[149] According to the opinion, the "carve-outs from the antitrust considerations provisions" allow firms to eschew "the heightened antitrust considerations when necessary or appropriate to achieve the purposes of Dodd-Frank, but do not permit neglect of the baseline antitrust laws."[150] As a result, Dodd-Frank's antitrust savings clause applied and defendants' conduct was not immunized from antitrust liability.

The court rejected defendants' motions to dismiss the complaint with regard to plaintiffs' section 1 claims and granted them with regard to their section 2 claims. In the wake of this decision, the parties entered a class action settlement agreement valued at nearly two billion dollars. The district court approved the settlement in 2016.

This case illustrated the competitive dangers lurking in the derivatives markets. Taking the allegations as true, big banks conspired to forestall the move to exchange trading to preserve their profit margins on derivatives trading. They did this in part through control of CME's and ICE Clear

142 *Id.*
143 *Id.* at *5.
144 *Id.* at *2, *5
145 *Id.* at *5.
146 *Id.*
147 *Id.* at *16.
148 *Id.* at *17.
149 *Id. See also* Gregory Scopino, *Expanding the Reach of the Commodity Exchange Act's Antitrust Considerations*, 45 HOFSTRA L. REV. 573, 574 (2016) (Antitrust Considerations language "appears broader than that found in existing antitrust law prohibitions" and "appears to even forbid anticompetitive conduct that would not reach the level of creating unreasonable restraints of trade or other traditional antitrust harms.")
150 *Id.*

Credit's risk committees. The big banks could employ a similar strategy to limit competition in the post Dodd-Frank world by using control over risk committees to refuse rival dealers access to clearinghouses and exchanges.

While there is a robust academic literature on reforming and regulating the derivatives markets,[151] there is scant scholarship on antitrust enforcement and competition in these markets. In an insightful series of articles, Professor Felix Chang has identified the competition problems that derivatives clearinghouses and trading platforms pose. He recognized that "the downstream dealer markets are where the real profits lie" and that "there is a danger that the bottlenecks operating at thin margins (clearinghouses) are being deployed to maintain the dominance of the dealers in the adjacent markets."[152] Chang observed that if the big banks use their control of clearinghouses to set "high bars" to membership, rival derivatives dealers may not be able to join clearinghouses.[153] This "scenario . . . appears to be playing out," Chang argued, because "the membership profile of the dominant" clearinghouses "remains unchanged from year to year."[154] The result may be that rivals are foreclosed from dealing because they are not able to clear their trades or clearing becomes more expensive because it must be done through a clearinghouse member.[155] Gregory Scopino, special counsel at the CFTC, has observed that, "[g]iven the concentrated, even oligopolistic nature of some markets for derivatives, the possibility that a handful of dominant market participants could collude to harm competition (or attempt to harm competition) in the future is real."[156] He further noted that even "several years" after Dodd-Frank was enacted "the swaps market is still heavily dominated by a handful of large, dealer banks, many of which have rigged benchmarks for . . . interest rates and foreign currencies that affect the prices of OTC swaps and other derivatives."[157]

In the unpublished *In re Credit Default Swaps Antitrust Litigation* opinion, the court determined that antitrust potentially could reach such anticompetitive conduct, but there is reason to believe that other courts applying *Credit Suisse* and *Trinko* might find this conduct to be immune from the antitrust laws, leaving regulators to deal with the problem. How should the financial regulators respond?

III. Do Sector Regulators Effectively Protect Competition?

One obvious solution would be for the sector regulators to police anticompetitive harm in the derivatives markets. Indeed, an animating idea in the implied antitrust immunity case law (and in Justice Scalia's *Trinko* opinion) is that there is less need for antitrust enforcement when regulators are "perform[ing] the antitrust function."[158] This raises the question whether regulators generally, and the financial regulators in particular, are willing and able to perform that function.

---

151 *See, e.g.*, D'Souza, Ellis & Fairchild, *supra* note 101 at 473; Frank Partnoy, *Financial Derivatives and the Costs of Regulatory Arbitrage*, 22 J. CORP. L. 211 (1997); Eric A. Posner & E. Glen Weyl, *An FDA for Financial Innovation: Applying the Insurable Interest Doctrine to Twenty-First-Century Financial Markets*, 107 NW. U. L. REV. 1307 (2015).

152 Felix B. Chang, *Second-Generation Monopolization: Parallel Exclusion in Derivatives Markets*, 2016 COLUM. BUS. L. REV. 657.

153 *Id.* at 697.

154 *Id.* at 697-98.

155 *Id.* at 723.

156 Scopino, *supra* note 149 at 584.

157 *Id.* at 636-37.

158 Verizon Communications Inc. v. The Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 412 (2004) ("One factor of particular importance is the existence of a regulatory structure designed to deter and remedy

Several scholars have argued that regulators are neither particularly eager nor well equipped to step in for the antitrust agencies and police anticompetitive conduct in regulated markets. The reasons cited for this conclusion are several: (1) competition enforcement typically is not among sector regulators' primary missions and may clash with other, higher, agency priorities; (2) sector regulators lack the requisite competition-enforcement expertise; (3) sector regulators do not have access to the more powerful antitrust remedies; and (4) sector regulators are subject to capture.

These concerns are well founded when it comes to the SEC and CFTC. First, neither agency prioritizes competition enforcement. The SEC "is first and foremost an investor-protection and information-disclosure agency, not an agency that investigates and weeds out cartels or other anticompetitive practices."[159] Competition is not mentioned in the SEC website's lengthy description of what the agency does.[160] In its oversight of "the key participants in the securities world, including securities exchanges, securities brokers and dealers, investment advisors, and mutual funds," the SEC states that it "is concerned primarily with promoting the disclosure of important market-related information, maintaining fair dealing, and protecting against fraud."[161] The CFTC's mission statement mentions competition as one among many other priorities: "The mission of the" CFTC "is to foster open, transparent, competitive, and financially sound markets. By working to avoid systemic risk, the Commission aims to protect market users and their funds, consumers, and the public from fraud, manipulation, and abusive practices related to derivatives and other products that are subject to the Commodity Exchange Act."[162]

Not only is competition enforcement a low or non-priority for many sector regulators, it may clash with agencies' higher priorities.[163] As Robert Jablon, Anjali Patel, and Latif Nurani have pointed out, "agencies sometimes view antitrust issues as distractions," including the Nuclear Regulatory Commission, which "severely curtailed its antitrust activities, finding such reviews 'not a sensible use of our limited resources needed to fulfill our primary mission. . . .'"[164] The financial

---

anticompetitive harm. Where such a structure exists, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny. Where, by contrast, '[t]here is nothing built into the regulatory scheme which performs the antitrust function,' the benefits of antitrust are worth its sometimes considerable disadvantages.") (quoting Silver v. New York Stock Exchange, 373 U.S. 341, 358 (1963)); *Silver*, 373 U.S. at 358 (no implied antitrust immunity where "[t]here is nothing built into the regulatory scheme which performs the antitrust function of insuring that an exchange will not in some cases apply its rules so as to do injury to competition which cannot be justified as furthering legitimate self-regulative ends.").

159 Dogan & Lemley, *supra* note 54 at 698.

160 U.S. Securities & Exchange Commission, What We Do, *available at* https://www.sec.gov/Article/whatwedo.html.

161 *Id.*

162 U.S. Commodity Futures Trading Commission, Mission and Responsibilities, *available at* http://www.cftc.gov/About/MissionResponsibilities/index.htm.

