# TEMPLE LAW REVIEW





**VOL. 91 NO. 3** **SPRING 2019**


# ARTICLES

## FINANCIAL REGULATION IN THE (RECEDING) SHADOW OF ANTITRUST


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ABSTRACT

*Mounting evidence that many key industries in the U.S. economy have become less competitive in recent years is prompting a renewed national conversation about an enhanced role for antitrust enforcement. But there are limits on the anticompetitive conduct antitrust enforcers and private plaintiffs can reach, especially in regulated markets. This is due in part to the doctrine of implied antitrust immunity: when a court perceives a conflict between the antitrust laws (e.g., the Sherman Act) and a regulatory regime (e.g., the securities laws), it may find immunity for conduct that otherwise would violate the antitrust laws. Two Supreme Court cases from the 2000s,* Verizon Communications Inc. v. Law Offices of Curtis V. Trinko *and* Credit Suisse v. Billing*, appeared to enhance these restrictions, seemingly increasing the likelihood that regulation will displace*



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The author would like to thank Afra Afsharipour, Christopher Buccafusco, Felix Chang, John Crawford, Jared Ellias, Elai Katz, Prasad Krishnamurthy, Luke Norris, Michael Pollack, Ed Rock, Gregory Scopino, Carl Shapiro, Howard Shelanski, Daniel Sokol, Rory Van Loo, Lawrence White, Ramsi Woodcock, and Yesha Yadav for their insightful comments and suggestions. The Article also benefitted from helpful comments from participants at the 2018 Corporate Law & Finance Meets Antitrust Policy: Old & New Questions Conference at Lund University, the 2018 Next Generation of Antitrust Scholars Conference at NYU, and the 2017 National Business Law Scholars Conference at the University of Utah. Thanks also to Matthew Rametta for his excellent research assistance.

*antitrust entirely in many circumstances. This Article demonstrates that these cases have had a surprisingly limited impact in most regulated markets but have affected the scope of implied immunity in the financial sector. As a result, the job of confronting heightened concentration and reduced competition in financial services may fall to sector regulators, especially the Securities & Exchange Commission and Commodity Futures Trading Commission. But these agencies are unprepared for the task and often 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 financial markets therefore may suffer. The stakes are high: increased concentration in financial markets harms consumers and may threaten systemic financial safety. In light of the sector regulators' limitations, this Article proposes a regulatory-design solution to the problem of competition enforcement in financial markets and focuses on Dodd-Frank's regulatory regime for the derivatives markets as a case study. It argues that Congress and/or the sector regulators should craft structural rules to protect competition in these markets ex ante rather than solely relying on conduct rules and corrective measures taken ex post. The Article contends that increased reliance on structural regulatory responses to competition problems in regulated markets may be beneficial from a competition standpoint when compared to antitrust enforcement and that these salutary effects may be enhanced when the products involved are potentially toxic, as is the case for some derivatives products. This approach is particularly crucial for the derivatives markets, which are enormous, continue to grow, and pose serious competition and systemic risks that may spill over into the wider economy.*

TABLE OF CONTENTS

## INTRODUCTION

Increased concentration across the economy is prompting a renewed national conversation about the appropriate role of antitrust. Indeed, there are strong indications that a number of key industries have become less competitive in recent years. In April 2016, the White House Council of Economic Advisers released an issue brief asserting that "competition appears to be declining in at least part of the economy."[1] President Obama issued an accompanying executive order, which outlined steps to increase competition.[2] *The Economist* observed in 2016 that, "[a]fter 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."[3] Economic policy experts have warned that "[t]here's no question that most industries are becoming more concentrated"[4] and "[i]n nearly every sector of the economy, the largest firms have more market share than they did in the late 1990s."[5] The most profitable of those firms earn "persistently high" returns "undiminished by competition."[6] These experts question whether "[l]ack of [c]ompetition" is "[s]trangling the U.S. [e]conomy."[7]

These concerns would suggest an enhanced role for antitrust law and for the federal antitrust enforcement agencies, which protect competition through merger control, investigations of anticompetitive conduct, and criminal enforcement.[8] There is persuasive evidence that the Federal Trade Commission

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1. COUNCIL OF ECON. ADVISERS, BENEFITS OF COMPETITION AND INDICATORS OF MARKET POWER 4 (2016), http://obamawhitehouse.archives.gov/sites/default/files/page/files/20160414_cea_competition_issue_brief.pdf [http://perma.cc/AL4C-N9JB].

2. Exec. Order No. 13,725, 81 Fed. Reg. 23,417 (Apr. 15, 2016).

3. *Too Much of a Good Thing*, ECONOMIST (Mar. 26, 2016), http://www.economist.com/news/briefing/21695385-profits-are-too-high-america-needs-giant-dose-competition-too-much-good-thing [http://perma.cc/YH82-EWBM].

4. David Wessel, *Is Lack of Competition Strangling the U.S. Economy?*, HARV. BUS. REV. (Mar.–Apr. 2018), http://hbr.org/2018/03/is-lack-of-competition-strangling-the-u-s-economy [http://perma.cc/5C5L-F2R9].

5. Jay Shambaugh & Ryan Nunn, *American Markets Need More Competition and More New Businesses*, BROOKINGS INSTITUTION (June 13, 2018), http://www.brookings.edu/blog/up-front/2018/06/13/american-markets-need-more-competition-and-more-new-businesses/ [http://perma.cc/RLG5-TZQT].

6. *Id.*

7. Wessel, *supra* note 4.

8. *See, e.g.*, *Guide to Antitrust Laws*, FED. TRADE COMM'N, http://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws [http://perma.cc/6MTK-S74H] (last visited Apr. 15, 2019) ("The FTC's competition mission is to enforce the rules of the competitive marketplace—the antitrust laws."); *Mission*, U.S. DEP'T OF JUST., ANTITRUST DIVISION, http://www.justice.gov/atr/mission [http://perma.cc/EJ3F-9788] (last visited Apr. 15, 2019) ("The mission of the Antitrust Division is to promote economic competition through enforcing and providing guidance on antitrust laws and principles."). 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. *See Antitrust Enforcement and the Consumer*, U.S. DEP'T JUST., http://www.justice.gov/atr/file/800691/download [http://perma.cc/H9GW-LKB4] (last

and the Antitrust Division of the U.S. Department of Justice indeed have been more active in the past several years,[9] but there are limits on the anticompetitive conduct federal antitrust enforcers (and private plaintiffs) can reach, especially in regulated markets.[10] This is due in part to the doctrine of implied antitrust immunity: when a court perceives a conflict between the antitrust laws (e.g., the Sherman Act) and a regulatory regime (e.g., the securities laws), it may find immunity for conduct that otherwise would violate the antitrust laws. Two Supreme Court decisions in the 2000s threatened to shift the balance between regulation and antitrust enforcement by expanding the reach of implied antitrust immunity and other forms of regulatory displacement of antitrust. In *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*[11] and *Credit Suisse Securities (USA) LLC v. Billing*,[12] 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.[13] The

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visited Apr. 15, 2019) (explaining the Antitrust Division's and Federal Trade Commission's antitrust enforcement powers).

9. *See, e.g.*, Alexei Alexis, *Merger Crackdown Part of 'Mixed' Obama Antitrust Record*, BLOOMBERG L. (June 1, 2016), http://www.bna.com/merger-crackdown-part-n57982073405/ [http://perma.cc/U5AM-SP49] ("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*, THESTREET (Apr. 28, 2016, 11:27 AM), http://www.thestreet.com/story/13538758/1/big-government-steps-up-challenges-to-big-business-in-merger-wars.html [http://perma.cc/5WMB-9CZT] ("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), http://www.propublica.org/article/airline-consolidation-democratic-lobbying-antitrust [http://perma.cc/J8JB-LGA2] ("[T]he 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."). While it is too soon to come to any firm conclusions, this trend toward more active enforcement appears to have extended into the Trump administration. *See*, *e.g.*, *5 on 45: Antitrust Enforcement in the Trump Era*, BROOKINGS INSTITUTION (Jan. 10, 2018), http://www.brookings.edu/podcast-episode/antitrust-enforcement-in-the-trump-era/ [http://perma.cc/R2ZY-4ATF] (describing "the Trump administration's antitrust efforts" as "robust for a Republican administration"); Harper Neidig, *Trump Regulators Signal New Antitrust Approach with AT&T Merger*, HILL (Nov. 18, 2017, 10:33 AM), http://thehill.com/policy/technology/360972-trump-regulators-signal-new-antitrust-approach [http://perma.cc/ACE2-8KER] (quoting experts' views that the Department of Justice's suit to block the AT&T-Time Warner merger might signal that the Trump administration would be tougher on vertical mergers than the Obama administration).

10. For purposes of this discussion, a regulated market is a market subject to statutory requirements and regulations enforced by a government agency or agencies.

11. 540 U.S. 398 (2004).

12. 551 U.S. 264 (2007).

13. *See, e.g.*, Richard M. Brunell, *In Regulators We Trust: The Supreme Court's New Approach to Implied Antitrust Immunity*, 78 ANTITRUST L.J. 279, 280 (2012) (noting that *Trinko* and *Credit Suisse* suggest that "the United States seems to be moving towards displacing antitrust in favor of regulatory remedies"); Stacey L. Dogan & Mark A. Lemley, *Antitrust Law and Regulatory Gaming*, 87 TEX. L. REV. 685, 685–86 (2009) (arguing that these cases "have fundamentally altered the

antitrust enforcement agencies warned that these cases could reduce or eliminate their ability to protect competition in markets subject to regulation.[14]

To date, the worst of these fears has yet to be realized. This Article's review of lower court decisions from the decade since the Supreme Court decided *Credit Suisse* 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 *Trinko* and *Credit Suisse* 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.[15] The story is different for cases involving the financial markets, however. There, courts have been more willing to find implied antitrust immunity or that regulation otherwise supplants antitrust.[16] 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).

These agencies are not particularly effective guardians of competition, however.[17] There are several explanations for this. In most cases, competition

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relationship between antitrust and regulation, placing antitrust law in a subordinate relationship" to regulation); Justin (Gus) Hurwitz, *Administrative Antitrust*, 21 GEO. MASON L. REV. 1191, 1193 (2014) (asserting that these cases "can be read together as advancing a very broad regulatory displacement standard for federal antitrust claims in fields subject to regulation"); Howard A. Shelanski, *The Case for Rebalancing Antitrust and Regulation*, 109 MICH. L. REV. 683, 684 (2011) [hereinafter Shelanski, *Rebalancing Antitrust and Regulation*] ("By broadening the conditions under which regulation blocks antitrust enforcement, [*Trinko* and *Credit Suisse*] redrew the boundary between antitrust and regulation . . . .").

14. *See, e.g.*, David L. Meyer, Deputy Ass't Att'y Gen'l, Antitrust Division, U.S. Dep't of Justice, We Should Not Let the Ongoing Rationalization of Antitrust Lead to the Marginalization of Antitrust at 17, Presented at the George Mason University Law Review 11th Annual Symposium on Antitrust (Oct. 31, 2007) (describing a portion of the *Credit Suisse* opinion as "remarkable" in its "implied confidence that, in the face 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 an effective way of preserving them." *Id.* at 15; *see also Is There Life After* Trinko *and* Credit Suisse*?: The Role of Antitrust in Regulated Industries: Hearing Before the Subcomm. on Courts & Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. 13 (2010) [hereinafter *Is There Life After* Trinko *and* Credit Suisse*?*] (statement of Howard A. Shelanski, Deputy Director for Antitrust, Bureau of Economics, Federal Trade Commission) ("[T]he 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.").

15. *See infra* notes 110–28, 157–75 and accompanying text.

16. *See infra* notes 129–56 and accompanying text.

17. *See infra* Section III.

policy and enforcement are not among the sector regulators' primary missions.[18] 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[19] of sector regulators also is 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.[20] 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 presents serious problems. Concentration in these markets increases the costs of doing financial business.[21] Prices rise as a small group of banks dominates trading.[22] More ominously,

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18. Efforts to increase the SEC's competition enforcement capabilities recently have been proposed. *See* Robert J. Jackson, Jr., *Competition: The Forgotten Fourth Pillar of the SEC's Mission*, U.S. SEC. & EXCH. COMM'N (Oct. 11, 2018), http://www.sec.gov/news/speech/speech-jackson-101118 [http://perma.cc/G47U-8UCG]. As Commissioner Jackson noted, the SEC has a statutory mandate to consider competition in its rulemakings. *See, e.g.*, 15 U.S.C. § 77b(b) (2018) ("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."). Despite this mandate, Jackson observed that "today's SEC rarely invokes competitive concerns when making rules or engaging in oversight of our financial markets." Jackson, *supra*.

19. Regulatory capture, as used in this Article, refers to private interest groups gaining influence over regulatory agencies to advance their own interests. This influence, "commonly believed to be contrary to the public interest," sometimes is achieved "through placement of sympathetic individuals in key government positions" and in other scenarios "by exerting pressure through procedural aspects of administrative processes." David Thaw, *Enlightened Regulatory Capture*, 89 WASH. L. REV. 329, 334–35 (2014); *see also* J. Jonas Anderson, *Court Capture*, 59 BOSTON COLL. L. REV. 1543, 1554 (2018) ("Broadly speaking, regulatory capture describes the situation where regulators have been co-opted by organized interest groups to adopt policies that run contrary to the public interest.").

20. *See, e.g.*, Adam Thierer & Brent Skorup, *A History of Cronyism and Capture in the Information Technology Sector*, 18 J. TECH. L. & POL'Y 131, 138–39 (asserting that "[t]he histories of the railroad and airline industries provide particularly egregious examples of regulatory capture" and that both industries used their regulators "to promote cartelization and market protectionism").

21. *See, e.g.*, Rory Van Loo, *Making Innovation More Competitive: The Case of Fintech*, 65 UCLA L. REV. 232, 247 (2018) ("Economists have connected [banking] market consolidation to lower deposit rates received by consumers on their bank account balances, as well as higher rates paid by consumers for personal loans and mortgages." (footnotes omitted)); Jackson, *supra* note 18 (asserting that concentration in financial markets results in higher costs for investors and entrepreneurs).