163 *See* Jablon, Patel, & Nurani, *supra* note 56 at 649-50 ("Even where agencies have express authority to include antitrust considerations within their regulatory functions, they often neglect to enforce antitrust principles fully in deference to other priorities that they deem more important as well as to needs that they consider more immediate.").

164 *Id.* at 650 (quoting Kansas Gas & Elec. Co., 49 N.R.C. 441, 463 (1999), 64 Fed. Reg. 33916, 33,925 (June 24, 1999)). *See also*, Dogan & Lemley, *supra* note 54 at 697-98 ("Even those agencies whose mission expressly

regulatory agencies have (correctly) asserted that competition concerns are but one factor they must balance against their other priorities. In the SEC's view, Congress, through the securities laws, "instructed the Commission to consider competition in all of its regulatory efforts, but it has not made promoting competition the paramount consideration."[165] And "while enhancing competition 'is a factor to be considered' by the Commission, it is up to the Commission to 'balance those concerns against all others that are relevant under the statute.'"[166]

Even when sector regulators prioritize protecting competition, many lack the expertise and institutional mechanisms to do so effectively. Jablon, Patel, and Nurani have argued that regulatory agencies' "procedural practices raise serious questions" about their "abilities to uncover antitrust violations."[167] While courts must in many cases allow for exhaustive discovery, "evidentiary proceedings are no longer the norm in agency proceedings."[168] Dogan and Lemley agree that "even agencies that are willing to take competition into account rarely provide effective mechanisms to enforce competition policy or deter antitrust violations."[169]

The relative weakness of remedies typically available to regulatory agencies compounds these problems. Most agencies do not have access to remedies as stringent as an antitrust court's ability to assign treble damages under the Sherman Act or to permanently enjoin anticompetitive conduct. As Jablon, Patel, and Nurani have noted, the administrative record in *Trinko* showed that Verizon admitted it had violated its open access commitments and voluntarily paid $3 million to the FCC and $10 million to competitive local exchange carriers.[170] While the *Trinko* opinion relied on these sanctions in part for its conclusion that the FCC's regulatory regime had fulfilled the antitrust function, the FCC Chairman subsequently told Congress that the Commission's maximum fine authority was in many instances "insufficient to punish and deter violations" independent local exchange carriers like Verizon had committed with the aim of "slow[ing] the development of local competition."[171] Among other measures, Chairman Powell recommended increasing the FCC's forfeiture authority against common carriers for single continuing violations of the Telecommunications Act from $1.2 million to "at least $10 million."[172]

involves the consideration of competition issues will not necessarily make it their first among potentially conflicting priorities.")

165 In Re Public Initial Public Offering Antitrust Litigation, Memorandum Amicus Curiae of the Securities and Exchange Commission, Submitted at the Request of the Court (S.D.N.Y. Dec. 20, 2002) (quoting Bradford National Clearing Corp. v. SEC, 590 F.2d 1085, 1104-05 (D.C. Cir. 1978)).

166 *Id.*

167 Jablon, Patel & Nurani, *supra* note 56 at 641.

168 *Id.*

169 Dogan & Lemley, *supra* note 54 at 704.

170 Jablon, Patel & Nurani, *supra* note 56 at 639. *See also*, Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 403 (2004).

171 Letter from Michael Powell, Chairman, Fed. Commc'ns Comm'n, to Leaders of the Senate and House Commerce and Appropriations Comms. (May 4, 2001), https://transition.fcc.gov/Bureaus/Common_Carrier/News_Releases/2001/nrcc0116.html; Jablon, Patel & Nurani, *supra* note 56 at 639. *See also*, Dogan & Lemley, *supra* note 54 at 704 ("An agency that stops certain conduct after it begins does not sufficiently deter antitrust violations; an agency that imposes modest fines but lacks the power to stop the conduct at all will be even less effective.")

172 Powell, *supra* note 171.

Agency capture is another oft-cited reason for regulators' relative weakness as competition enforcers.[173] The literature on capture is well-developed.[174] There is a general scholarly consensus that the political nature of top agency jobs and the revolving door between agencies and the industries they regulate make the sector regulators much more susceptible to industry pressure than antitrust courts.[175] There is reason to believe too that capture is a more pressing problem with sector regulators, especially the financial services regulators, than it is for the antitrust agencies. Among other factors, Antitrust Division and FTC staffers are less likely to have come from or go back to companies subject to ongoing antitrust enforcement oversight than are SEC and CFTC staffers to do the same with companies under ongoing agency regulation.

There are objective measures of the relative competition-enforcement abilities of the antitrust agencies, on the one hand, and the sector regulators on the other. The expert staffs of the antitrust agencies are far larger and more experienced than the competition staffs, if any, at the sector regulators. In recent years, the Antitrust Division typically has had between 340 and 400 attorneys and approximately 50 economists dedicated to competition enforcement,[176] while the FTC's Bureau of Competition has had around 300 attorneys and support staff.[177] Some regulatory agencies, like the FCC, FDIC, and the Federal Reserve, have dedicated competition staff with specific expertise. The FCC has a Wireline Competition Bureau, which includes a Competition Policy Division.[178] The FDIC, Federal Reserve, and Office of the Comptroller of the Currency have staff dedicated to reviewing proposed bank mergers.[179] Even at these agencies, however, the competition staff is far smaller than at the Antitrust Division and FTC. The comparison with the SEC and CFTC is starker. Neither agency has a dedicated competition division or competition staff. Nor has either agency established such a body post-*Credit Suisse*, when it appeared the SEC and

---

173 *See e.g.*, Dogan & Lemley, *supra* note 54 at 698 ("Agencies are famously subject to capture," while "[j]udges are much less subject to having their purpose diverted or to being captured.")

174 This literature is voluminous. *See, e.g.*, Jean-Jacques Laffont & Jean Tirole, *The Politics of Government Decision-Making: A Theory of Regulatory Capture*, 106 Q.J. ECON. 1089 (1991); Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J. OF L., ECON. & ORGANIZATION 167 (1990); Richard A. Posner, *The Concept of Regulatory Capture: A Short, Inglorious History*, in PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT (Daniel Carpenter & David A. Moss eds., 2013) (discussing the history of political capture theory for federal agencies); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT SCI. 3 (1971).

175 *See, e.g.*, Dogan & Lemley, *supra* note 54 at 699 ("[j]udges, by contrast, are much less subject to having their purpose diverted or to being captured.")

176 *See* Melissa Lipman, Law 360, *Proposed Hiring Would Give DOJ Extra Enforcement Power* (Feb. 10, 2016) (from "at least 2009 until 2014, the number of attorney spots" at the Division was 390; at the time of writing, the Division had 380 attorney slots, but only 344 were filled); U.S. Dep't of Justice, Antitrust Division, Economic Analysis Group, EAG Phone Directory, https://www.justice.gov/atr/about-division/economic-analysis-group/eag-phone-directory

177 *See* Federal Trade Commission, Bureau of Competition, https://www.ftc.gov/es/about-ftc/bureaus-offices/bureau-competition.

178 *See*, Federal Communications Commission, Wireline Competition, https://www.fcc.gov/wireline-competition.

179 The Federal Reserve houses its merger review team in the Division of Supervision and Regulation and has an Assistant Director for Mergers and Acquisitions. *See* Board of Governors of the Federal Reserve System, Organizations Charts Accessible Version, https://www.federalreserve.gov/aboutthefed/organization-charts-accessible.htm#bsr.

CFTC would have increased responsibility for competition matters, or in the wake of Dodd-Frank, which required the agencies to monitor and protect competition in the derivatives markets.

Considering this lack of experienced competition staff, it is unsurprising that the SEC and CFTC bring very few independent competition-related enforcement actions.[180] It seems clear that the financial services agencies are either unwilling or unable to "perform the antitrust function" as envisioned by the Supreme Court's case law balancing antitrust and regulation. This conclusion is troubling. It means that when courts apply *Credit Suisse* or *Trinko* to shift the responsibility for policing competition away from the expert antitrust agencies to regulatory bodies that are unprepared for the task, they are leaving some regulated markets, especially the financial markets, vulnerable to anticompetitive conduct.

What is the solution to this problem? Scholars' proposals fall into three categories: judicial, legislative, and sector-regulator empowerment. The judicial approach would rely on courts to ensure that antitrust continues to play an important role in regulated markets. Several judicial strategies have been suggested. One is for courts to strictly limit *Credit Suisse* and *Trinko* so that regulation displaces antitrust only in those narrow circumstances where antitrust enforcement would be plainly repugnant to a regulatory regime. Professor Shelanski has argued that among the "variety of ways that the harmful consequences of *Trinko* and *Credit Suisse* could be mitigated" would be for lower federal courts to interpret those cases "narrowly."[181] Lower courts could apply a high standard for how active "regulatory supervision must be to trigger preclusion of an antitrust claim" and "take a very narrow view of what constitutes 'expansion' of existing antitrust law or of what claims are likely to confuse district courts."[182]

Professors Dogan and Lemley have attacked the problem by proposing antitrust intervention in the case of "regulatory gaming," which they defined as conduct that "abuses a neutral or procompetitive regulatory structure and wields it as a tool to accomplish exclusionary results."[183] They distinguished this sort of gaming from "ordinary government petitions," which are protected under the *Noerr-Pennington* doctrine.[184] Rather, they are focused on "private conduct that distorts the regulatory process," such as pharmaceutical product hopping to delay generic drug competition and industry capture of government standard setting. In those types of cases, Dogan and Lemley contended that antitrust law is the proper tool to evaluate defendants' conduct.[185] Jablon, Patel, and

[180] For example, a review of the CFTC's 2017 enforcement actions shows only one matter arguably involving a competition violation. CFTC Enforcement Actions 2017, http://www.cftc.gov/LawRegulation/Enforcement/EnforcementActions/index.htm. That action was brought against the Royal bank of Scotland for attempted manipulation of the U.S. Dollar International Swaps and Derivatives Association Fix. *See* Commodities Futures Trading Commission, CFTC Orders The Royal Bank of Scotland to Pay $85 Million Penalty for Attempted Manipulations of U.S. Dollar ISDAFIX Benchmark Swap Rates (Feb. 3, 2017), http://www.cftc.gov/PressRoom/PressReleases/pr7527-17. Even in that case, it is not clear that RBS violated any competition law. Similarly, a review of the Securities and Exchange Commission's "Noteworthy Enforcement Actions" from fiscal year 2017 shows no competition or antitrust related matters. U.S. Securities and Exchange Commission, Division of Enforcement, Annual Report: A Look Back at Fiscal Year 2017, https://www.sec.gov/files/enforcement-annual-report-2017.pdf.

[181] Shelanski, *supra* note 33 at 729 (2011).

[182] *Id.* at 730.

[183] Dogan & Lemley, *supra* note 54 at 708.

[184] *Id.*

[185] *Id.*

Nurani have argued for complementary competition enforcement by the antitrust agencies and sector regulators, asserting that, "except where there is a direct conflict, judicial antitrust and agency cases" should "both move forward within their jurisdictions."[186] For antitrust immunity to apply, the authors would require "a clear demonstration that any immunized anticompetitive conduct is necessary to the agency's mission, that the regulatory immunity is articulated and intended rather than implied, and that the agency involved is in fact effectively regulating industry conduct in pursuit of an appropriate competition policy."[187]

The second category of proposed solutions is legislative. Among Professor Shelanski's suggested remedies is congressional action exempting the federal antitrust agencies from the limits *Trinko* and *Credit Suisse* place on antitrust enforcement.[188] Public enforcement eschews many of the potential pitfalls of private suits: it is "much more likely than private litigation to avoid claims that will be prone to judicial errors, interfere with regulation, or fail to yield net benefits over regulation."[189] As a result, Shelanski argued that even if one agreed with the Supreme Court's concerns about antitrust enforcement in regulated markets, those concerns apply with significantly less force to government enforcement. Another legislative solution Shelanski proposed is granting sector regulators "antitrust-like authority to make case-by-case determinations about allegedly anticompetitive conduct even in the absence of a formal rulemaking proceeding."[190]

This latter recommendation suggests a third type of proposed solution to the problems displacement of antitrust in regulated markets poses: empowering the sector regulators to become more effective competition enforcers. Gregory Scopino has asserted that the CFTC already has the tools necessary to protect competition in the regulated derivatives markets: the "antitrust considerations" clauses in Dodd-Frank's derivatives title.[191] These provisions, described in detail above, state that "[u]nless necessary or appropriate to achieve the purposes of this Act," certain organizations operating in the derivatives markets, including derivatives clearinghouses and exchanges, "shall not—(A) adopt any rule or take any action that results in any unreasonable restraint of trade; or (B) impose any material anticompetitive burden."[192] Scopino argued that while, as currently written, the "antitrust considerations" apply to only about "100 or so business organizations that are CFTC-regulated swap entities," the CFTC could grant itself the power to police more anticompetitive conduct by promulgating a rulemaking that would expand the reach of these provisions to "cover any person who engaged in conduct that harmed competition (or had the propensity to do so) in the markets for derivatives."[193] He contended that with this broader authority, the CFTC could become "one more set of eyes" to detect and prevent anticompetitive conduct in the derivatives markets. Indeed, in Scopino's view, the CFTC, as the primary derivatives markets regulator, is "most likely to be the first agency to detect – and the best agency to comprehend the full implications of – anticompetitive behavior in the markets it regulates."[194] Accordingly, he advocated granting the CFTC the authority to seek "antitrust-style injunctive

---

186 Jablon, Patel, and Nurani, *supra* note 56 at 656.
187 *Id.* at 660.
188 Shelanski, *supra* note 33 at 730.
189 *Id.* at 714.
190 *Id.* at 730-31.
191 Scopino, *supra* note 149.
192 7 U.S.C. § 6s(j)(6); 15 U.S.C. § 78o-10(j)(6).
193 *Id.* at 584, 585-86.
194 *Id.* at 657.

remedies" for competition violations, including "ordering the breakup of a large financial entity (or entities)."[195]

Each of these proposed types of solutions to the problems *Credit Suisse* and *Trinko* raise in regulated markets—judicial, legislative, sector-regulator empowerment—have merit. As discussed above, lower courts in a variety of regulated markets have strictly limited the application of *Credit Suisse* and *Trinko*, consistent with Professor Shelanski's call for judicial restraint. As a result, in certain cases courts have allowed the antitrust agencies (or private plaintiffs) and sector regulators to conduct complementary investigations, as Jablon, Patel, and Nurani proposed. Legislation exempting the federal antitrust agencies from efforts to dismiss enforcement actions based on *Credit Suisse* or *Trinko* or empowering the sector regulators to become more effective competition enforcers also could help ameliorate the problems these cases pose. So too could other, similar proposed measures, like Scopino's suggested enhancements to the CFTC's abilities to protect and promote competition.