22. Higher prices come in the form of increased bid-ask spreads on trades. Yair Listokin, *Taxation and Liquidity*, 120 YALE L.J. 1682, 1698 n.27 (2011) ("When the bid/ask spread is high, the seller pays a high transaction cost for selling."); Letter from Sherrod Brown, U.S. Senator, to David A. Stawick, Sec'y, Commodity Futures Trading Comm'n, and Elizabeth Murphy, Sec'y, Sec. & Exch. Comm'n 4 (Nov. 17, 2010), http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=26486&SearchText=sherrod [http://perma.cc/ZCA9-AFBK] (noting that concentration in derivatives markets "forces end-users of derivatives to pay wide spreads and excessive fees"). Bid-ask spreads are the difference between the highest price potential buyers are willing to pay for an asset and the lowest price a potential seller will accept. *See* Open-End Fund Liquidity Risk Management Programs; Swing Pricing; Re-Opening of Comment Period for Investment Company Reporting Modernization Release, 80 Fed. Reg. 199 (proposed Oct. 15, 2015) (to be codified at 17 C.F.R. pts. 210, 270, 274). The spread

systemic financial soundness may be threatened as the biggest banks maintain or increase their market shares in financial products.[23] Big banks may use their market power to evade or defeat Dodd-Frank's safety requirements, especially in the derivatives markets.[24] And, to the extent concentration is linked to the types of interconnectedness that lead to 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.[25] This Article addresses the problem from a regulatory-design perspective and asks, given *Trinko* and *Credit Suisse*, how should Congress and financial-sector regulators structure statutes, regulations, and other administrative guidance in light of antitrust's diminished role in these markets? The Article focuses on Dodd-Frank's regulatory regime for the derivatives sector as a case study. The derivatives markets are among the financial system's largest and most important.[26] Their notional size (the face value of outstanding over-the-counter derivatives contracts), which has ranged in recent years from $500 to $700 trillion, is many times larger than the entire world economy.[27] And these markets continue to grow.[28] They pose both competition

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between these two prices typically is retained by the bank brokering the transaction. *See* ZVI BODIE ET AL., INVESTMENTS 16 (Stephen M. Patterson 4th ed., McGraw Hill Companies 1999) ("The dealer's profit margin is the 'bid-ask[]' spread—the difference between the price at which the dealer buys for and sells from inventory.").

23. *See, e.g.*, Felix B. Chang, *Second-Generation Monopolization: Parallel Exclusion in Derivatives Markets*, 2016 COLUM. BUS. L. REV. 657, 663 [hereinafter Chang, *Second-Generation Monopolization*] (noting that concentration in derivatives markets "is a surefire conduit of systemic risk").

24. For example, big banks might use their dominant market positions and control of certain clearinghouses to forestall the derivatives markets' transition to exchange trading and central clearing, a transition that Dodd-Frank mandates. *See, e.g.*, *In re* Credit Default Swaps Antitrust Litig., No. 13md2476 (DLC), 2014 WL 4379112, at *5 (S.D.N.Y. Sept. 4, 2014) (denying a motion to dismiss a claim that derivatives dealers conspired to use their control of clearinghouses and other strategies to prevent the emergence of derivatives exchange trading that would have reduced the dealers' profits).

25. *See infra* notes 319–40 and accompanying text.

26. 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 & ECON. DEP'T, OTC DERIVATIVES MARKET ACTIVITY IN THE FIRST HALF OF 2008, at 1 (Nov. 2008) [hereinafter BANK FOR INT'L SETTLEMENTS, FIRST HALF OF 2008]. Those figures were $595 trillion and $10 trillion, respectively, in mid-2018. BANK FOR INT'L SETTLEMENTS, STATISTICAL RELEASE: OTC DERIVATIVES STATISTICS AT END-JUNE 2018, at 2 (Oct. 2018) [hereinafter BANK FOR INT'L SETTLEMENTS, END-JUNE 2018]. Notional value refers to the face value of the contracts. *Id.* 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, at ii (Sept. 13, 2012) (unpublished manuscript), http://www.theigc.org/wp-content/uploads/2015/02/Sundaram-2012-Working-Paper.pdf [http://perma.cc/ZAE8-FTC8].

27. *See, e.g.*, Steve Denning, *Big Banks and Derivatives: Why Another Financial Crisis Is Inevitable*, FORBES (Jan. 8, 2013, 6:26 PM), http://www.forbes.com/sites/stevedenning/2013/01/08/five-years-after-the-financial-meltdown-the-water-is-still-full-of-big-sharks/#127b1dd23a41 [http://perma.cc/77L7-RUYR].

challenges and significant systemic risks.[29] Commentators have described the derivatives markets as "[t]he greatest risk of all"[30] and "[t]he world's scariest story."[31]

The derivatives markets are widely recognized as having played a key role in the 2008 financial crisis.[32] 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 (thereby limiting pricing opacity and promoting competition).[33] The increased significance of derivatives clearinghouses and exchanges in the Dodd-Frank regulatory scheme raises the danger that firms controlling these entities could exclude derivatives-trading rivals who need access to complete their swaps.[34] Such conduct could lead to reduced competition and higher prices in derivatives trading. Big-bank control of clearinghouses and exchanges also may give those firms the opportunity to manipulate the types of derivatives contracts that are exchange traded and centrally cleared, pushing certain contracts into the over-the-counter markets where the banks can charge higher prices.[35] To the extent central clearing of

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28. *See* Mayra Rodríguez Valladares, *Derivatives Markets Growing Again, with Few New Protections*, N.Y. TIMES: DEALB%K (May 13, 2014, 4:35 PM), http://nyti.ms/2NasAQA [http://perma.cc/N5MB-PXYD].

29. *See, e.g.*, Sean J. Griffith, *Governing Systemic Risk: Towards a Governance Structure for Derivatives Clearinghouses*, 61 EMORY L.J. 1153, 1153 (2012) ("Derivatives transactions create systemic risk by threatening to spread the consequences of default throughout the financial system."); Letter from Sherrod Brown to David A. Stawick and Elizabeth Murphy, *supra* note 22, at 4 ("There is already a high level of concentration in [the derivatives] market, raising concerns about anticompetitive pricing and conduct.").

30. 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/ [http://perma.cc/X48Z-UWPF].

31. Denning, *supra* note 27.

32. *See, e.g.*, FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT, at xxiv (2011), http://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf [http://perma.cc/63QE-NNBA] ("We conclude over-the-counter derivatives contributed significantly to this crisis."); *Dodd-Frank Act*, U.S. COMMODITY FUTURES TRADING COMM'N, http://www.cftc.gov/LawRegulation/DoddFrankAct/index.htm [http://perma.cc/GQ2Q-EXSG] (last visited Apr. 15, 2019) ("[Derivatives], which have not previously been regulated in the United States, were at the center of the 2008 financial crisis.").

33. *See, e.g.*, *Dodd-Frank Act*, *supra* note 32 ("Instead of trading out of sight of the public, standardized derivatives will be required to be traded on regulated exchanges or swap execution facilities . . . [and] will be moved into central clearinghouses to lower risk in the financial system."). Clearinghouses act as "the buyer to every seller's clearing member and the seller to every buyer's clearing member." INTERCONTINENTAL EXCH., MANAGE YOUR RISK: HOW CLEARING WORKS 1 (2016), http://www.theice.com/publicdocs/How_Clearing_Works.pdf [http://perma.cc/7WWD-VMJA]. The clearinghouse "becomes the central counterparty to the trade, thereby guaranteeing financial performance of the contract." *Id.*

34. *See, e.g.*, Chang, *Second-Generation Monopolization*, *supra* note 23, at 661 ("[A]fter financial reform laws mandated centralized clearing for credit default swaps, the top dealers conspired to funnel trades into the clearinghouse that they controlled while denying rivals access to the same clearinghouse.").

35. *See* Kristin N. Johnson, *Governing Financial Markets: Regulating Conflicts*, 88 WASH. L. REV. 185, 224 (2013) ("[L]imiting small dealers' direct access to clearinghouse platforms encourages

derivatives trades reduces systemic risk (the key premise of Dodd-Frank's derivatives reforms), this outcome may threaten systemic soundness. Despite these risks, antitrust immunity may shield such conduct from attack, leaving sector regulators as the only bulwark against anticompetitive activity in these markets. But the CFTC and SEC appear generally unwilling or unable to actively enforce competition rules, creating a dangerous gap in oversight that large banks may use to their advantage.[36]

To solve this problem, this Article argues that Congress and the 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. Structural regulation generally refers to government efforts to organize markets by, for example, limiting market participants' market shares, cross-ownership, or entry into new lines of business.[37] Dodd-Frank required the SEC and CFTC 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[ir] governance . . . or to mitigate systemic risk, promote competition, or mitigate conflicts of interest" regarding those entities.[38] In 2010, the SEC and CFTC issued proposed rules including such ownership and governance limits, but those rules have not been finalized.[39] 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.[40] Several financial services firms and their advisors countered that limits

small dealers and large dealers to continue to strike bilateral arrangements outside of the purview of the clearinghouse and regulators.").

36. *See infra* Section III.

37. The term "structural regulation" is often used in reference to financial services, telecommunications, and media markets. In financial services, it generally refers to limits on activities financial institutions may undertake. *See, e.g.*, JOHN ARMOUR ET AL., PRINCIPLES OF FINANCIAL REGULATION 505 (2016) ("'Structural regulation' refers to measures designed to limit the range of activities that may be carried on by a banking firm."). In the media markets, structural regulation typically refers to ownership restrictions on media outlets. *See, e.g.*, Jerome A. Barron, *Structural Regulation of the Media and the Diversity Rationale*, 52 FED. COMM. L.J. 555 (2000) (discussing structural media regulation, including "multiple ownership rules").

38. 15 U.S.C. §§ 8323(b), 8343(b) (2018).

39. *See* 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, 75 Fed. Reg. 65,882 (proposed Oct. 26, 2010) (to be codified at 17 C.F.R. pt. 242) (SEC); Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities Regarding the Mitigation of Conflicts of Interest, 75 Fed. Reg. 63,732 (proposed Oct. 18, 2010) (to be codified at 17 C.F.R. pts. 1, 37–40) (CFTC).

40. Department of Justice of the United States of America, Comment Letter on Proposed Rule on 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 3–6 (Dec. 28, 2010) (SEC); Department of Justice of the United States of America, Comment Letter on Proposed Rule on Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities Regarding the

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.[41] Further, they asserted that any concerns about anticompetitive restrictions on access to clearinghouses or exchanges should be assuaged by Dodd-Frank's conduct and governance restrictions on clearinghouses and SEFs.[42]

Considering the reduced role of antitrust in financial markets, this Article argues that structural regulation of clearinghouses and derivatives trading platforms is an appropriate regulatory-design response to the risks big-bank control of these competitive bottlenecks poses.[43] While such structural regulation could take several different forms, including nationalizing clearinghouses; treating them like public utilities, with the federal government setting rates; or requiring them to have a supervisory-board structure with separate sets of directors to represent the shareholders and the public interest,[44] the Article suggests that ownership and governance restrictions on these entities may be the best approach. Such limits should serve to protect competition among derivatives dealers, but they 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.

Further, the Article contends that increased reliance on regulatory responses to competition problems in regulated markets may turn out to be beneficial from a competition standpoint, as compared to antitrust enforcement, in light of the challenges government and private plaintiffs face in antitrust suits based on refusal to deal and essential facilities claims. Antitrust enforcement

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Mitigation of Conflicts of Interest 3–4 (Dec. 28, 2010) (CFTC). The author was a signatory to these comments.

41. *See infra* notes 382–99 and accompanying text.

42. *See, e.g.*, Letter from James B. Fuqua, Managing Dir., Legal, UBS Sec. LLC, and David Kelly, Managing Dir., Legal, UBS Sec. LLC, to David A. Stawick, Sec'y, Commodity Futures Trading Comm'n, and Elizabeth Murphy, Sec'y, Sec. & Exch. Comm'n 1 (Nov. 17, 2010), http://www.sec.gov/comments/s7-27-10/s72710-71.pdf [http://perma.cc/J9G3-6NVQ] ("A more appropriate and effective way to mitigate conflicts of interest would be for the Commissions to require each SEF to establish rules addressing conflicts of interest and through compliance by each SEF, and enforcement by the Commissions, of those rules as well as the SEF Core Principles (from sections 733 and 763 of Dodd-Frank)."); Letter from Larry E. Thompson, Gen. Counsel, Depository Tr. & Clearing Corp., to Mary Schapiro, Chairman, Sec. & Exch. Comm'n, and Gary Gensler, Chairman, Commodity Futures Trading Comm'n 2 (June 3, 2011), http://www.sec.gov/comments/4-625/4625-3.pdf [http://perma.cc/Z3RG-KJ3Z] ("DTCC believes that structural governance requirements offer the best solution to reduce risk, increase transparency and promote market integrity within the financial system while avoiding the potential negative impact on capital, liquidity and mitigating systemic risk that could result from any ownership or voting limitations.").

43. A competitive bottleneck is a platform or facility to which access is required to compete in a particular market. *See, e.g.*, Mark Armstrong, *Competition in Two-Sided Markets*, 37 RAND J. ECON. 668, 669 (2006) (noting that "competitive bottlenecks" exist when a firm that "wishes to interact with an agent on the single-homing side" of a two-sided market "has no choice but to deal with that agent's chosen platform").

44. *See* Griffith, *supra* note 29, at 1227.

generally is considered the best tool for protecting competition,[45] but when antitrust cases become difficult for plaintiffs to win, structural regulation may be a more effective option. The potential salutary effects of a shift toward regulatory responses to competition problems in regulated 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 only goals of current antitrust law likely are not always the optimal outcomes for the derivatives markets. With structural protections playing the antitrust role in the derivatives markets, sector regulators may be better able to focus on reducing output and innovation as appropriate, a systemic soundness goal that is 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.

The Article proceeds in four sections. Section I addresses the function of antitrust in regulated markets and the impact *Trinko* and *Credit Suisse* have had on that function. Section II details the derivatives markets' role in the 2008 financial crisis and Congress's response—Dodd-Frank—and explores Dodd-Frank's relationship to the antitrust laws. Section III analyzes the sector regulators' ability and willingness to administer competition rules in the absence of antitrust enforcement. Section 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.