Currently, however, despite their merits, none of these solutions sufficiently address the problems *Credit Suisse* and *Trinko* pose in the financial markets. Courts have applied these cases with more force in the financial sector than in other regulated markets, displacing antitrust in favor of regulation in some cases. The restraint courts have shown in many regulated markets cannot be counted on in the financial markets. As for legislative solutions, Congress passing laws limiting the reach of *Credit Suisse* and *Trinko* to private plaintiffs seems unlikely in the current political environment. The same is true for legislation granting the sector regulators broader powers to bring competition enforcement actions. While the CFTC could promulgate rulemakings granting itself broader authority to police competition, neither that agency nor the SEC is equipped to do such policing effectively. As Scopino noted, the CFTC has "been chronically underfunded and therefore might not have the resources to devote to antitrust-style enforcement actions."[196] Any enhanced authority to protect competition would be ineffectual without the expert staff to investigate potential anticompetitive conduct and to litigate when violations are uncovered. Neither the CFTC nor the SEC is close to having the necessary personnel resources to fulfill a broader competition enforcement mandate. Creating and staffing dedicated competition divisions within these agencies could be an effective solution, but seems unlikely, at least in the near term. Even if such divisions were put in place, the financial regulatory agencies still would be subject to the other limitations—conflicting priorities, limited remedies, and capture—that restrict their current competition enforcement efforts.

In the absence of effective judicial or legislative solutions to the problems *Credit Suisse* and *Trinko* pose in the financial markets, and in light of the financial regulators' insufficient competition-enforcement resources, these markets remain vulnerable to anticompetitive conduct. Another solution is available, however: regulatory design that protects and promotes competition through structural mechanisms.

IV. A Regulatory-Design Approach

When antitrust immunity attaches to conduct in regulated markets, or regulation otherwise displaces antitrust, and the sector regulators are unable or unwilling to root out competitive

[195] *Id.* at 658.
[196] Scopino, *supra* note 149 at 654.

problems, the best way to preserve and promote competition may be to create structural protections that provide ex ante bulwarks against anticompetitive conduct. The CFTC and SEC provided a model for how this might work in the derivatives markets in their responses to Dodd-Frank's requirement that they promulgate rules regarding conflicts of interest in derivatives trading and clearing.

A. Structural Regulation in the Derivatives Markets

The CFTC and SEC issued proposed rulemakings in October 2010 addressing these conflicts-of-interest issues. The rules have yet to be finalized. The agencies took slightly different approaches in their proposed rulemakings. As a general matter, the CFTC's proposed rule required SEFs and clearinghouses to "establish and enforce rules to minimize conflicts of interest in [their] decision-making process and establish a process for resolving any conflicts of interest."[197] The CFTC crafted different rules for clearinghouses on the one hand and SEFs and designated contract markets ("DCMs") on the other. Both sets of rules were structured around ownership/voting limits and governance restrictions. The proposed rules offered clearinghouses two choices for complying with the CFTC's ownership/voting limits. Option one was to bar any member from owning more than 20 percent of a clearinghouse's equity or controlling more than 20 percent of its voting power, and to prohibit "enumerated entities" (big banks) together from owning more than 40 percent of a clearinghouse's equity or controlling more than 40 percent of its voting power.[198] Further, a clearinghouse would have to ensure that "no resolution or similar measure on which the enumerated entities are entitled to vote" is "passed by less than a majority of all outstanding equity interests similarly entitled to vote."[199] The second option was for a clearinghouse to cap all members' (including enumerated entities') individual equity ownership/voting stakes at 5 percent.[200] In this scenario, there would be no aggregate ownership/voting cap on enumerated entities. In terms of governance, the proposed rules would have required that at least 35 percent of a clearinghouse's board of directors be composed of independent directors. The same would be true for the executive and risk management committees, and at least 10 percent of risk management committee members would be required to be "representative of customers," which in this context meant "any customer of a clearing member."[201] The nominating committee would have to be composed of at least 51 percent independent directors. The chairpersons of the risk management and nominating committees also would have to be independent directors.

The CFTC's proposed conflict of interest rules for DCMs and SEFs took a different approach to ownership/voting limits than those for clearinghouses. Rather than offering two options for complying with the limits, the proposed rules simply restricted individual company ownership/voting stakes to 20 percent and did not include any aggregate cap on big-bank ownership

---

[197] Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities Regarding the Mitigation of Conflicts of Interest, 75 Fed. Reg. 63,732, 63,747, 63,750 (Oct. 18, 2010).

[198] *Id.* at 63,750-63,751. The rule defines "Enumerated Entities" as "A bank holding company . . . with total consolidated assets" of $50 billion or more; "A nonbank financial company" supervised by the Federal Reserve Board; an affiliate of either such a bank holding company or supervised nonbank financial company; "A swap dealer," as defined in Dodd-Frank, or "associated person; "A major swap participant," as defined in Dodd-Frank, or "associated person." *Id.* at 63,750.

[199] *Id.* at 63,751.

[200] *Id.* at 63,751.

[201] *Id.* at 63,750.

or voting power. Regarding governance, the proposed rules required DCMs and SEFs to have a regulatory oversight committee composed entirely of independent directors and a membership or participation committee with 35 percent independent directors. As with clearinghouses, the CFTC proposal would have required DCMs' and SEFs' boards of directors and executive committees to include at least 35 percent independent directors and their nominating committees to include at least 51 percent independent directors.

The SEC's approach to these conflicts-of-interest risks was generally similar to the CFTC's, but included important differences as well. Like the CFTC's proposal, the SEC's proposed rule offered two ownership/voting model choices to clearinghouses. One option capped individual stakes at 20 percent and had an aggregate cap of 40 percent on big banks. The second option capped individual stakes at 5 percent but had no aggregate cap. In contrast to the CFTC's approach, however, the SEC would have imposed stricter governance requirements on clearinghouses choosing the model with no aggregate cap, mandating that the board of directors and risk committee have a majority of independent directors and that the nominating committee be composed entirely of independent directors. The SEC's ownership/voting limits on security-based SEFs mirrored the CFTC's approach to exchanges, limiting individual firm's ownership/voting stakes to 20 percent but lacking an aggregate ownership cap on big banks. However, the SEC's proposed rules would have imposed stricter governance standards on security-based SEFs, requiring a majority of independent directors on the board and executive committee and 100 percent independent directors on the regulatory oversight and nominating committees.

The agencies called for comments on these proposed rulemakings and they received a range of responses. In its submission, the Department of Justice's Antitrust Division argued that the proposals, especially the CFTC's, would not do enough to protect competition in the derivatives markets.[202] The Division limited its comments to the ownership and governance restrictions on DCMs and SEFs and the governance restrictions on clearinghouses; it did not address ownership restrictions on clearinghouses. While it "strongly approve[d] of the CFTC's efforts to improve governance practices, reduce systemic risk, and promote competition" through the proposed rulemaking, the Division asserted that the lack of an aggregate cap on big-bank ownership of DCMs/SEFs meant that the proposal "may not sufficiently protect and promote competition" or "reduce the risk that" big banks might use their control of these platforms to harm competition in the derivatives markets.[203] The Division was concerned that the big banks might exercise control over trading platforms to "exclude rivals, limit pre- and post-trade transparency, decline to trade certain contracts to disadvantage rivals, or to try to evade exchange-trading requirements."[204]

Caps on both individual ownership and aggregate big-bank ownership of DCMs/SEFs would, in the Division's view, "be the most effective structural approach to protecting competition in the derivatives markets."[205] Aggregate ownership caps were important because the big banks "have very similar incentives to limit access and otherwise" restrict competition.[206] The Division