## 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[46] or where Congress has put in place a "pervasive regulatory scheme for controlling"[47] 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 would play a diminished role in regulated markets, especially the financial markets.

45. *See, e.g.*, United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972) ("Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise."); Dogan & Lemley, *supra* note 13, at 686 ("Economic theory teaches that antitrust courts are better equipped than regulators to assure efficient outcomes in many circumstances.").

46. Gordon v. N.Y. Stock Exch., Inc., 422 U.S. 659, 682 (1975).

47. Otter Tail Power Co. v. United States, 410 U.S. 366, 374 (1973).

### A. *Decisions Limiting Implied Immunity*

In a series of mid-twentieth-century cases, the Court determined that implied antitrust immunity should be rare. It cautioned in *United States v. Philadelphia National Bank*[48] 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."[49] 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.[50] Rejecting that contention, the Court stated that in passing the 1960 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."[51]

Decided the same year as *Philadelphia National Bank*, *Silver v. New York Stock Exchange*[52] explored the extent to which the antitrust laws applied to securities exchanges regulated under the Securities Exchange Act of 1934 (1934 Act). Plaintiff Silver operated two securities trading firms, neither of which was a member of the New York Stock Exchange (NYSE).[53] To compete in this business, Silver's companies secured direct private telephone wires to securities firms.[54] These firms applied to the NYSE for approval of the connections and received temporary approval soon thereafter.[55] Subsequently, without providing Silver notice, the NYSE decided to disapprove the connections, and Silver's private wires were removed.[56] Silver alleged that the resulting loss of the ability to get quotations quickly and the stigma from the NYSE's disapproval caused his firms' volume of business to fall and their profits to suffer.[57] Silver received no explanation for the decision from the NYSE.[58] He sued the Exchange under sections 1 and 2 of the Sherman Act and prevailed on these antitrust claims in the district court.[59] The Second Circuit reversed, finding that the NYSE's actions were within its general authority "as defined by" the 1934 Act and that its conduct was immune from antitrust attack because it was "exercising a power which it is required to exercise by" that Act.[60]

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48. 374 U.S. 321 (1963).
49. *Phila. Nat'l Bank*, 374 U.S at 350–51 (footnote omitted).
50. *Id.* at 350–55.
51. *Id.* at 352.
52. 373 U.S. 341 (1963).
53. *Silver*, 373 U.S. at 343.
54. *Id.*
55. *Id.* at 344.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 345–46.
60. *Id.* at 346–47.

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."[61] The Court observed that removing Silver's direct connections to the securities firms would, standing alone, plainly constitute a per se Sherman Act section 1 violation.[62] 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."[63] Because the 1934 Act did not include an express antitrust exemption, the Court concluded that immunity, if it existed, would have to be implied, "and '[i]t is a cardinal principle of construction that repeals by implication are not favored.'"[64] 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."[65] Searching for an analysis that would reconcile the 1934 Act and the antitrust laws, "rather than holding one completely ousted," the Court focused on the SEC's lack of jurisdiction to "review particular instances of enforcement of exchange rules."[66] In the Court's view, this lack of jurisdiction meant that the antitrust exemption question did not implicate any "conflict or coextensiveness of coverage with the agency's regulatory power."[67] Indeed, because the SEC 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 rules" to harm competition.[68] 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.[69]

The Supreme Court in a related line of cases has held that the antitrust laws may not apply when Congress has established a "pervasive regulatory scheme" governing the conduct in question.[70] In *Otter Tail Power Co. v. United States*,[71] the Court declined to find antitrust immunity where Congress had "rejected a pervasive regulatory scheme for controlling the interstate distribution of power in favor of voluntary commercial relationships."[72] The Court reasoned that where commercial relationships "are governed in the first instance by business

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61. *Id.* at 347.
62. *Id.*
63. *Id.* at 349.
64. *Id.* at 357 (alteration in original).
65. *Id.*
66. *Id.*
67. *Id.* at 358.
68. *Id.*
69. *Id.* at 361.
70. Otter Tail Power Co. v. United States, 410 U.S. 366, 374 (1973).
71. 410 U.S. 366 (1973).
72. *Otter Tail*, 410 U.S. at 374.

judgment and not regulatory coercion, courts must be hesitant to . . . override the fundamental national policies embodied in the antitrust laws."[73]

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. In *Gordon v. New York Stock Exchange, Inc.*,[74] the Court concluded that the antitrust laws were impliedly repealed as to the defendant stock exchanges' agreement to fix minimum commissions charged for certain trades.[75] Typically, price-fixing agreements between competitors are unlawful under section 1 of the Sherman Act.[76] But in this case, the SEC had authority to supervise the exchanges' fixing of commission rates and had actively investigated and overseen exchange commission rate practices, before abolishing fixed rates in 1975.[77] 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."[78] Citing *Silver*, the Court further held that implied antitrust immunity should be found only "if necessary to make the [regulatory scheme] work, and even then only to the minimum extent necessary."[79] Nonetheless, the *Gordon* Court found that implied repeal was necessary in that case to "make the Exchange Act work as it was intended."[80] It relied on three factors in reaching this conclusion: statutory authorization for SEC regulation of the relevant practice, an extensive history of actual SEC regulation, and ongoing congressional approval of the SEC's regulatory role.[81] The Court concluded that to allow antitrust enforcement

73. *Id.*

74. 422 U.S. 659 (1975).

75. *Gordon*, 422 U.S. at 691. The NYSE and the American Stock Exchange had rules setting commission rates for all members for transactions of less than $500,000. *Id.* at 661.

76. *See, e.g.*, Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006) ("Horizontal price-fixing agreements . . . are *per se* unlawful.").

77. *Gordon*, 422 U.S. at 666–81.

78. *Id.* at 682 (quoting United States v. Phila. Nat'l Bank, 374 U.S. 321, 350–51 (1963)).

79. *Id.* at 685 (quoting Silver v. N.Y. Stock Exch., 373 U.S. 341, 357 (1963)).

80. *Id.* at 691.

81. *Id. United States v. National Ass'n 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. *Nat'l Ass'n of Sec. Dealers*, 422 U.S. at 729–30. 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. *Id.* at 730 ("[T]he question presented is whether the SEC's exercise of regulatory authority under" the 1940 Act "and the Maloney Act is sufficiently pervasive to confer an implied immunity. We hold that it is."). The Court 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.

regarding the commission rates "would unduly interfere . . . with the operation of the Securities Exchange Act."[82]

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

In 2007, the Court again applied these *Gordon* factors to analyze whether implied antitrust immunity should extend to certain conduct of underwriters of initial public offerings (IPOs). *Credit Suisse Securities v. Billing* involved allegations that investment banks had violated the antitrust laws by agreeing to require customers seeking to participate in potentially lucrative technology IPOs to purchase those same securities in the aftermarket at a higher price ("laddering"), to pay "unusually high commissions" on subsequent purchases of securities from the underwriters, or to purchase other, "less desirable" securities ("tying").[83] 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 law to supervise the activities in question; (2) evidence that the responsible 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.[84]

Finding that the first, second, and fourth factors were clearly satisfied in this case, the opinion centered on the third factor: whether application of both the antitrust and securities laws to the relevant conduct would create a risk of conflicting outcomes or guidance.[85] While there appeared to be no current conflict between the antitrust and securities laws in this matter—the Court assumed for purposes of argument that the SEC disapproved and would continue to disapprove of the accused conduct[86]—the Court was concerned that, absent antitrust immunity for the relevant practices, in future cases antitrust courts might make "unusually serious mistakes" and assign liability for conduct the SEC might approve of.[87] The Court reasoned that only the expert regulatory agency could confidently draw the "fine securities-related lines" required to distinguish permissible from impermissible conduct in these markets[88] and that to allow an antitrust suit against the conduct in question would force underwriters to avoid not only conduct impermissible under the securities laws but "also a wide range of joint conduct that the securities law permits or

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82. *Gordon*, 422 U.S. at 686.
83. Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 267 (2007).
84. *Id.* at 275–76.
85. *Id.* at 265.
86. *Id.* at 279.
87. *Id.* at 279–82.
88. *Id.* at 280–82.

encourages."[89] This outcome would in the Court's view "threaten serious harm to the efficient functioning of the securities markets,"[90] which, combined with the SEC's mandate to consider competition when making policy,[91] demonstrated "a serious conflict" between the securities and antitrust laws.[92]

In cases where the relevant regulatory scheme does not include a specific antitrust savings clause, it seems that a court applying *Credit Suisse* should find implied antitrust immunity when (1) the challenged conduct clearly is under active regulatory supervision and (2) allowing antitrust claims against the challenged conduct *might* result (in the current case or in a future case involving similar conduct) in inconsistencies between antitrust court decisions and the regulator's determinations. Professor Howard Shelanski has asserted that the *Credit Suisse* opinion broke from established implied antitrust immunity precedent by barring even those antitrust claims which are "consistent with [the] securities laws, and not even potentially repugnant to the regulatory scheme," when the accused conduct is "so similar to regulated conduct" that a court might in a future case mistakenly "confuse the two."[93] He observed that the decision did not provide helpful guidance on how similar the conduct accused under the antitrust laws must be to conduct permissible under the securities laws to create the type of conflict that should result in implied immunity.[94]

Three years before it decided *Credit Suisse*, the Supreme Court also explored the tension between regulation and antitrust in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*.[95] The plaintiffs in that case had brought a refusal-to-deal claim based on Verizon's duties under the Telecommunications Act of 1996 (1996 Act) to provide competitors with access to its telephone network.[96] The Court conceded that despite the regulatory overlay, antitrust immunity was precluded in this case by the 1996 Act's comprehensive antitrust saving clause.[97] In dicta, however, the majority opinion

89. *Id.* at 282.

90. *Id.* at 283.

91. *See, e.g.*, 15 U.S.C. § 77b(b) (2018) ("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.").

92. *Credit Suisse*, 551 U.S. at 283–84. The majority opinion also dismissed Justice Thomas's assertion in his 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. *See id.* at 275.

93. Shelanski, *Rebalancing Antitrust and Regulation*, *supra* note 13, at 707–08.

94. Howard Shelanski, *Antitrust & Deregulation,* 127 YALE L.J. 1922, 1953–54 (2018) [hereinafter Shelanski, *Antitrust & Deregulation*].

95. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398 (2004).

96. *Id.* at 404–05.

97. *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." Telecommunications Act of 1996, Pub. L. No. 104-104, § 601(b)(1), 110 Stat. 56, 143 (codified in scattered sections of 15 and 47 U.S.C.). The Court held that this clause "bars a finding of implied immunity." *Trinko*, 540 U.S. at 406.

observed that absent this savings clause the Act's enforcement regime would have been "[i]n some respects . . . a good candidate for implication of antitrust immunity, to avoid the real possibility of [antitrust] judgments conflicting with the agency's regulatory scheme."[98] The Court also noted that, in analyzing whether a firm has a duty to deal,

> [o]ne 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.[99]

The opinion reasoned 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 recognize an expansion of the contours of § 2."[100] *Trinko*, therefore, suggests that the existence of a relevant regulatory scheme, especially one designed to protect competition, should weigh against extending antitrust liability to claims unsupported by clear precedent.[101] Professor Shelanski has identified a number of difficulties with the *Trinko* Court's guidance for evaluating a regulatory regime's impact when determining whether a court should recognize an antitrust claim. He noted that the Court was silent on the key issues of how closely a regulation must relate to the accused conduct and whether that regulation must be actively enforced to bar "aggressive antitrust claims."[102] And he observed that the "Court's distinction between novel and established antitrust claims is porous."[103]

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

In the wake of *Credit Suisse* and *Trinko*, there was understandable concern among antitrust enforcers and scholars that these decisions 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."[104] In 2010, Professor Shelanski, then the Deputy Director for Antitrust in the Bureau of Economics at

98. *Trinko*, 540 U.S. at 406.

99. *Id.* at 412.

100. *Id.* (citation omitted).

101. *See Is There Life After* Trinko *and* Credit Suisse*?*, *supra* note 14, at 23 (statement of Howard A. Shelanski, Deputy Director for Antitrust, Bureau of Economics, Federal Trade Commission) ("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.").

102. Shelanski, *Rebalancing Antitrust and Regulation*, *supra* note 13, at 702; *see also* Hurwitz, *supra* note 13, at 1224 ("[B]oth *Trinko* and *Credit Suisse* suggest that potential regulation alone may be sufficient to establish implied immunity.").

103. Shelanski, *Rebalancing Antitrust and Regulation*, *supra* note 13, at 704.

104. Dogan & Lemley, *supra* note 13, at 685–86. The authors asserted that *Credit Suisse* and *Trinko* "plac[ed] 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." *Id.*

the Federal Trade Commission, testified before the House Judiciary Committee's 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 American economy."[105] More recent scholarship has continued to stress the transformational nature of the *Credit Suisse* and *Trinko* decisions.[106]

While their language certainly suggested a potential sea change in antitrust's role in regulated markets, it is not at all clear that *Credit Suisse* and *Trinko* have in practice 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.

*Credit Suisse*'s intended reach and the extent to which it might apply to cases implicating regulatory regimes other than the securities laws, including other financial services regulations, is difficult to divine from the opinion. There was a history of courts finding antitrust immunity in the securities markets well before *Credit Suisse* was decided.[107] As the Court observed, 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.[108] Extensive securities-law experience likely is required to tell the two apart—experience the Court was concerned antitrust courts lack.[109] It seemed that whether a court would apply *Credit Suisse* to conduct governed by other regulatory schemes would depend on a determination that the relevant

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105. *Is There Life After* Trinko *and* Credit Suisse*?*, *supra* note 14, at 13 (statement of Howard A. Shelanski, Deputy Director for Antitrust, Bureau of Economics, Federal Trade Commission).

106. *See, e.g.*, Brunell, *supra* note 13, at 312 (contending that "recent American cases," including *Trinko* and *Credit Suisse*, "have broadened the implied immunity defense in a way that suggests that antitrust law should not apply if regulatory remedies are available"); Hurwitz, *supra* note 13, at 1193 (arguing that *Credit Suisse* and *Trinko*, along with a third, non-antitrust case, *American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011), "can be read together as advancing a very broad regulatory displacement standard for federal antitrust claims in fields subject to regulation"); 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 observed 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.

107. *See, e.g.*, Gordon v. N.Y. Stock Exch., Inc., 422 U.S. 659, 691 (1975) (holding that "[i]mplied repeal of the antitrust laws is . . . necessary to make the Exchange Act work as it was intended" in a case involving stock exchanges' agreement to fix minimum commissions for certain trades); United States v. Nat'l Ass'n of Sec. Dealers, Inc., 422 U.S. 694, 729–30 (1975) (finding that certain agreements regarding mutual fund trading and other related acts enjoyed antitrust immunity based on the SEC's regulatory authority over the conduct).

108. Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 279 (2007).

109. *Id.* at 282 ("[A]ntitrust courts are likely to make unusually serious mistakes in this respect.").

scheme shared the attributes 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. They 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;[110] provision of natural gas, regulated under the Commodity Exchange Act;[111] transpacific airline travel, regulated under "Air Services Agreements" between Japan and other nations (including the United States) as well as under Japanese law;[112] and provision of race horses, regulated under the Interstate Horseracing Act.[113] In the transpacific air travel case, the court observed that "the implied preclusion doctrine arose in the context of securities law" and while the defendants "cite[d] to one case applying the doctrine outside of the securities context, application outside of that context is indisputably rare."[114] At this point, the only case outside the financial sector where a court has granted a defendant implied antitrust immunity based on *Credit Suisse* involved a conflict between the Sherman Act and a section of the Social Security Act regarding establishment of a sole managed-care entity with a monopoly position in the Merced County Medicaid managed-care plan market.[115] The court in that case determined that if it found the accused conduct violated the Sherman Act, "it 'would produce conflicting guidance, requirements, duties, privileges or standards of conduct'" and that the relevant section of the Social Security Act is "'clearly incompatible' with the Sherman Act."[116]

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

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110. Energy Mktg. Servs., Inc. v. Columbia Gas Transmission Corp., 639 F. Supp. 2d 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*.").

111. *In re* W. States Wholesale Nat. Gas Antitrust Litig., 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 . . . .").

112. *In re* Transpacific Passenger Air Transp. Antitrust Litig., No. C 07-05634 CRB, 2011 WL 1753738, at *16–17 (N.D. Cal. May 9, 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").

113. Churchill Downs Inc. v. Thoroughbred Horsemen's Grp., LLC, 605 F. Supp. 2d 870, 882 (W.D. Ky. 2009). The *Churchill Downs* court observed that, "[b]ecause *Credit Suisse* dealt with a hedge fund and securities laws, it is not directly applicable here. Nevertheless, its principles are instructive." *Id.* at 881. Still, the court ultimately found "no such clear repugnancy between the IHA and the antitrust laws." *Id.* at 886.

114. *In re Transpacific Passenger*, 2011 WL 1753738, at *17 (citations omitted).

115. Horisons Unlimited v. Santa Cruz-Monterey-Merced Managed Med. Care Comm'n, No. 1:14-CV-00123-LJO-MJS, 2014 WL 3342565, at *9–10 (E.D. Cal. July 2, 2014).

116. *Id.* at *10.

purchasing companies as part of leveraged buyouts.[117] The court determined that because these transactions were not subject to the securities laws, there was no conflict with antitrust.[118] Another court refused 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.[119] 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.'"[120] 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.[121] Further, the court determined there was no conflict between the IRS regulations and private antitrust enforcement against the alleged conduct.[122] In a case discussed in more detail below, the court in *In re Credit Default Swaps Antitrust Litigation*[123] rejected the defendants' argument that the Dodd-Frank statutory scheme grants implied antitrust immunity to conduct regulated under its derivatives title.[124] 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."[125] This logic later was applied by another district court in *In re Interest Rate Swaps Antitrust Litigation*.[126]

Overall, courts have issued decisions in twenty-six cases in which the defendants claimed antitrust immunity based on *Credit Suisse*.[127] In only five of these cases did courts grant immunity (and two of those decisions were district

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

118. *See id.* ("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.").

119. Hinds Cty. v. Wachovia Bank N.A., 700 F. Supp. 2d 378, 401–06 (S.D.N.Y. 2010).

120. *Id.* at 403 (quoting Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 276 (2007)).

121. *Id.* at 404.

122. *Id.*

123. No. 13md2476 (DLC), 2014 WL 4379112 (S.D.N.Y. Sept. 4, 2014).

124. *In re Credit Default Swaps Antitrust Litig.*, 2014 WL 4379112, at *16–17. Title VII of the Dodd-Frank Act, "Wall Street Transparency and Accountability," establishes a framework for regulation of swaps markets. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 701–774, 124 Stat. 1376, 266–427 (2010).

125. *In re Credit Default Swaps Antitrust Litig.*, 2014 WL 4379112, at *17.

126. 261 F. Supp. 3d 430, 497–98 (S.D.N.Y. 2017) (adopting the analysis of the *In re Credit Default Swaps Antitrust Litigation* decision and finding that Dodd-Frank's "antitrust savings clause applies here").

127. This result is based on two Westlaw searches. The first used the query "Credit /s Suisse /s Billing" and searched the time period after June 18, 2007. That search yielded 54 cases, which were reviewed to identify cases in which the defendant claimed antitrust immunity based on *Credit Suisse*. The second search used the query "'551 U.S. 264' '127 S. Ct. 2383' '168 L. Ed. 2d 145'" and the same date range. That search yielded 31 cases, which also were reviewed to identify the relevant cases.

court and appellate holdings in the same case).[128] 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 decision to bring antitrust claims in regulated markets outside the financial sector.

In cases involving financial services, however, and especially in the securities-law context, courts have relied on *Credit Suisse* to find antitrust immunity under certain circumstances. In *Electronic Trading Group, LLC v. Banc of America Securities, LLC*,[129] the Second Circuit determined that the securities laws precluded application of the antitrust laws in a case involving alleged price fixing of borrowing fees for short sales of certain securities.[130] The court found that all four *Credit Suisse* factors were satisfied in this case: short selling is "within the heartland of the securities business,"[131] 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."[132] 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.[133] This was the actual conflict.[134] The potential conflict was linked to the chance that the SEC might decide to directly regulate the borrowing fees.[135]

128. Those five cases are *Electronic Trading Group, LLC v. Banc of America Securities, LLC*, 588 F.3d 128 (2d Cir. 2009); *U.S. Futures Exchange, LLC v. Board of Trade of the City of Chicago, Inc.*, 346 F. Supp. 3d 1230 (N.D. Ill. 2018); *Horisons Unlimited v. Santa Cruz-Monterey-Merced Managed Medical Care Commission*, No. 1:14-CV-00123-LJO-MJS, 2014 WL 3342565 (E.D. Cal. July 2, 2014); *Mayor and City Council of Baltimore v. Citigroup, Inc.*, Nos. 08 Cv. 7746 & 08 Cv. 7747, 2010 WL 430771 (S.D.N.Y. Jan. 26, 2010); and *In re Short Sale Antitrust Litigation*, 527 F. Supp. 2d 253 (S.D.N.Y. 2007), *aff'd, Electronic Trading Group, LLC v. Banc of America Securities, LLC*, 588 F.3d 128 (2d Cir. 2009).

129. 588 F.3d 128 (2d Cir. 2009).

130. *Elec. Trading Grp.*, 588 F.3d at 138.

131. *Id.* at 134.

132. *Id.* at 137.

133. *Id.* at 137–38.

134. *Id.*

135. *Id.* at 138. Even in the securities context, some courts applying *Credit Suisse* have declined to find implied antitrust immunity. In *Pennsylvania Avenue 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. *Borey*, 569 F. Supp. 2d at 1130–32. This decision treated *Credit Suisse* as having narrowed implied antitrust immunity doctrine as compared to an earlier Second Circuit decision, *Finnegan v. Campeau Corp.*, 915 F.2d 824 (2d Cir. 1990), which had found

The district court in *Mayor and City Council of Baltimore v. Citigroup, Inc.*[136] reached a similar conclusion in a case involving an alleged conspiracy by broker-dealers of auction rate securities (ARS) to stop supporting the auction market. Before the 2008 financial crisis, these broker-dealers often would buy ARS from their own accounts to ensure that auctions did not fail due to insufficient demand.[137] In early 2008, almost all these broker-dealers decided to stop this practice, with the result that on February 13, 2008, 87% of all ARS auctions failed, harming their issuers.[138] The defendants raised an implied immunity defense to the plaintiffs' Sherman Act section 1 claim.[139] The court applied the *Credit Suisse* factors to determine if the defendants were insulated from the antitrust allegations.[140] It found that the ARS market falls in the "[h]eartland of [s]ecurities [r]egulation"; that the SEC had "[c]lear and adequate authority" to regulate that market; and that the agency had "actively exercised" that authority, including by investigating the alleged practices the plaintiffs challenged.[141] Indeed, the SEC was involved in an ongoing investigation of the February 2008 collapse of the ARS market, which resulted in significant settlements requiring broker-dealers to buy ARS from clients at par value.[142] In analyzing the final *Credit Suisse* factor (conflict between the securities and antitrust laws), the court found the same "fine line-drawing" requirement in this case that the Supreme Court found in *Credit Suisse*.[143] This was because the SEC permitted or even promoted certain forms of interaction among the broker-dealers, including allowing ARS issuers to engage multiple broker-dealers to "jointly underwrite ARS offerings and jointly manage ARS auctions."[144] The court credited the defendants' argument that, given the agency's permissive attitude toward certain joint activities, "it is reasonable to expect that the SEC may permit further collective action or joint bidding by broker-dealers to restore liquidity to the ARS market."[145] It would be "unreasonable to expect" ARS broker-dealers to distinguish joint communications that would be permissible under the securities laws from those that would be unlawful under the antitrust laws.[146] Putting ARS broker-dealers

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implied antitrust immunity in a case involving similar collusive conduct. *Borey*, 569 F. Supp. 2d at 1130–32.

136. Nos. 08 Cv. 7746 & 08 Cv. 7747, 2010 WL 430771 (S.D.N.Y. Jan. 26, 2010).

137. *Mayor and City Council of Baltimore*, 2010 WL 430771, at *1–2. ARS are "municipal bonds, corporate bonds and preferred stocks with interest rates or dividend yields that are periodically reset through auctions." *Id.* at *1.

138. *Id.* at *2.

139. *Id.* at *3.

140. *Id.* at *4–7.

141. *See id.* at *4–5.

142. *Id.* at *6 ("The SEC . . . reached settlements . . . including a nearly $30 billion settlement with Defendants Citigroup and UBS described by SEC Chairman Christopher Cox as 'the largest in SEC history . . . .'" (quoting SEC Press Release 2008-290 (Dec. 11, 2008))).

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at *7.

in that position, the court found, would disincentivize them from engaging in joint conduct the securities laws would permit or encourage.[147] "Therefore, the required fine line-drawing is best left to the 'securities-related expertise' of the SEC . . . ."[148]

One district court to date has relied on *Credit Suisse* to find implied antitrust immunity in a financial market governed by the Commodity Exchange Act, rather than the securities laws. *U.S. Futures Exchange v. Board of Trade of the City of Chicago*[149] involved CFTC approval of certain rules the Chicago Board of Trade (CBOT) proposed regarding transfer of its treasury futures business between two clearinghouses.[150] The plaintiffs in that case, who backed a competing treasury futures exchange, alleged that CBOT's rules violated the antitrust laws by depriving the competing exchange of liquidity.[151] The defendants argued that their conduct enjoyed implied antitrust immunity because the CFTC had formally approved the rules in question.[152] The court found that while the implied immunity doctrine arose in the SEC context, depending on the facts, it also could apply in cases implicating the Commodity Exchange Act.[153] Applying *Credit Suisse* to the facts before it, the court determined that implied antitrust immunity was appropriate.[154] It found that the CFTC had regulatory authority to supervise the defendants' suspect conduct, that it exercised that regulatory authority, that there was a risk of conflicting guidance because the "CFTC expressly approved defendants' rules as consistent with the CEA, notwithstanding possible anticompetitive effects," and that the conflict affected practices that "lie at the heart" of the CFTC's regulatory responsibilities.[155] In reaching this decision, the court relied heavily on the CFTC's express approval of the defendants' accused conduct.[156]

Like the judicial treatment of *Credit Suisse* in cases arising outside the financial sector, 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.[157] Several decisions illustrate this point. In *AstroTel, Inc. v. Verizon Florida, LLC*,[158] a district court held that while *Trinko* "forestalls

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147. *Id.*

148. *Id.* (quoting Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 282 (2007)).

149. 346 F. Supp. 3d 1230 (N.D. Ill. 2018).

150. *U.S. Futures Exch.*, 346 F. Supp. 3d at 1239–40.

151. *Id.* at 1255.

152. *Id.*

153. *Id.* at 1258 (noting that the "Seventh Circuit has already applied implied antitrust immunity principles from the SEC Context in the CEA context").

154. *Id.* at 1259.

155. *Id.* at 1259–61.

156. *Id.* at 1261.

157. *But see U.S. Futures Exch.*, 346 F. Supp. 3d at 1263 (relying on *Trinko* to reject plaintiffs' antitrust claim because it "lies on the outer bounds of antitrust law, and is best left to the CFTC to regulate").

158. No. 8:11-cv-2224-T-33TBM, 2012 WL 1581596 (M.D. Fla. May 4, 2012).

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."[159] The Tenth Circuit held in *Buccaneer Energy (USA) Inc. v. Gunnison Energy Corp.*[160] 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.[161] In *Nobody in Particular Presents, Inc. v. Clear Channel Communications, Inc.*,[162] the plaintiff, a concert promoter, alleged that the defendant, a radio station owner who also had a rock promotion business, had violated the essential facilities doctrine[163] by denying rock radio advertising and promotional support to nonaffiliated promoters.[164] The district court found that *Trinko* "actually supports [the plaintiff's] claim under the essential facilities doctrine" and rejected the defendant's summary judgment motion on that claim.[165] It determined that the defendant's conduct bore a "striking resemblance to the refusal to deal in *Aspen Skiing*," which the *Trinko* Court agreed was actionable.[166] 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."[167] The court concluded that "[a]ntitrust law is the only mechanism by which Clear Channel's behavior may be policed."[168]

In *In re Remeron Antitrust Litigation*,[169] a New Jersey district court rejected the defendant's assertion that, based on *Trinko*, the Federal Drug Administration's (FDA) regulation of patent listings in the Orange Book barred

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159. *AstroTel*, 2012 WL 1581596, at *2–3; *see also* Viamedia, Inc. v. Comcast Corp., 218 F.3d 674, 699 (N.D. Ill. 2016) (holding that *Trinko* bars refusal-to-deal claim but not tying and exclusive dealing claims).