---

202 Before the Commodity Futures Trading Commission, In the Matter of: RIN 3038-AD01, Comments of the United States Department of Justice (December 28, 2010). The author was a signatory to these comments and to the Department's comments on the SEC's proposed rule.
203 *Id.* at 1-2, 4.
204 *Id.* at 4.
205 *Id.* at 4-5.
206 *Id.* at 5.

observed that, in its experience, "structural protections, like aggregate ownership limits, are likely" to better protect competition "and require less oversight than relying solely on ongoing regulatory restrictions."[207] Further, the Division suggested that aggregate ownership caps might promote the creation of multiple DCMs and SEFs, increasing competition in these markets.[208] Even if economies of scale in trading meant that the derivatives markets would be served best by one trading platform (which the Division doubted was the case), it argued that competition for the market would "benefit all market participants."[209]

Regarding the CFTC's governance proposals for DCMs and SEFs, the Division asserted that requiring these entities' boards of directors and all their committees to have a majority of independent directors, and their nominating committees to be 100 percent independent, would "reduce the risk" that these platforms would "erect anticompetitive barriers to competitors or otherwise limit competition" in the derivatives markets.[210]

The Division limited its comments on the CFTC's proposed rules for clearinghouses to governance requirements. It noted that control over a clearinghouse could be used to reject certain swaps for clearing (so they could continue to be traded bilaterally) and to restrict access to new clearinghouse members or to decline clearing certain instruments to harm competitors.[211] As a result, the Division recommended that clearinghouses not choosing the aggregate ownership cap option should be required to have a majority of independent directors on their board, 100 percent independent directors on their nominating committee, and a majority of independent directors on their risk management and executive committees.[212]

The Division's comments on the SEC's proposed rules were similar, but less extensive than its suggestions to the CFTC.[213] The SEC's proposal did not include an aggregate ownership cap option for security-based SEFs and National Securities Exchanges that allow security-based swaps trading. Based on its concerns that big banks controlling a security-based SEF or exchange would have shared incentives to disadvantage rivals or otherwise harm competition, the Division recommended that the SEC add an aggregate big-bank ownership/voting cap to its proposed rules governing these entities.[214] An aggregate cap on big banks, the Division asserted, would "greatly reduce the risk" that they "could impose anticompetitive access restrictions on competitors" or harm competition in other ways, and also would "encourage" firms to "sponsor new, viable SEFs/Exchanges, increasing competition among trading platforms."[215]

In contrast to the DOJ's objections to the agencies' proposed rules, the big banks and certain other participants in the derivatives markets opposed the rulemakings because in their view they were too restrictive and intrusive. In its comments on the CFTC's proposed rulemaking,

---

207 *Id.* at 6.
208 *Id.* at 5.
209 *Id.* at 7.
210 *Id.* at 8.
211 *Id.*
212 *Id.* at 9.
213 Before the United States Securities and Exchange Commission, In the Matter of RIN 3235-AK47, File No. S7-27-10, Comments of the United States Department of Justice (Dec. 28, 2010).
214 *Id.* at 4.
215 *Id.* at 6.

Deutsche Bank argued that while individual entity ownership limits set at 20 percent "would adequately address conflicts concerns," the aggregate cap on big-bank ownership of clearinghouses and exchanges would "exacerbate, rather than diminish" conflicts, particularly for clearinghouses.[216] Deutsche Bank asserted that when "a clearinghouse is owned and controlled by its" members "there is a greater emphasis placed on equal access, safety and democratic decision-making."[217] In contrast, the bank urged, nonmember ownership results in a "greater emphasis" being "placed on achieving a return on investment, risk-taking and hierarchical decision-making."[218] "Most importantly," the bank averred, "nonmember owners do not bear the enormous risks of default that are borne by members" and "[t]he ability of these nonmember-owners to impose risks on members creates moral hazard."[219]

Further, rather than enhancing competition, Deutsche Bank contended that aggregate ownership caps would "increase the risk of monopoly pricing" because, absent ownership and control, "fewer dealers will be willing to take on the risks" of clearinghouse membership.[220] In Deutsche Bank's view, the result would be "entrench[ing] the most powerful clearinghouses and increas[ing] the likelihood of their monopolistic behavior."[221] This argument mirrors objections to the essential facilities doctrine that forced sharing removes the incentives to invest in creating such facilities in the first place.[222]

Instead of employing ownership caps, the bank asserted that conflicts of interest "are best addressed through governance rules requiring clearinghouses to have boards of directors whose composition reflects the interests of a variety of market participants (including a number of independent directors), a risk committee and an independent advisory committee."[223] Nonetheless, Deutsche Bank argued that the agencies' proposed governance rules were too strict and, in particular, that the requirements for independent directors on the risk management committee were "excessive and inappropriate."[224] Because clearinghouse members risk their capital, Deutsche Bank

---

216 Letter from Ernest C. Goodrich, Managing Director—Legal Department, Deutsche Bank AG & Marcelo Riffaud, Managing Director—Legal Department, Deutsche Bank AG to David A. Stawick, Secretary, Commodity Futures Trading Commission & Elizabeth Murphy, Secretary, Securities and Exchange Commission (Oct. 6, 2010) at 11, https://www.scribd.com/document/50740263/26325Deutsche.
217 *Id.*
218 *Id.* at 11-12.
219 *Id.* at 12.
220 *Id.* at 13.
221 *Id.*
222 Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L. J. 841, 851 (1990) ("Required sharing discourages building facilities . . . even though they benefit consumers."); U.S. Dep't. of Justice, Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act, Chapter 7, Unilateral, Unconditional Refusals to Deal with Rivals ("a firm may be unwilling to assume the risk and costs of creating a facility if it could later be compelled to share that facility on terms it would not otherwise have chosen."), https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-7#N_89_.
223 Goodrich, *supra* note 216 at 13.
224 Letter from Ernest C. Goodrich, Managing Director—Legal Department, Deutsche Bank AG & Marcelo Riffaud, Managing Director—Legal Department, Deutsche Bank AG to David A. Stawick, Secretary, Commodity Futures Trading Commission & Elizabeth Murphy, Secretary, Securities and Exchange Commission (Nov. 8, 2010) at 5, https://www.sec.gov/comments/s7-27-10/s72710-9.pdf.

asserted that "it is appropriate that they have the decisive input into risk management decisions" and "should be involved at a minimum in vetting and approving membership decisions."[225]

Other big banks and important players in the derivatives markets echoed Deutsche Bank's arguments. Morgan Stanley opposed the aggregate 40 percent ownership cap and argued that, "at a minimum," such a cap should not apply to "startup" clearinghouses to "foster a market in which newly formed ventures can thrive," thereby increasing competition, decreasing transaction costs, and promoting liquidity.[226] It also "strongly recommended" that the agencies eliminate the 35 percent independent director requirement for clearinghouses' risk management committees, because the expert individuals best situated to make the difficult decisions required are likely to be affiliated with clearinghouse members.[227] In any event, Morgan Stanley advised that independent directors are not necessary for risk committees because "market forces should . . . prevent anticompetitive behavior" involving "margin requirements and standards for membership eligibility."[228] JPMorgan Chase also opposed the aggregate ownership cap and asserted that individual ownership stakes should be capped at ten percent rather than five percent.[229] It took issue with the governance restrictions too, arguing that the 35 percent independent director requirement for the board of directors would be "problematic to implement in practice" because it would be difficult to find independent directors with the requisite expertise.[230] The bank proposed instead a requirement that "no single class of interested parties achieves more than [] 65% of the seats on the board."[231] The Depository Trust and Clearing Corporation ("DTCC") agreed with Deutsche Bank that conflicts of interest should be addressed through governance requirements. DTCC went so far as to argue that ownership and voting limitations on clearinghouses and exchanges should be "eliminated in their entirety."[232]

In retrospect, it certainly seems that the Division's concerns were well founded and the big banks' objections, particularly regarding the composition of risk committees, misplaced at best and cynical at worst. The allegations in the *In re Credit Default Swaps* case, which the banks settled for almost two billion dollars, closely track the Division's theories of how risk committees could be used to disadvantage derivatives trading rivals, harm consumers, and manipulate the types of derivatives required to be exchange-traded and cleared. Plaintiffs in that case alleged that the dealer-defendants used their control over both ICE Clear Credit's and CME's risk committees to "limit changes to the over-the-counter CDS market."[233] "Under the guise of risk committee meetings," the big banks "imposed rules restricting participation in ICE that were designed to prevent a transition to

225 *Id.* at 5-6.
226 Letter from James Hill, Managing Director, Morgan Stanley to David A. Stawick, Secretary, Commodity Futures Trading Commission & Elizabeth M. Murphy, Secretary, Securities and Exchange Commission (Nov. 17, 2010) at 1-3.
227 *Id.* at 4.
228 *Id.* at 5.
229 Letter from Barry L. Zubrow, EVP and Chief Risk Officer, JPMorgan Chase to David A. Stawick, Secretary, Commodity Futures Trading Commission & Elizabeth M. Murphy, Secretary, Securities and Exchange Commission (Nov. 17, 2010) at 5.
230 *Id.* at 3.
231 *Id.*
232 Letter from Larry E. Thompson, General Counsel, Depository Trust and Clearing Corporation, to The Hon. Mary Schapiro, Chairman, U.S. Securities and Exchange Commission and The Hon. Gary Gensler, Chairman. U.S. Commodity Futures Trading Commission (Nov. 15, 2010) at 2, https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=26404&SearchText=Thompson.
233 *In re Credit Default Swaps Antitrust Litigation*, 2014 WL 4379112 at *5 (S.D.N.Y. 2014).

exchange trading" because such a transition would have lowered their bid-ask spreads and reduced their profits.[234] Similarly, "[a]s a condition of their joining" CME's clearinghouse, "Dealer-Defendants demanded to control CME's risk committee" and "operating through that committee froze CME's ability to clear trades. They did this by, among other things, promulgating rules that limited how many members could join the clearinghouse."[235] As Professor Felix Chang has observed, due to big-bank control, clearinghouses may "set high bars to . . . membership" with the result that "rival dealers will be unable to gain entry."[236] Chang concluded that this "scenario appears to be playing out since the membership profile of the dominant . . . clearinghouses remains unchanged from year to year."[237]

This is not to say that there is no merit to concerns that, absent control over clearinghouse decision-making, financial firms will be reluctant to contribute the necessary capital to form and support clearinghouses. But big-bank objections to, for example, requirements that 35 percent of risk committee members be independent, should be taken with a strong dose of skepticism, considering the history of these markets. The Antitrust Division's call for structural regulation appears to have a strong grounding in the available evidence.[238]

B. Is Structural Regulation of the Derivatives Markets Preferable to Antitrust?

There are many reasons to conclude that antitrust enforcement more effectively protects and promotes competition than regulatory-agency enforcement. But can the same be said of the comparison to structural regulation of the type proposed in the 2010 SEC and CFTC rulemakings? The difficulty of prevailing on the types of antitrust claims that arise in markets involving bottlenecks suggests that structural regulation may indeed do a better job safeguarding competition than antitrust enforcers or private plaintiffs suing under the antitrust laws can do under current law.

---

[234] *Id.*
[235] *Id.*
[236] Chang, *supra* note 152 at 697.
[237] *Id.* at 697-98.
[238] Ownership and governance restrictions are not the only available structural approach to addressing the competitive and systemic risks clearinghouses pose. Another regulatory option is to nationalize derivatives clearinghouses and treat them like central banks. While this possibility may have intuitive appeal to some, scholars and other experts have noted potential problems with this approach. Paul Tucker has suggested three reasons for leaving clearinghouses in the private sector: that public agencies may have their own shortcomings, including being subject to the demands of short-term political imperatives; the global nature of the derivatives markets makes it unclear which country's central government would provide the clearing service; and "*it isn't true that" clearinghouses "can't be allowed to fail . . . so long as stability is maintained.*" Paul Tucker, *Are Clearing Houses the New Central Banks*?, Over the Counter Derivatives Symposium 9-10 (April 2014), file:///C:/Users/sweinst4/Downloads/tucker-clearinghouses-new-central-banks-tucker-2014-pdf.pdf. Tucker argued that the "solution to moral hazard is not to embrace it by taking central clearing into the state, but to cure it by putting risk back on to the community of private sector firms that bring risk to the clearing house." *Id.* at 10. *See also*, Colleen M. Baker, *Clearinghouses for Over-the-Counter Derivatives* (Nov. 2016) (while "clearinghouses could be state-owned[,] . . . state actors, like private actors, also err" and the "private market is likely to have more advanced risk management expertise, which should ideally promote clearinghouse stability."), http://cms.ineteconomics.org/uploads/downloads/Clearinghouses_FINAL_ONLINE.pdf. Another possible regulatory response would be to treat clearinghouses like public utilities, with the federal government setting rates. This approach might undercut clearinghouses' ability to charge supracompetitive prices and, if it extended government control to clearinghouse membership and access, could solve the competition problems clearinghouses raise under Dodd-Frank. But, as with nationalization, utility-type regulation comes with significant costs. As Professor Chang has observed, it would be "very difficult for regulators to monitor and set rates" and utility treatment might "stifle beneficial competition" when technological change undermines a dominant clearinghouse's position. Felix B. Chang, *The Systemic Risk Paradox: Banks and Clearinghouses under Regulation*, 2014 COLUM. BUS. L. REV. 747, 809-10.

Professor Chang has argued that the bottleneck problems clearinghouses pose can be addressed through antitrust's essential facilities doctrine.[239] Some courts have found that firms controlling a facility to which access is required to compete in a relevant market cannot unreasonably deny such access to downstream rivals.[240] An oft-cited articulation of the elements of this type of claim is found in the Seventh Circuit's decision in *MCI Communications v. AT&T Co.*[241] That court explained that the "case law sets forth four elements necessary to establish liability under the essential facilities doctrine: (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility."[242]

The problem with relying on the essential facilities doctrine, as Professor Chang noted, is that it is highly disfavored among courts and commentators.[243] Professor Areeda famously asserted that essential facilities is "less a doctrine than an epithet, indicating some exception to the right to keep one's creations to oneself, but not telling us what those exceptions are."[244] Critics have argued that the doctrine can dampen dynamic efficiency by undermining incentives for firms to create competing facilities or for monopolists to improve their own facility.[245] Certain of these objections apply squarely in the case of clearinghouses. If potential members believe they ultimately will be forced to offer open access to their clearinghouse, they may be unwilling to make the significant capital investments starting and maintaining a clearinghouse would require.[246] Further, even when

---

[239] Chang, *supra* note 238 at 810-13 (describing derivatives clearinghouses as essential facilities and asserting that the essential facilities "framework can be useful in supplementing the regulation of clearinghouses by, among other things, giving shape to the open-access obligation and clarifying when rivals of clearinghouse members might be able to pursue a private right of action.")

[240] *See, e.g.*, Hecht v. Pro-Football, Inc., 570 F.2d 982, 992 (D.C. Cir. 1977) ("[W]here facilities cannot practicably be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms. It is illegal restraint of trade to foreclose the scarce facility."); Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 542 (9th Cir. 1991) ("[T]he essential facilities doctrine imposes liability when one firm, which controls an essential facility, denies a second firm reasonable access to a product or service that the second firm must obtain in order to compete with the first.").