160. 846 F.3d 1297 (10th Cir. 2017).

161. *Buccaneer Energy*, 846 F.3d at 1308–09.

162. 311 F. Supp. 2d 1048 (D. Colo. 2004).

163. *Nobody in Particular Presents*, 311 F. Supp. 2d at 1110. The essential facilities doctrine refers to an antitrust cause of action some courts recognize that bars a firm or firms controlling a facility to which access is necessary to compete in a relevant market from unreasonably denying competitors access to that facility. *See, e.g.*, MCI Commc'ns Corp. v. AT&T Co., 708 F.2d 1081, 1132–33 (7th Cir. 1983) (describing elements of an essential facilities claim).

164. *Nobody in Particular Presents*, 311 F. Supp. 2d at 1110.

165. *Id.* at 1113.

166. *Id.* In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), the Supreme Court upheld the judgment of the lower courts that a refusal to deal was actionable under section 2 of the Sherman Act where the defendant ski company's withdrawal from a joint-ticketing arrangement with a rival did not appear to be "justified by any normal business purpose" and the evidence supported an inference that the defendant "was not motivated by efficiency concerns and that it was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival." *Aspen Skiing*, 472 U.S. at 608, 610–11.

167. *Nobody in Particular Presents*, 311 F. Supp. 2d at 1114.

168. *Id.*

169. 335 F. Supp. 2d 522 (D.N.J. 2004).

the plaintiffs' antitrust claim regarding the defendant "late-listing" its patent.[170] 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."[171] Accordingly, the court determined that there "exist[ed] no regulatory scheme so extensive as to supplant antitrust laws" in this case and therefore *Trinko* did not bar the plaintiff's antitrust claims.[172] In litigation challenging the proposed merger of health insurance providers Aetna and Humana, the defendants relied on *Trinko*'s language regarding the relationship between regulation and antitrust to argue that "[t]he [r]egulatory [s]cheme [g]overning Medicare Advantage Plans [p]recludes [t]he [p]ossibility [o]f [a]nticompetitive [b]ehavior" post-merger.[173] While the court agreed (also citing *Trinko*) that "the government's regulation of Medicare Advantage remains relevant," it rejected the defendants' contention that the regulatory scheme eliminated the possibility of anticompetitive effects arising from the proposed merger, because the relevant regulations were "not 'designed to deter and remedy anticompetitive harm.'"[174] In its opinion explaining its order blocking the merger, the court carefully examined the Center for Medicare and Medicaid Services' (CMS) regulations and that agency'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."[175]

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 many 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

170. *In re Remeron Antitrust Litig.*, 335 F. Supp. 2d at 529–31. The "Orange Book" is a commonly used name for an FDA publication, *Approved Drug Products with Therapeutic Equivalence Evaluations*, which lists drugs the FDA has approved as safe and "related patent and exclusivity information." *Approved Drug Products with Therapeutic Equivalence Evaluations (Orange Book)*, U.S. FOOD & DRUG ADMIN., http://www.fda.gov/drugs/informationondrugs/ucm129662.htm [http://perma.cc/HZR6-M8AX] (last updated Sept. 26, 2018). The Orange Book can be used to identify therapeutically equivalent drugs that may be cheaper than branded pharmaceuticals, typically generic versions of the same drug. *See* Jennifer Gershman, *4 Interesting Facts About the Orange Book*, PHARMACY TIMES (Mar. 13, 2018), http://www.pharmacytimes.com/contributor/jennifer-gershman-pharmd-cph/2018/03/4-interesting-facts-about-the-orange-book [http://perma.cc/7UN4-JFDW] ("The Orange Book is . . . the gold standard reference for generic drug substitution.").

171. *In re Remeron Antitrust Litig.*, 335 F. Supp. at 530.

172. *Id.* at 531.

173. Defendants' Proposed Findings of Fact, Conclusions of Law, and Post-Trial Brief at 127, United States v. Aetna Inc., 240 F. Supp. 3d 1 (D.D.C. 2017) (No. 1:16-cv-1494-JDB), 2017 WL 9605144. The 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 (alteration in original) (quoting Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 411 (2004)).

174. *Aetna*, 240 F. Supp. 3d at 47–48 (quoting *Trinko*, 540 U.S. at 412).

175. *Id.* at 52.

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.[176] As a result, the district courts in *In re Credit Default Swaps Antitrust Litigation* and *In re Interest Rate 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.[177] 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[178]—any less difficult to manage in the derivatives markets than they are in other financial 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.

Nonetheless, *Credit Suisse*, *Trinko*, and their progeny increase the likelihood that courts will find antitrust immunity (or that regulation otherwise displaces antitrust) in the financial markets. Given that likelihood, how can competition in the financial sector be ensured? That question arose when Congress enacted a new regulatory structure for the derivatives markets with the passage of Dodd-Frank 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 2008 FINANCIAL CRISIS, AND 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

176. 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 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) (2018). And section 28 of the Securities Exchange Act of 1934 contains essentially the same language. *Id.* § 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. Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 289 (2007) (Thomas, J., dissenting). 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 saving provisions that encompass antitrust and other remedies." *Id.* Writing for the majority, Justice Breyer rejected this argument, noting that the United States had presented it in *Gordon* and "the Court, in finding immunity, necessarily rejected it." *Id.* at 275 (majority opinion) (citing Gordon v. N.Y. Stock Exch., Inc., 422 U.S. 659, 689 (1975)). Justice Breyer also stated that the parties had not raised arguments in the lower courts 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.*

177. *In re* Interest Rate Swaps Antitrust Litig., 261 F. Supp. 3d 430, 497–98 (S.D.N.Y. 2017); *In re* Credit Default Swaps Antitrust Litig., No. 13md2476 (DLC), 2014 WL 4379112, at *16–17 (S.D.N.Y. Sept. 4, 2014).

178. *Credit Suisse*, 552 U.S. at 282.

world's largest insurance company, at the cost of $161 billion.[179] AIG was brought down by what was at the time a little-known subsidiary, AIG Financial Products Corporation (AIGFP).[180] While AIG was 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.[181] When the bill came due on AIGFP's CDS, AIG faced a liquidity crisis and neared collapse.[182] 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."[183] Another type of financial derivative, mortgage-backed securities (MBS), was the primary cause of the collapse of Bear Stearns.[184] Lehman Brothers' huge derivatives portfolio threatened financial destruction to Lehman's many counterparties when the firm collapsed in 2008.[185]

Obscure and little understood at the time, financial derivatives played a leading role in 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.[186] Common types of derivatives include options,[187]

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179. OFFICE OF THE SPECIAL INSPECTOR GEN. FOR THE TROUBLED ASSET RELIEF PROGRAM, AIG REMAINS IN TARP AS TARP'S LARGEST INVESTMENT 1 (July 25, 2012), http://www.sigtarp.gov/Audit%20Reports/AIG_Remains_in_TARP_Mini_Book.pdf [http://perma.cc/W4GA-LXHG].

180. *Id.* at 2–4.

181. *Id.* at 2–3.

182. *Id.* at 3–4.

183. FIN. CRISIS INQUIRY COMM'N, *supra* note 32, at 352.

184. *See* William RYBACK, TORONTO LEADERSHIP CENTRE, CASE STUDY ON BEAR STEARNS 7–8 (2009), http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/02BearStearnsCaseStudy.pdf [http://perma.cc/QDL7-R6PU] (noting that "Bear Stearns' reputation was irreparably damaged" in July 2007 when its primary hedge fund, which "was made up of complex derivatives backed by home mortgages[,] . . . failed as . . . subprime funds lost nearly all their value").

185. *See* Michael J. Fleming & Ansari Sarkar, *The Failure Resolution of Lehman Brothers*, FED. RES. BANK. N.Y. ECON. POL'Y REV., Dec. 2014, at 175, 175 ("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." (citation omitted)).

186. Frank D'Souza et al., *Illuminating the Need for Regulation in Dark Markets: Proposed Regulation of the OTC Derivatives Market*, 12 U. PA. J. BUS. L. 473, 474 (2010).

187. "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 218 (5th ed. 2010) (emphasis omitted).

swaps,[188] forward contracts,[189] and futures contracts.[190] Parties typically enter derivatives contracts to hedge risk or to speculate on an underlying asset.[191] 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.[192] Those figures were $595 trillion and $10 trillion in mid-2018.[193]

Before the financial crisis, derivatives were traded both on exchanges and over the counter (OTC).[194] Common derivatives species, such as standard options and futures, often were traded on regulated exchanges, like the Chicago Mercantile Exchange and the Chicago Board of Trade.[195] In these types of transactions, the exchange served as the go-between for the contracting parties.[196] The CFTC regulated these exchanges, while the SEC regulated exchanges on which stock options were traded.[197] Contracts traded on exchanges were settled by clearinghouses, which served as intermediaries between buyers and sellers.[198]

Less common derivatives species, like forwards and swaps, were likely to be traded over the counter precrisis.[199] This meant that most exotic derivatives contracts were entered directly by the counterparties and were not traded on

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188. Swaps are contracts that allow parties to exchange obligations or risks. *See id.* at 222. 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.*

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

190. "[A] futures contract [is] an agreement to buy or sell an asset in the future at a certain price." *Id.* at 169. While futures and forwards are similar in some ways, futures are standardized instruments that sell on organized exchanges, while forwards are not standardized and are privately traded. *Id.* at 169, 221.

191. RENA S. MILLER, CONG. RESEARCH SERV., R41715, CONFLICTS OF INTEREST IN DERIVATIVES CLEARING 2 (2011) ("The different types of derivative financial instruments are used for the same broad purposes—hedging business risk and taking on risk in search of speculative profits.").

192. BANK FOR INT'L SETTLEMENTS, FIRST HALF OF 2008, *supra* note 26, at 1. Notional value refers to the face value of the contracts, upon which the payment streams for a particular swap are based. *Explanatory Notes*, U.S. COMMODITY FUTURES TRADING COMM'N, http://www.cftc.gov/MarketReports/SwapsReports/ExplanatoryNotes/index.htm [http://perma.cc/ZDE5-RFJC] (last visited Apr. 15, 2019). Gross market value "provides a more meaningful measure of amounts at risk than notional amounts." BANK FOR INT'L SETTLEMENTS, END-JUNE 2018, *supra* note 26, at 2.

193. BANK FOR INT'L SETTLEMENTS, END-JUNE 2018, *supra* note 26, at 2.

194. OTC transactions are entered directly by trading parties, rather than via an exchange. *See, e.g.*, D'Souza et al., *supra* note 186, at 482 (explaining that derivatives are traded either on exchanges or OTC).

195. *Id.* at 481–82.

196. *See id.*

197. *Id.* at 492 nn.85–86.

198. Clearinghouses act as "the buyer to every seller's clearing member and the seller to every buyer's clearing member." INTERCONTINENTAL EXCH., *supra* note 33, at 1. The clearinghouse "becomes the central counterparty to the trade, thereby guaranteeing financial performance of the contract." *Id.*

199. *See* D'Souza et al., *supra* note 186, at 482.

exchanges or cleared by third-party entities.[200] 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.[201]

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.[202] In this context, CDS allow lenders to hedge their risks, which typically is good for the economy: by spreading their risk to additional parties, lenders may be able to make more loans.[203]

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.[204] It was this form of speculation, combined with a boom in structured mortgage-backed securities, that created the toxic mix from which the 2008 financial crisis emerged.[205] Housing prices soared in the early 2000s.[206] Mortgage rates were relatively low and banks typically did not enforce strict borrowing standards.[207] 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).[208] These mortgage-backed securities carried different levels of risk, depending on the characteristics of the underlying mortgages.[209] Even sophisticated investors had trouble assessing the risk of investing in these CDOs because it was difficult to know exactly how risky the underlying mortgages were.[210] Credit rating agencies

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200. *Id.* at 482–83.

201. *Id.* at 494–95.

202. *Id.* at 483–84.

203. *Id.* at 487 ("[CDS] allow banks to transfer credit exposure to counterparties . . . , which allows banks to lend more money.").

204. FIN. CRISIS INQUIRY COMM'N, *supra* note 32, at 50.

205. D'Souza et al., *supra* note 186, at 490–91.

206. FIN. CRISIS INQUIRY COMM'N, *supra* note 32, at 84 ("With the recession over and mortgage rates at 40-year lows, housing kicked into high gear—again.").

207. *Id.*; *see also id.* at 187 ("Lax mortgage regulation and collapsing mortgage-lending standards and practices created conditions that were ripe for mortgage fraud.").

208. *See* Eric S. Belsky & Nela Richardson, *Understanding the Boom and Bust in Nonprime Mortgage Lending* 5 (Harv. Univ. Joint Ctr. for Hous. Studies, Working Paper No. UBB10-1, 2010), http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/ubb10-1.pdf [http://perma.cc/867G-FAK2] ("At 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.").

209. *See id.* at 6 ("Mortgage-backed security issuers created increasingly more complicated securities backed by mortgage loans.").

210. *See* Yaw Owusu-Ansah, *What Went Wrong? Examining Moody's Rated CDO Data* 3 (Econ. Dep't, Colum. Univ. Working Paper No. 1, 2013), http://www.columbia.edu/~yao2103/wp1.pdf [http://perma.cc/766H-ZHV9] ("Given the size and complexity of the collaterals . . . in the CDO deals,

proved unhelpful, as they often gave AAA ratings to what turned out to be very risky assets.[211]

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.[212] The mortgage-backed securities that held these mortgages quickly surrendered value and investors lost their stakes.[213] Further, investors who had entered CDS based on these failed mortgage-backed securities were due payment. Counterparties that did not have the funds to meet these obligations were overwhelmed.[214] 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.[215]

These financial products 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, OTC swaps were exempt from CFTC and SEC regulation.[216] The primary goal of Dodd-Frank's derivatives reforms was to

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it was costly for investors to independently price and evaluate all the assets in the collateral pool. As such, investors relied on the ratings giving [sic] by the rating agencies to assess their credit risks and also make their investment decisions.").