[241] 708 F.2d 1081 (7th Cir. 1983).

[242] *Id.* at 1132-33.

[243] Chang, *supra* note 238 at 812 (noting "the controversy surrounding essential facilities in general antitrust circles"); Spencer Weber Waller, *Areeda, Epithets, and Essential Facilities*, 2008 WIS. L. REV. 359 (arguing for rehabilitating the essential facilities doctrine, and noting the "counterrevolution in antitrust thought that has left the essential facilities doctrine, charitably speaking, hanging by a thread.")

[244] Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L. J. 841 (1990).

[245] *See* Daniel F. Spulber & Christopher S. Yoo, *Mandating Access to Telecom and the Internet: The Hidden Side of Trinko*, 107 COLUM. L. REV. 1822, 1834-45 (2007) (arguing that "when competitive entry is possible, the essential facilities doctrine can have a detrimental impact on incentives to invest in alternative network capacity" and "[c]ompelled access also dampens the incentives of the essential facilities defendant to invest in improvements in its facilities... ."); Alan Kezsbom & Alan V. Goldman, *No Shortcut to Antitrust Analysis: The Twisted Journey of the "Essential Facilities" Doctrine*, 1996 COLUM. BUS. L. REV. 1, 2 (1996) ("The concept of an essential facility has been used by would-be competitors who do not have the skill or drive to 'blaze their own path,' but instead simply wish to appropriate, under the guise of requiring 'fair' access to 'essential' facilities, the capital investment and business efforts of their successful predecessors in the relevant market.")

[246] *See, e.g.*, Letter from Ernest C. Goodrich, Managing Director—Legal Department, Deutsche Bank AG & Marcelo Riffaud, Managing Director—Legal Department, Deutsche Bank AG to David A. Stawick, Secretary, Commodity Futures Trading Commission & Elizabeth Murphy, Secretary, Securities and Exchange

courts are willing to consider liability under the essential facilities doctrine, the four-part test is difficult for plaintiffs to satisfy.[247]

Essential facilities allegations are a species of refusal-to-deal claims, which also are challenging for plaintiffs. Unilateral refusals to deal are rarely actionable.[248] Claims asserting unlawful concerted refusals to deal are sometimes successful, but still can be difficult for plaintiffs to win.[249] To address this problem, Professor Chang also has proposed applying the theory of parallel exclusion to exclusionary conduct by clearinghouse members. Professors Scott Hemphill and Tim Wu, who developed this theory, have described parallel exclusion as "self-entrenching conduct, engaged in by multiple firms, that harms competition by limiting the competitive prospects of an existing or potential rival to the excluding firms."[250] Chang argued that in situations where members of a clearinghouse's risk committee "arrive independently at policies" which exclude competitors, under current antitrust case law courts may have little recourse to prevent the conduct. If the decisions indeed are made independently, section 1 of the Sherman Act would not apply. Chang would have courts solve this problem by using Hemphill and Wu's theory to find a section 2 "shared monopoly" violation where clearinghouse members exclude rivals in a manner that unreasonably harms competition. In the absence of such a solution, Chang asserted that the "inability of antitrust to recognize a 'second generation' of monopolization harms from parallel exclusion consigns the OTC derivatives markets to a degree of concentration that imperils competition, consumers, and systemic risk."[251]

Structural regulation of clearinghouses and derivatives exchanges avoids the problems antitrust enforcement faces in these markets. Whether exclusionary conduct by clearinghouse members working through risk committees or otherwise falls into gaps in the antitrust laws is much

---

Commission (Oct. 6, 2010) at 13 ("Without the possibility for ownership and control, fewer dealers will be willing to take on the risks of membership in a new clearinghouse.")

247 Robert Pitofsky, Donna Patterson & Jonathan Hooks, *The Essential Facilities Doctrine under U.S. Antitrust Law*, 70 ANTITRUST L. J. 443, 449 ("Courts rarely impose liability under the essential facilities doctrine, in large part because the doctrine requires a showing that the facility controlled by the defendant is truly *essential* to competition–i.e., constitutes an input without which a firm cannot compete with the monopolist.") *See also*, Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 410-11 (2004) (outcome in defendant's favor "would be unchanged even if we considered to be established law the 'essential facilities' doctrine crafted by some lower courts, under which the Court of Appeals concluded respondent's allegations might state a claim. We have never recognized such a doctrine, and we find no need either to recognize it or to repudiate it here. It suffices for present purposes to note that the indispensable requirement for invoking the doctrine is the unavailability of access to the 'essential facilities'; where access exists, the doctrine serves no purpose.")

248 *See, e.g.*, Duty Free Ams., Inc. v. Estee Lauder Cos., 797 F.3d 1248, 1265 (2015) ("[i]t is by now well settled that '[a] unilateral refusal to deal is [generally] not unlawful.'")

249 In *Northwest Wholesaler Stationers v. Pacific Stationary & Printing Co.*, 472 U.S. 284 (1985), the Supreme Court placed limits on *per se* treatment of concerted refusals to deal. It explained that its past decisions had applied the *per se* rule to group boycotts where "the boycotting firm possessed a dominant position in the relevant market" and "the practices were generally not justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive." *Id.* at 294. The Court concluded that "[a]lthough a concerted refusal to deal need not necessarily possess all of these traits to merit *per se* treatment, not every cooperative activity involving a restraint or exclusion will share with the *per se* forbidden boycotts the likelihood of predominately anticompetitive consequences." *Id.* at 295.

250 C. Scott Hemphill & Tim Wu, *Parallel Exclusion*, 122 YALE L. J. 1182, 1189 (2013).

251 Chang, *supra* note 152 at 738.

less important if the big banks cannot control risk committees or other clearinghouse and derivatives exchange committees. Absent that control, the big banks will find it difficult to exclude rivals. The structural solution would not require relying on uncertain regulatory enforcement to ensure competition is protected. Sufficiently strict ownership caps and governance restrictions address the problem without active agency involvement.

One potentially serious drawback to this structural approach was suggested in the big banks' responses to the CFTC's and SEC's proposed conflicts-of-interest rulemakings. It may prove difficult to convince big banks to contribute sufficient capital to clearinghouses over which they do not have ultimate control. Without big-bank contributions, clearinghouses may face a liquidity shortage and may not be able to serve their systemic risk function. It is unclear, however, how much of a problem this will pose in practice. Under the agencies' proposed rulemakings, big banks still can own significant stakes in clearinghouses and exchanges. And as a group, big banks can own up to 40 percent or even 100 percent of a clearinghouse or exchange. True, the rules' governance restrictions limit the big banks' control, but even under the strictest of the proposed limits, they still could have a significant presence on most committees and the board of directors. There will be some profit to be made by owning part of a clearinghouse or exchange and there are other significant advantages to membership, including the ability to trade and clear trades without seeking approval from these facilities. In sum, the competition-related benefits of structural regulation are strong and the drawbacks are speculative.