211. *See* John Patrick 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, 180–81 (noting that "observers have criticized rating agencies sharply" and arguing 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).

212. *Id.* at 122.

213. *See* OFFICE OF THE SPECIAL INSPECTOR GEN. 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) ("As loan delinquencies increased and housing prices decreased, mortgage-backed securities (bundles of individual mortgages) began losing value, and the associated losses at financial institutions resulted in serious financial difficulties."), http://www.sigtarp.gov/Audit%20Reports/Emergency_Capital_Injections_Provided_to_Support_the_Viability_of_Bank_of_America.pdf [http://perma.cc/w4ga-lxhg]; RYBACK, *supra* note 184, at 7–8 (describing how Bear Stearns' primary hedge fund, which "was made up of complex derivatives backed by home mortgages[,] . . . failed as . . . subprime funds lost nearly all their value").

214. *See* OFFICE OF THE SPECIAL INSPECTOR GEN. FOR THE TROUBLED ASSET RELIEF PROGRAM, *supra* note 213, at 2; *see also* D'Souza, *supra* note 186, at 490 ("As borrowers defaulted, the protection buyers demanded compensation from their counterparties. However, the protection sellers were not all adequately capitalized and were unable to make such large payments.").

215. *See* RYBACK, *supra* note 184, at 8 (noting that "Bear Stearns' reputation was irreparably damaged" by the failure of its hedge funds invested in mortgage-backed securities); D'Souza et al., *supra* note 186, at 491 ("CDO losses represented 94% of AIG's total loss.").

216. *See* 7 U.S.C. §§ 1a(13), 2(d) (2018) (exempting OTC swaps from CFTC oversight); 15 U.S.C. § 78-b1(a), (b)(1) (2018) (exempting security-based swaps from SEC oversight).

ensure that the vast majority of swaps would be centrally cleared by clearinghouses, which would be required to impose strict margin requirements and maintain sufficient capital reserves to cover any defaults.[217] Further, swaps subject to the central clearing requirement would have to be traded on exchanges or SEFs.[218]

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."[219] It also mandates 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."[220] Section 763 contains parallel requirements for securities-based swaps, which the SEC regulates under the Dodd-Frank framework.[221]

This new regulatory regime aimed to transform the swaps markets from a predominantly bilateral, decentralized, over-the-counter system to a centralized framework in which most swaps must be exchange traded, centrally cleared, and regulated.[222] 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

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217. *See, e.g.*, Letter from Timothy F. Geithner, Sec'y of the Treasury, to Sen. Harry Reid 1 (May 13, 2009), http://www.maths-fi.com/Timothy-Geithner-OTC-letter-05132009.pdf [http://perma.cc/K3FA-E99K] ("To contain systemic risks, the C[ommodity] E[xchange] A[ct] and the securities laws should be amended to require clearing of all standardized OTC derivatives through regulated central counterparties (CCPs)."); Press Release, U.S. Dep't of the Treasury, Regulatory Reform Over-the-Counter (OTC) Derivatives (May 13, 2009), http://www.treasury.gov/press-center/press-releases/Pages/tg129.aspx [http://perma.cc/CE2J-D23L] ("Objectives of [r]egulatory [r]eform of OTC [d]erivatives [m]arkets [include that] [t]he 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.")

218. Press Release, U.S. Dep't of the Treasury, *supra* note 217 ("Objectives of [r]egulatory [r]eform of OTC [d]erivatives [m]arkets [include] [t]he movement of standardized trades onto regulated exchanges and regulated transparent electronic trade execution systems.").

219. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 723(h)(1)(A), 124 Stat. 1376, 1675–76 (2010) (codified as amended at 7 U.S.C. § 2(h)(1)(A)).

220. *Id.* § 723(h), 124 Stat. at 1681 (codified as amended at 7 U.S.C. § 2(h)(8)(A)(i), (ii)).

221. *Id.* § 763, 124 Stat. at 1762 (codified as amended at 7 U.S.C. § 78c-3(a)(1)) ("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.* § 763, 124 Stat. at 1767 (codified as amended at 7 U.S.C. § 78c-3(h)(1)) ("With respect to transactions involving security-based swaps subject to the clearing requirement . . . , counterparties shall . . . execute the transaction on an exchange; or . . . execute the transaction on a security-based swap execution facility . . . .").

222. *See, e.g.*, *Assessing the Regulatory, Economic, and Market Implications of the Dodd-Frank Derivatives Title: Hearing Before the H. Comm. on Fin. Servs.*, 112th Cong. 3 (2015) (statement of Rep. David Scott) (explaining that the Dodd-Frank derivatives title "aims to regulate credit default swaps and other derivatives" and "requires central clearing and exchange trading for derivatives that can . . . be cleared"); Letter from Timothy F. Geithner to Sen. Harry Reid, *supra* note 217, at 1 (discussing "establishment of a comprehensive regulatory framework for over-the-counter (OTC) derivatives," which will include central clearing and exchange trading of standardized OTC derivatives).

suffer. As a result, the swaps markets post-Dodd-Frank bear a strong resemblance to other regulated markets that rely on shared facilities.

In such markets, firms controlling the bottleneck can disadvantage downstream rivals by denying them access to the facility.[223] The railroad terminal facilities at issue in *United States v. Terminal Railroad Ass'n of St. Louis*[224] are a classic example of this problem. An association of railroads controlled the only existing means to cross 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.[225] 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, placing new members "upon a plane of equality in respect of benefits and burdens" with association members.[226] The Court also required that the defendants provide for the use of the terminal facilities by any railroad not choosing to join the association "upon such just and reasonable terms and regulations as will . . . place every such company" on equal footing with association members as to expenses and charges.[227] Exchange-trading and central-clearing requirements create the same types of anticompetitive risks as the privately controlled railroad terminal facilities 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."[228] 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."[229]

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

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223. *See* Robert Pitofsky et al., *The Essential Facilities Doctrine Under U.S. Antitrust Law*, 70 ANTITRUST L.J. 443, 447 (2002) ("[N]umerous lower courts have found the essential facilities doctrine potentially applicable in those extraordinary circumstances where one firm uses its control of a bottleneck to eliminate actual or potential competitors.").

224. 224 U.S. 383 (1912).

225. *Terminal R.R. Ass'n of St. Louis*, 224 U.S. at 397–400.

226. *Id.* at 411.

227. *Id*.

228. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 723(a), 124 Stat. 1376, 1675–76 (2010).

229. *Id.* § 723(a)(2), 124 Stat. at 1677 (CFTC); *id.* § 763(a), 124 Stat. at 1763 (SEC).

"by a bank holding company . . . with total consolidated assets of" $50 billion or more, a "nonbank financial company" supervised by the Federal Reserve Board, a swap or security-based swap dealer, or a "major swap participant" or "major security-based swap participant."[230] 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 such a dealer "has a material debt or equity investment."[231] 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.[232] The CFTC and SEC promulgated proposed conflicts-of-interest rules in October 2010, but they have not been finalized.[233] These rules are discussed in detail below.[234]

The CFTC also adopted rules governing access to designated contract markets (DCMs) and SEFs, both of which are types of derivatives exchanges. 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 manner."[235] Further, the CFTC required DCMs to "establish and impartially enforce rules governing denials, suspensions, and revocations of . . . access privileges."[236] The SEC proposed a similar rule for security-based SEFs, but it has not been

230. *Id.* § 726(a), 124 Stat. at 1695 (CFTC); *id.* § 765(a), 124 Stat. at 1796–97 (SEC).

231. *Id.* § 726(b), 124 Stat. at 1695 (CFTC); *id.* § 765(b), 124 Stat. at 1797 (SEC).

232. *Id.* § 726(c), 124 Stat. at 1695 (CFTC); *id.* § 765(c), 124 Stat. at 1797 (SEC).

233. 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, 75 Fed. Reg. 65,882 (proposed Oct. 26, 2010) (to be codified at 17 C.F.R. pt. 242) (SEC); Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities Regarding the Mitigation of Conflicts of Interest, 75 Fed. Reg. 63,732 (proposed Oct. 18, 2010) (to be codified at 17 C.F.R. pts. 1, 37–40) (CFTC).

234. *See infra* notes 345–65 and accompanying text.

235. Core Principles and Other Requirements for Designated Contract Markets, 77 Fed. Reg. 36,612, 36,701 (June 19, 2012) (to be codified at 17 C.F.R. pts. 1, 16, 38). The CFTC explained that "impartial access rules are necessary in order to prevent the use of discriminatory access requirements as a competitive tool against certain participants." *Id.* at 36,625. The agency promulgated a similar rule for SEFs, requiring that they grant access using criteria "that are impartial, transparent and applied in a fair and nondiscriminatory manner." Core Principles and Other Requirements for Swap Execution Facilities, 78 Fed. Reg. 33,476, 33,587 (June 4, 2013) (to be codified at 17 C.F.R. pt. 37). 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.

236. Core Principles and Other Requirements for Designated Contract Markets, 77 Fed. Reg. at 36,701.

finalized.[237] That rule would have required security-based SEFs to "establish fair, objective, and not unreasonably discriminatory standards for granting impartial access to trading on [a] facility."[238] 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.[239] The only discretion security-based SEFs would have had would have been over eligible contract participants.[240]

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 more generally. 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.[241]

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."[242] 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."[243] The Dodd-Frank 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, contended that the antitrust savings clause "applies to the entire Act" and that the limiting "phrase 'unless otherwise specified' . . . refers only to . . . four specific provisions" in the Act "that explicitly modify the operation of those

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237. Registration and Regulation of Security-Based Swap Execution Facilities, 76 Fed. Reg. 10,948 (proposed Feb. 2, 2011) (to be codified at 17 C.F.R. pts. 240, 242, 249); *see also Section 763: Security-Based Swaps*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/spotlight/dodd-frank-section.shtml#763 [http://perma.cc/6ZZT-CGAJ] (last updated July 16, 2015) (showing that this rule is still proposed and not yet final).

238. Registration and Regulation of Security-Based Swap Execution Facilities, 76 Fed. Reg. at 10,962.

239. *Id.* at 11,059–60.

240. *Id.*

241. *See supra* Section I.

242. Dodd-Frank Wall Street Reform and Consumer Protection Act § 6, 12 U.S.C. § 5303 (2018).

243. The antitrust savings clause in the Telecommunications Act of 1996 states, "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." Telecommunications Act of 1996, Pub. L. No. 104-104, § 601(b)(1), 110 Stat. 56, 143.

specified provisions of the antitrust laws in specified ways."[244] The four provisions he referred to include two that "explicitly shorten[]" the "standard [Hart-Scott-Rodino Act] pre-merger waiting period" and two that ensure a Hart-Scott-Rodino Act exemption is not triggered by Dodd-Frank's requirement that regulatory agencies review certain types of transactions.[245]

Nonetheless, the derivatives title contains several sections that arguably supersede the antitrust laws by adding what appear to be limited antitrust exemptions. These "[a]ntitrust 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 process or take any action that results in any unreasonable restraint of trade; or (B) impose any material anticompetitive burden."[246] The introductory clause appears to offer an antitrust exemption to actors who can show that suspect conduct is "necessary or appropriate" for fulfilling the Act's goals.[247]

This interpretation was rejected, however, by the district court in *In re Credit Default Swaps Antitrust Litigation*.[248] That case was a class action brought on behalf of persons who bought CDS from or sold CDS to the defendant banks.[249] The 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 prices in the form of wide bid-ask spreads.[250] According to the plaintiffs, the dealer-defendants, to preserve their advantage, took measures to ensure that an

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244. 156 CONG. REC. 1347 (2010) (statement of Rep. 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 statutory scheme." *Id.* He cited *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.*

245. *Id.* The Hart-Scott-Rodino Antitrust Improvements Act of 1976 requires parties contemplating certain acquisitions to file premerger notifications with the Federal Trade Commission and the Department of Justice's Antitrust Division before consummating their deals. Hart-Scott-Rodino Antitrust Improvements Act of 1976 § 201, 15 U.S.C. § 18(a) (2018). Parties cannot finalize transactions subject to Hart-Scott-Rodino filing requirements until the Hart-Scott-Rodino waiting period (thirty days for most transactions) expires. *Id.*

246. 7 U.S.C. § 6s(j)(6); 15 U.S.C. § 78o-10(j)(6).

247. 7 U.S.C. § 6s(j)(6). Representative Conyers argued that these "Antitrust Considerations" clauses do not create an antitrust exemption. *See* 156 CONG. REC. 1347 (2010) (statement of Rep. Conyers, Jr.). 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.*

248. *In re* Credit Default Swaps Antitrust Litig., No. 13md2476 (DLC), 2014 WL 4379112, at *16–17 (S.D.N.Y. Sept. 4, 2014).

249. *Id.* at *1.

250. *Id.* at *2–3. Bid-ask spreads represent the difference between the price at which a dealer will purchase an asset and the price at which it will sell that asset. *See id.* at *1. The spread between these two prices represents the dealer's profits. *Id.*

electronic exchange for CDS trading did not emerge.[251] Such an exchange would have competed with the dealer-defendants, increased price transparency in the derivatives markets, and forced a reduction in the dealer-defendants' bid-ask spreads.[252] The alleged measures included restricting dissemination of pre- and post-trade pricing information required for establishing an exchange and attempting to foreclose non-dealers from transacting with inter-dealer brokers, intermediaries that could access buy or sell prices and match those offers with another dealer.[253]

In 2008, nascent derivatives clearinghouses and exchanges appeared ready to transform the derivatives markets.[254] 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 have "been generally open to dealers, banks, and institutional investors" and would have allowed customers and dealers to "trade directly."[255] This exchange would have "excluded [dealer-defendants] as intermediaries in many CDS transactions and made real-time pricing information available to investors."[256] The price transparency it promised threatened to reduce the supracompetitive pricing the dealer-defendants had enjoyed.[257] The plaintiffs alleged that as CMDX prepared to enter the market, the dealer-defendants "conspired to shut it down."[258] They "agreed not to deal with CMDX or any other clearing platform that might allow CDS trading" and "to clear almost all transactions" though ICE Clear Credit, a clearinghouse they controlled.[259] The plaintiffs further claimed that the dealer-defendants used their position on ICE Clear Credit's risk committee to hinder changes to the OTC derivatives market by imposing rules "restricting participation in ICE . . . to prevent a transition to exchange trading."[260] 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 CMDX licenses to data and a standardized "Master Agreement" necessary to run an exchange platform.[261] They did this by "leveraging their status as Markit's and ISDA's largest customers," the plaintiffs claimed, and through their positions on the boards of both organizations.[262] 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

251. *Id.* at *4–5.
252. *Id.* at *3–5.
253. *Id.* at *2–3.
254. *Id.* at *3–4.
255. *Id.* at *3.
256. *Id.*
257. *Id.* at *3–5.
258. *Id.* at *4.
259. *Id.*
260. *Id.* at *5.
261. *Id.* at *2, *5.
262. *Id.* at *5.

committee.[263] The plaintiffs alleged that the dealer-defendants used the captured risk committee to freeze CME's ability to clear trades.[264] They contended that the dealer-defendants' conduct harmed them by "keeping the market opaque, preventing competition, and maintaining inflated bid/ask spreads."[265]

In moving to dismiss the class action complaint, one of the defendants' arguments was that Dodd-Frank "precludes application of the antitrust laws" to post-enactment conduct.[266] They asserted that the derivatives title's "antitrust considerations" clauses were an exception to the Act's antitrust savings clause.[267] 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."[268] 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."[269] As a result, Dodd-Frank's antitrust savings clause applied and the defendants' conduct was not immunized from antitrust liability.[270] The court in a similar case, *In re Interest Rate Swaps Antitrust Litigation*, also "adopt[ed] this analysis," rejecting the defendants' assertion that the plaintiffs' post-Dodd-Frank antitrust claims were precluded by the Act's "[a]ntitrust considerations" clauses.[271]

The *In re Credit Default Swaps Antitrust Litigation* court rejected the defendants' motions to dismiss the complaint with regard to the plaintiffs' Sherman Act section 1 claims and granted them with regard to their section 2 claims.[272] In the wake of this decision, the parties entered a class action settlement agreement valued at nearly $2 billion.[273] The district court approved the settlement in 2016.[274]

This case illustrated the competitive dangers lurking in the derivatives markets. Taking the allegations as true, the big banks conspired to forestall the move to exchange trading to preserve their profit margins on derivatives

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.* at *16.

267. *Id.* at *17.

268. *Id.*; *see also* Gregory Scopino, *Expanding the Reach of the Commodity Exchange Act's Antitrust Considerations*, 45 HOFSTRA L. REV. 573, 584 (2016) (explaining that the 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").

269. *In re Credit Default Swaps Antitrust Litig.*, 2014 WL 4379112, at *17.

270. *Id.*

271. *In re* Interest Rate Swaps Antitrust Litig., 261 F. Supp. 3d 430, 497 (S.D.N.Y. 2017).

272. *In re Credit Default Swaps Antitrust Litig.*, 2014 WL 4379112, at *18.

273. *In re* Credit Default Swaps Antitrust Litig., 13md2476 (DLC), 2016 WL 2731524, at *1 (S.D.N.Y. Apr. 26, 2016).

274. *Id.* at *19.

transactions. They did this in part through control of CME's and ICE Clear 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. Or they could boycott emerging exchanges. The plaintiffs in *In re Interest Rate Swaps Antitrust Litigation* alleged that the dealer-defendants conspired both pre- and post-Dodd-Frank to attempt to prevent the emergence of, and later to destroy, electronic trading platforms for interest rate swaps. As with the CDS markets, the plaintiffs contended that interest rate swaps dealers took these steps to maintain the large profits they enjoyed in OTC transactions.

While there is a robust academic literature on reforming and regulating the derivatives markets,[275] there is scant scholarship on antitrust enforcement and competition in these markets. A handful of academics have identified the competition problems that derivatives clearinghouses and trading platforms pose, especially the threat that clearinghouses can act as competitive bottlenecks that the big banks can leverage to disadvantage their rivals.[276] Big banks can use their control of clearinghouses to set "high bars" to membership, with the result that rival derivatives dealers may not be able to join or access clearinghouses.[277] There is evidence that the big banks may be successfully pursuing this strategy because the major clearinghouses' memberships remain mostly unchanged over time.[278] 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.[279] 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 derivatives market participants could collude to harm competition (or attempt to harm competition) in the future is real."[280] He further noted that even years after Dodd-Frank was enacted, a small cadre of big banks continued to dominate the swaps markets and that many of these firms have "rigged

275. *See, e.g.*, D'Souza et al., *supra* note 186; Griffith, *supra* note 29; 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 (2013); Paolo Saguato, *The Ownership of Clearinghouses: When "Skin in the Game" Is Not Enough, the Remutualization of Clearinghouses*, 34 YALE J. REG. 601 (2017).

276. *See, e.g.*, Chang, *Second-Generation Monopolization*, *supra* note 23, at 679 (arguing that "the downstream dealer markets are where the real profits lie" and "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 dealer markets"); Johnson, *supra* note 35, at 222–25 (arguing that clearinghouses' anticompetitive incentives will "[l]imit [a]ccess to [c]learinghouse [m]embership" and "[c]learing [e]ligibility").

277. Chang, *Second-Generation Monopolization*, *supra* note 23, at 697.

278. *Id.* at 697–98 ("[T]he membership profile of the dominant . . . clearinghouses has remained unchanged from year to year.").

279. *Id.* at 722–23.

280. Scopino, *supra* note 268, at 584 (footnote omitted).

benchmarks for . . . interest rates and foreign currencies that affect the prices of OTC swaps and other derivatives."[281]

While two district courts have determined that antitrust potentially could reach such anticompetitive conduct, there is reason to believe that other courts applying *Credit Suisse* and *Trinko* might find this behavior immune from the antitrust laws, leaving sector 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.[282] 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."[283] This raises the question of whether regulators generally, and the financial regulators in particular, are willing and able to perform that function.

Several scholars have argued that sector regulators are neither particularly eager nor well equipped to step in for the antitrust agencies and police anticompetitive conduct in regulated markets.[284] 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.[285]

These concerns are well founded when it comes to the SEC and CFTC. First, neither agency prioritizes competition enforcement. The SEC's "primary

281. *Id.* at 636–37.

282. Sector regulators are agencies authorized to regulate particular industries or market sectors. Examples include the financial regulatory agencies, the Federal Communications Commission, and the Nuclear Regulatory Commission. The antitrust enforcement agencies' mandate, by contrast, extends across the entire economy.

283. Verizon Commc'ns Inc. v. 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 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." (alteration in original) (citation omitted) (quoting Silver v. N.Y. Stock Exch., 373 U.S. 341, 358 (1963))); *see also Silver*, 373 U.S. at 358 (finding 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").

284. *See, e.g.*, Dogan & Lemley, *supra* note 13, at 695–700; *see also* Jablon, Patel & Nurani, *supra* note 106, at 630 ("[Regulatory] agencies are not adequate or complete substitutes for courts in antitrust enforcement.").

285. *See, e.g.*, Dogan & Lemley, *supra* note 13, at 695–700; Jablon, Patel & Nurani, *supra* note 106, at 638–55.

mission . . . is to protect investors and maintain the integrity of the securities markets."[286] It pursues this mission through an information-disclosure regime: "Only through the steady flow of timely, comprehensive and accurate information can people make sound investment decisions."[287] Competition is not mentioned in the SEC website's lengthy description of what the agency does.[288] 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."[289] SEC Commissioner Robert J. Jackson has warned that the agency has "forgotten a crucial part of [its] mission: to pursue the kind of vigorous competition that American investors deserve."[290] For its part, the CFTC's mission statement mentions competition as one among many other priorities, including managing systemic risk and protecting consumers from "fraud, manipulation, and abusive practices."[291]

Not only is competition enforcement a low or nonpriority for many sector regulators, but it also may clash with agencies' higher priorities.[292] Some agencies "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.'"[293] The financial 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

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286. U.S. SEC. & EXCH. COMM'N, *The Investor's Advocate*, COLUM. UNIV. (Dec. 1999), http://www.columbia.edu/~hcs14/SEC.htm [http://perma.cc/N69E-BN8M] [hereinafter SEC, *The Investor's Advocate*]; *see also* Dogan & Lemley, *supra* note 13, at 698 (asserting that 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").

287. SEC, *The Investor's Advocate*, *supra* note 286.

288. *What We Do*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/Article/whatwedo.html [http://perma.cc/F8EL-JSEA] (last visited Apr. 15, 2019).

289. *Id.*

290. Jackson, *supra* note 18.

291. *Mission and Responsibilities*, U.S. COMMODITY FUTURES TRADING COMM'N (last visited Apr. 15, 2019), http://www.cftc.gov/About/MissionResponsibilities/index.htm [http://perma.cc/WK47-AY47] ("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 . . . .").

292. *See* Jablon, Patel & Nurani, *supra* note 106, 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.").

293. *Id.* at 650 (omission in original) (quoting *In re* Kansas Gas & Elec. Co., 49 N.R.C. 441, 463 (1999)); *see also* Dogan & Lemley, *supra* note 13, at 697–98 ("Even those agencies whose mission expressly involves the consideration of competition issues will not necessarily make it their first among potentially conflicting priorities.").

not made promoting competition *the* paramount consideration."[294] 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.'"[295]

In his seminal work on government bureaucracy, Professor James Q. Wilson described the way that bureaucratic cultures shape agency competencies.[296] These cultures dictate where resources are devoted, which employees advance, and how the agencies perform tasks that they do not view to be within their core mission (answer: poorly).[297] The evidence suggests that the financial services agencies lack cultures of competition enforcement. Indeed, their cultures strongly favor other values over competition in certain instances. Bureaucratic cultures are difficult to change, so it would be unreasonable to expect that the SEC and CFTC will prioritize or dramatically improve their competition enforcement capabilities in the near future.[298]

Even when sector regulators prioritize protecting competition, many lack the expertise and institutional mechanisms to do so effectively. Regulatory agencies might not employ investigatory and adjudicatory procedures sufficient to root out anticompetitive conduct.[299] While courts must in many cases allow for exhaustive discovery, the same cannot be said for most agency proceedings.[300] As a result, even those sector regulators that value protecting competition may not have the institutional systems necessary to follow through effectively.[301]

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 power to assign treble damages under the Sherman Act or to permanently enjoin anticompetitive conduct.[302] 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

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294. Memorandum Amicus Curiae of the Securities and Exchange Commission, Submitted at the Request of the Court, *In re* Initial Pub. Offering Antitrust Litig., No. 01 CIV 2014 (S.D.N.Y. Dec. 20, 2002).

295. *Id.* (quoting Bradford Nat'l Clearing Corp. v. Sec. & Exch. Comm'n, 590 F.2d 1085, 1104–05 (D.C. Cir. 1978)).

296. JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 90–110 (1989).

297. *Id.* at 95 ("Since every organization has a culture, every organization will be poorly adapted to perform tasks that are not defined as part of that culture.").

298. *Id.* at 101 ("[O]rganizations will resist taking on new tasks that seem incompatible with its dominant culture.").

299. *See* Jablon, Patel & Nurani, *supra* note 106, at 641 ("'Regulatory' agenc[ies'] procedural practices raise serious questions of [their] abilities to uncover antitrust violations.").

300. *See id.* ("[E]videntiary proceedings are no longer the norm in agency proceedings.").

301. *See* Dogan & Lemley, *supra* note 13, at 704 ("[E]ven agencies that are willing to take competition into account rarely provide effective mechanisms to enforce competition policy or deter antitrust violations.").

302. *See* Jablon, Patel & Nurani, *supra* note 106, at 638–39.

million to competitive local exchange carriers.[303] 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" that incumbent local exchange carriers like Verizon had committed with the aim of "slow[ing] the development of local competition."[304] 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."[305]

Agency capture is another explanation for regulators' relative weakness as competition enforcers.[306] The literature on capture is well developed.[307] There is a general scholarly consensus that the political nature of top agency jobs and the revolving door between agencies and the industries they oversee make sector regulators much more susceptible to industry pressure than antitrust courts.[308] Studies have shown that capture may be a particular problem at the financial regulatory agencies.[309] There is a steady flow of lawyers between the SEC and CFTC, on the one hand, and Wall Street firms and the law firms and lobbyists

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303. *Id.* at 639; *see also* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 403–04 (2004).

304. Letter from Michael Powell, Chairman, Fed. Commc'ns Comm'n, to Leaders of the Senate and House Commerce and Appropriations Comms. (May 4, 2001), http://transition.fcc.gov/Bureaus/Common_Carrier/News_Releases/2001/nrcc0116.html [http://perma.cc/Y7JZ-BPAM]; *see also* Dogan & Lemley, *supra* note 13, 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."); Jablon, Patel & Nurani, *supra* note 106, at 639.

305. Letter from Michael Powell to Leaders of the Senate and House Commerce and Appropriations Comms., *supra* note 304.

306. *See, e.g.*, Dogan & Lemley, *supra* note 13, at 698–99 (noting that "[a]gencies are famously subject to 'capture,'" while "[j]udges, by contrast, are much less subject to having their purpose diverted or to being captured").

307. This literature is voluminous. *See, e.g.*, Richard A. Posner, *The Concept of Regulatory Capture: A Short, Inglorious History*, (discussing the history of political capture theory for federal agencies), *in* PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 49, 49–56 (Daniel Carpenter & David A. Moss eds., 2013); 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.L. ECON. & ORG. 167 (1990); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

308. *See, e.g.*, Dogan & Lemley, *supra* note 13, at 699 ("Judges, by contrast, are much less subject to having their purpose diverted or to being captured.").