There is another potentially compelling reason to prefer structural regulation to antitrust in this context: increased competition in derivatives trading may not always be beneficial. Antitrust enforcement typically has one goal: eliminating unlawful barriers to competition to increase output of goods and services—thereby lowering prices—and spur innovation.[252] In most markets, this goal is in harmony with, or at least not inconsistent with, other public policy objectives. Markets for toxic products are an exception. Professor Daniel Crane has studied this issue with regard to the tobacco industry.[253] He observed that "output remains the dominant goal of antitrust enforcement in the tobacco industry" and that "[i]n general, the antitrust establishment simply ignores the harmful nature of tobacco" when considering enforcement in that sector. To address this problem in antitrust law, Crane identified what he termed "net-harm markets," which he described as markets where "(1) The consumption of the good at any level of output produces greater total internal and external costs than internal and external benefits; or (2) At the output level determined by a competitive market, consumption of the good produces greater total costs than total benefits."[254] Crane conceded that it may be difficult to identify net-harm markets, but suggested that one way to do so is to look to whether public policy, expressed through government statements and actions, evinces a consensus that output of a product is harmful. This is the case for tobacco products, and in Crane's view it means that tobacco is a net-harm market which "should be eligible for extraordinary antitrust treatment."[255] Crane advised that in net-harm markets, antitrust agencies and

---

252 *See* Daniel A. Crane, *Harmful Output in the Antitrust Domain: Lessons from the Tobacco Industry*, 39 GA. L. REV. 321, 341 (2005) ("output remains the Holy Grail of modern antitrust enforcement").
253 *Id.*
254 *Id.* at 346.
255 *Id.* at 358. As evidence for the public-policy consensus that tobacco output is "on balance, harmful," Crane pointed to "official expression" of that sentiment "in government expenditures on anti-tobacco advertising, frequent government warnings on the dangers of tobacco consumption, numerous

courts should "pursue a goal of harm-reduction, rather than one of output maximization" and that in cases where a public policy consensus exists to reduce consumption of a product "then the antitrust laws should not be used to increase consumption of that product."[256]

Are derivatives a net-harm market? As Crane noted, it is difficult to determine quantitatively if a market produces greater costs than benefits.[257] There is persuasive evidence that the derivatives markets were in large part responsible for much of the damage the financial crisis caused.[258] That damage was enormous. The Government Accountability Office stated in 2013 that studies have shown the crisis caused between a "few trillion" and over $10 trillion in lost output and led to "large declines in employment, household wealth, and other economic indicators."[259] The derivatives markets also provide important economic benefits, however, allowing companies to hedge risks, thereby expanding the amount of available credit in the economy.[260] Whether those benefits outweigh the harms derivatives already have caused and may cause in the future is likely impossible to say with mathematical certainty.

To the extent Dodd-Frank represents a public policy consensus on the treatment of derivatives, that consensus is that, to reduce systemic risk, the vast majority of derivatives should be traded on transparent exchanges and centrally cleared. Dodd-Frank accordingly is biased toward standardized swaps that can be exchange-traded and away from exotic swaps that might not qualify for exchange trading. Arguably, the Act also at least implicitly aims to reduce output of derivatives contracts. By pushing most derivatives trades to regulated exchanges and central clearinghouses, Dodd-Frank increases the chances that certain trades will not be consummated, either because regulators having seen them will bar them or because clearinghouses will reject either the derivatives trader or a specific trade.[261] That being said, there is no explicit mandate in Dodd-Frank to reduce the overall output of derivatives trades similar to government pronouncements in the tobacco

---

federal and state statutory schemes, federal and state regulations, and federal and state anti-tobacco litigation." *Id.* at 357-58.

256 *Id.* at 367.

257 *Id.* at 356 ("The empirical model is too fraught with controverted methodologies, wide ranges of value estimates, and normative assumptions to form the basis of a compelling argument that a particular industry causes more harms than benefits and therefore should be subject to extraordinary antitrust rules.")

258 *See, e.g.*, Charles W. Murdock, *The Dodd-Frank Wall Street Reform and Consumer Protection Act: What Caused the Financial Crisis and will Dodd-Frank Prevent Future Crises?*, 64 SMU L. REV. 1243, 1249 (2011) ("this article demonstrates [that] it was the 'big banks'--by funding the subprime lenders, buying their mortgages and securitizing them, slicing them to form CDOs and synthetic CDOs through derivatives, and leaning on the credit rating agencies to get AAA ratings for junk--that were the primary cause of the financial crisis."); Brian J.M. Quinn, *The Failure of Private Ordering and the Financial Crisis of 2008*, 5 N.Y.U. J. OF L. & BUS. 549, 593 (2009) ("Synthetic derivatives permitted market participants to generate potentially infinite levels of leverage. The additional leverage from synthetic derivatives created deeper and unexpected interconnections among participants and thus accelerated distress throughout the system.")

259 Government Accountability Office, *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act* (Jan. 2013), http://www.gao.gov/assets/660/651322.pdf.

260 Quinn, *supra* note 258 at 607 ("Derivative transactions can be valuable and efficiency enhancing," allowing parties to hedge against real risks, like the price of fuel increasing or the likelihood of an important creditor defaulting. These hedges are socially efficient. Banning default swaps completely as some have suggested would be a mistake.")

261 *But see*, Antony Page, *Revisiting the Causes of the Financial Crisis*, 47 IND. L. REV. 37, 56 (2014) ("A centralized exchange, for example, might simply increase the demand for derivatives and concentrate the credit risk.")

markets. Nonetheless, derivatives markets potentially are net-harm markets for which antitrust, with its goal of increasing output and innovation, is an awkward fit. Under Crane's model, enforcers and courts would give the derivatives markets different antitrust treatment than non-net-harm markets. At least under current antitrust law and agency policy that approach seems unlikely to be implemented. The problem is avoided altogether, however, if competition issues in the derivatives markets are addressed by structural regulation with sector-regulator oversight, rather than antitrust enforcement.[262] In this scheme, the structural regulations "perform the antitrust function" that sector regulators are unequipped for, freeing them to concentrate on their core competency—ensuring that the derivatives markets do not unduly increase systemic risk. In doing so, the sector regulators can judge how much competition and innovation is healthy in these markets.

While concerns about toxic products likely do not apply to many regulated markets, the advantages of structural regulation we see in the derivatives markets may be broadly relevant to other regulated markets where antitrust immunity or displacement of antitrust on regulatory grounds is a risk. In the potential absence of antitrust enforcement in markets where the sector regulators are unprepared or unwilling to perform the antitrust function structural regulation can fill the gap. Some sector regulators may be willing and competent guardians of competition; when that is the case, there is less need to consider the structural alternative. But, particularly in the financial markets, structural regulation should be considered a primary option when it is clear that the shadow of antitrust is receding.

V. Conclusion

Increased concentration in many markets is forcing a renewed national conversation about the appropriate role of antitrust. In this light, the Supreme Court's restrictions on antitrust enforcement in regulated markets are especially concerning. This concern is heightened by evidence that sector regulators generally are poorly suited to protect competition and reluctant to take on that job. This article has proposed a regulatory-design solution to the challenge of protecting competition in regulated markets. Structural regulation of potential competitive bottlenecks can adequately preserve competition while allowing sector regulators to focus on their core missions. When executed properly, this approach may be superior to active sector-regulator competition enforcement and even to traditional antitrust enforcement.

262 Professors Eric Posner and Glen Weyl argue for a different type of regulatory solution to the problems increased innovation and output of derivatives pose. In their article *An FDA for Financial Innovation: Applying the Insurable Interest Doctrine to Twenty-First-Century Financial Markets*, 107 NW. U. L. REV. 1307 (2015), the authors propose the creation of an equivalent to the Food and Drug Administration for regulating financial derivatives. "Financial innovators" would be required to "submit proposed new financial products to the government for approval before they may sell them to the public." *Id.* at 1309-10. That agency would approve such products only if "they satisfy a test for social utility that focuses on whether the product will likely be used more often for insurance than for gambling." *Id.* at 1307.