309. *See, e.g.*, Lawrence G. Baxter, *Understanding Regulatory Capture: An Academic Perspective from the United States*, *in* MAKING GOOD FINANCIAL REGULATION: TOWARDS A POLICY RESPONSE TO REGULATORY CAPTURE (Stefano Pagliari ed., 2012); PROJECT ON GOV'T OVERSIGHT, DANGEROUS LIAISONS: REVOLVING DOOR AT SEC CREATES RISK OF REGULATORY CAPTURE (2013), http://pogoarchives.org/ebooks/20130211-dangerous-liaisons-sec-revolving-door.pdf [http://perma.cc/N4WZ-BM2F].

that represent them on the other, which appears to affect outcomes of agency proceedings in some cases.[310]

Objective measures of the relative competition-enforcement abilities of the antitrust agencies versus the sector regulators tend to confirm the supposition that sector regulators generally cannot be relied on to fulfill the antitrust function in regulated markets. 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,[311] while the FTC's Bureau of Competition has had around 300 attorneys and support staff and approximately 50 antitrust economists.[312] Some regulatory agencies, like the FCC, Federal Deposit Insurance Corporation (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.[313] The FDIC, Federal Reserve, and the Office of the Comptroller of the Currency have staff dedicated to reviewing proposed bank mergers. Even at these agencies, however, the competition staff is smaller and more narrowly focused than the staffs of the Antitrust Division and FTC.[314]

310. *See, e.g.*, PROJECT ON GOV'T OVERSIGHT, *supra* note 309, at 2 ("Former [SEC employees] routinely help corporations try to influence SEC rulemaking, counter the agency's investigations of suspected wrongdoing, soften the blow of SEC enforcement actions, block shareholder proposals, and win exemptions from federal law."). *But see* Ed deHaan et al., *The Revolving Door and the SEC's Enforcement Outcomes: Initial Evidence from Civil Litigation*, J. ACCT. & ECON., Nov.–Dec. 2015, at 65, 68 (concluding, in a study of SEC enforcement in accounting-related civil cases, that "SEC regulatory efforts are not, on average, compromised due to revolving door incentives" but also "find[ing] some evidence that law firms hiring more SEC alumni are able to obtain more favorable outcomes for their clients").

311. *See* Melissa Lipman, *Proposed Hiring Would Give DOJ Extra Enforcement Firepower*, LAW360 (Feb. 10, 2016, 6:59 PM), http://www.law360.com/articles/757889/proposed-hiring-would-give-doj-extra-enforcement-firepower [http://perma.cc/JTA9-MRJK] (noting that although 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); *see also EAG Phone Directory*, U.S. DEP'T JUST., http://www.justice.gov/atr/about-division/economic-analysis-group/eag-phone-directory [http://perma.cc/4DMF-XHWF] (last visited Apr. 15, 2019).

312. *See Bureau of Competition*, FED. TRADE COMM'N, http://www.ftc.gov/about-ftc/bureaus-offices/bureau-competition [http://perma.cc/GK5Z-NZ9A] (last visited Apr. 15, 2019); *Bureau of Economics Biographies*, FED. TRADE COMM'N, http://www.ftc.gov/about-ftc/bureaus-offices/bureau-economics/biographies [http://perma.cc/U8MR-5S73] (last visited Apr. 15, 2019).

313. *See Wireline Competition*, FED. COMMC'NS COMM'N, http://www.fcc.gov/wireline-competition [http://perma.cc/8NH8-8R2F] (last visited Apr. 15, 2019).

314. The Office of the Comptroller of the Currency's Legal Division has a Chief Counsel's Office, which manages seven legal practice areas. Only one of these seven subdivisions, the Bank Activities and Structure Division, deals with competition issues, specifically bank mergers and acquisitions, and even that subdivision has many other, non-competition-related duties. Office of the Comptroller of the Currency, *About the Legal Division*, U.S. DEP'T TREASURY, http://www.occ.treas.gov/topics/laws-regulations/about-legal.html [http://perma.cc/TBM4-NBXN] (last visited Apr. 15, 2019). The FDIC's Legal Division consists of the Office of the General Counsel and four specialized branches. *Organization Directory and Office Contacts*, FED. DEPOSIT INS. CORP., http://www.fdic.gov/about/contact/directory [http://perma.cc/P9W4-4W8P] (last updated Mar. 4, 2019). The FDIC describes its practice of law as "broad" and states that its Legal Division is a "full-service corporate

The comparison with the SEC and CFTC is starker. Neither agency has a dedicated competition division or group.[315] And neither agency established such a body post-*Credit Suisse*, when it appeared the SEC and 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. This paucity of personnel resources is perhaps predictable given these agencies' bureaucratic cultures.[316]

Considering this lack of experienced competition staff, it is unsurprising that the SEC and CFTC bring very few independent competition-related enforcement actions.[317] While these agencies have collaborated with the

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practice, providing not only litigation but transactional, regulatory, and administrative legal services." *Legal Division Honors Program*, FED. DEPOSIT INS. CORP., http://www.fdic.gov/about/legalhonors/ [http://perma.cc/ECN3-XN26] (last updated May 14, 2018). In this description of its legal work, the FDIC does not mention competition-related matters. The FDIC is involved in competition law only to the extent that it arises in the course of bank resolutions. The Federal Reserve's lawyers are housed in three divisions, the Legal Division, the Division of Supervision and Regulation, and the Consumer and Community Affairs Division. *See Careers*, FED. RES., http://www.federalreserve.gov/careers-jobs-by-category.htm [http://perma.cc/M7EK-9RSJ] (last updated Dec. 6, 2018). Antitrust is listed as one among many practice areas on which the Federal Reserve's lawyers counsel the Board. *Id.* The agency houses its merger review team in the Division of Supervision and Regulation and has an Assistant Director for Mergers and Acquisitions. *See Structure of the Federal Reserve System*, FED. RES., http://www.federalreserve.gov/aboutthefed/organization-charts-accessible.htm#bsr [http://perma.cc/9HA8-5CY8] (last updated Apr. 5, 2018). The regional Federal Reserve Banks have their own legal groups. These groups also work in a broad range of legal practice areas and, while there is some focus on mergers and acquisitions, this is only a fraction of what they are responsible for. *See, e.g.*, *Legal*, FED. RES. BANK OF N.Y., http://www.newyorkfed.org/aboutthefed/org_legal.html [http://perma.cc/XSS9-RXL3] (last visited Apr. 15, 2019) (explaining that the New York Federal Reserve Bank's Legal Group consists of seven functions: "Bank Applications, Compliance, Corporate Secretary's Office . . . , Federal Reserve Law Enforcement Unit . . . , Group Operations and Strategy . . . , Legal, and Records Management").

315. *See* Jackson, *supra* note 18 (asserting that the SEC has "made the mistake of assuming that competition policy is reserved to the Federal Trade Commission and Department of Justice" and calling for the creation of an Office of Competition Economics at the SEC); *see also*, *The CFTC Organization*, COMMODITY FUTURES TRADING COMM'N, http://www.cftc.gov/sites/default/files/2018-09/cftcorgchart.pdf [http://perma.cc/GVD7-YYUK] (last visited Apr. 15, 2019) (showing the lack of a competition group); *Organization Chart*, SEC. & EXCH. COMM'N, http://www.sec.gov/about/secorg.pdf [http://perma.cc/9DJQ-WTP6] (last visited Apr. 15, 2019) (same).

316. *See* WILSON, *supra* note 296, at 101, 110 (noting that "tasks that are not part of the [bureaucratic] culture will not be attended to with the same energy and resources as are devoted to tasks that are part of it" and "[t]asks that are not defined as central to the mission are often performed poorly or starved for resources").

317. For example, a review of the CFTC's 2017 independent enforcement actions shows only one matter arguably involving a competition violation. *Enforcement Actions*, U.S. COMMODITY FUTURES TRADING COMM'N, http://www.cftc.gov/LawRegulation/Enforcement/EnforcementActions/index.htm [http://perma.cc/T68C-V3P6] (last visited Apr. 15, 2019) (select "2017" from the "By year" drop-down menu; then click "Apply"). That action was brought against the Royal Bank of Scotland (RBS) for attempted manipulation of the U.S. Dollar International Swaps and Derivatives Association Fix (ISDAFIX). *See* Press Release, Commodity Futures Trading Comm'n, 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 [http://perma.cc/CP6D-L42P]. In 2016, the CFTC brought similar cases against Goldman Sachs and Citibank for attempted manipulation of the U.S. Dollar ISDAFIX Benchmark Swap Rates. *See* Press

Department of Justice and other enforcement agencies on significant competition investigations, there is little evidence that they would bring such cases on their own.[318] 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.[319] To this end, lower courts could apply a high standard for how actively regulators must supervise accused conduct to preclude an antitrust claim and interpret narrowly "what constitutes 'expansion' of existing antitrust law" and "what claims are likely to confuse district courts."[320]

Another judicial approach proposes antitrust intervention in the case of "regulatory gaming," which is defined as conduct that "abuses a neutral or procompetitive regulatory structure and wields it as a tool to accomplish exclusionary results."[321] This sort of gaming is distinguished from "ordinary

Release, Commodity Futures Trading Comm'n, CFTC Orders Goldman Sachs To Pay $120 Million Penalty for Attempted Manipulation of and False Reporting of U.S. Dollar ISDAFIX Benchmark Swap Rates (Dec. 21, 2016), http://www.cftc.gov/PressRoom/PressReleases/pr7505-16 [http://perma.cc/7NJU-NR6K]; Press Release, Commodity Futures Trading Comm'n, CFTC Orders Citibank To Pay $250 Million for Attempted Manipulation and False Reporting of U.S. Dollar ISDAFIX Benchmark Swap Rates (May 25, 2016), http://www.cftc.gov/PressRoom/PressReleases/7371-16 [http://perma.cc/Z99V-QAMG]. The agency also brought three cases involving noncompetitive trades in violation of CFTC regulations.

318. For example, the CFTC referred to the Department of Justice its concerns about manipulation of the Japanese Yen London Interbank Offered Rate (LIBOR) and then collaborated with the Department on the ensuing investigation, which resulted in significant penalties and disgorgement from various financial firms. *See, e.g.*, Press Release, U.S. Dep't of Justice, RBS Securities Japan Limited Agrees to Plead Guilty in Connection with Long-Running Manipulation of Benchmark Interest Rates (Feb. 6, 2013), http://www.justice.gov/opa/pr/rbs-securities-japan-limited-agrees-plead-guilty-connection-long-running-manipulation-libor [http://perma.cc/XGH8-LYMJ]. The CFTC and Justice Department also worked together in investigating manipulation of the foreign currency exchange spot market. *See, e.g.*, Press Release, U.S. Dep't of Justice, Five Major Banks Agree to Parent-Level Guilty Pleas (May 20, 2015), http://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas [http://perma.cc/85FB-Q8M5].

319. *See, e.g.*, Shelanski, *Rebalancing Antitrust and Regulation*, *supra* note 13, at 729–30 (arguing 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").

320. *Id.* at 730.

321. Dogan & Lemley, *supra* note 13, at 708.

government petitions"—protected under the *Noerr-Pennington* doctrine—and focuses 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.[322] In those types of cases, antitrust law may be the proper tool to evaluate defendants' conduct.[323] Others have argued for complementary competition enforcement by antitrust courts and sector regulators, except in cases of explicit conflict between the antitrust laws and a regulatory regime.[324]

The second category of proposed solutions is legislative. One suggested remedy is congressional action exempting the federal antitrust agencies from the limits *Trinko* and *Credit Suisse* place on antitrust enforcement.[325] 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."[326] As a result, 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 proposed legislative solution is granting sector regulators adjudicatory authority to pursue competition violations without engaging in formal rulemaking proceedings.[327]

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. The CFTC arguably already has the tools necessary to protect competition in the regulated derivatives markets: the "[a]ntitrust [c]onsiderations" clauses in Dodd-Frank's derivatives title.[328] These provisions, described in detail above,[329] 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

322. *Id*. The *Noerr-Pennington* doctrine provides antitrust immunity for conduct involving petitioning the government. *See, e.g.*, Sosa v. DirecTV, Inc., 437 F.3d 923, 929 (9th Cir. 2006).

323. Dogan & Lemley, *supra* note 13, at 708.

324. Jablon, Patel & Nurani, *supra* note 106, at 656 (noting that "except where there is a direct conflict, judicial antitrust and agency cases" should "both move forward within their jurisdictions"). The authors argued that antitrust immunity should apply only upon "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." *Id.* at 660.

325. Shelanski, *Rebalancing Antitrust and Regulation*, *supra* note 13, at 730.

326. *Id.* at 714.

327. *Id.* at 730–31 (arguing that Congress could give "regulatory agencies antitrust-like authority to make case-by-case determinations about allegedly anticompetitive conduct even in the absence of a formal rulemaking proceeding").

328. Scopino, *supra* note 268, at 583 (explaining that the "[a]ntitrust [c]onsiderations" sections are "an overlooked provision of the Act [that] could be an effective tool to address the problem of anticompetitive conduct that affects the prices of swaps and other derivatives").

329. *See supra* notes 246–48, 266–71 and accompanying text.

anticompetitive burden."[330] Advocates argue that while, as currently written, these "antitrust considerations" apply to only a limited group of firms, the CFTC could grant itself the power to police more anticompetitive conduct by promulgating a rule that would expand their reach to "cover any person who engaged in conduct that harmed competition (or had the propensity to do so) in the markets for derivatives."[331] With this broader authority, the CFTC could become "[o]ne [m]ore [s]et of [e]yes" to detect and prevent anticompetitive conduct in the derivatives markets.[332] Indeed, on this 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."[333] Accordingly, some advocate granting the CFTC the authority to seek "antitrust-style injunctive remedies" for competition violations, including "ordering the breakup of a large financial entity (or entities)."[334]

Each of these proposed types of solutions to the problems *Credit Suisse* and *Trinko* raise in regulated markets—judicial, legislative, and sector-regulator empowerment—have merit. As discussed above, lower courts in a variety of regulated markets have limited the application of *Credit Suisse* and *Trinko*, consistent with the call for judicial restraint.[335] As a result, in certain instances courts have allowed the antitrust agencies (or private plaintiffs) and sector regulators to pursue complementary cases.[336] Legislation exempting the federal antitrust agencies from efforts based on *Credit Suisse* or *Trinko* to dismiss enforcement actions or empowering the sector regulators to become more effective competition enforcers also could help ameliorate the problems these cases present.

Currently, however, despite their merits, none of these solutions sufficiently address the challenges *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.[337] The restraint courts have shown in many regulated markets cannot be

330. 15 U.S.C. § 78o-10(j)(6) (2018).

331. Scopino, *supra* note 268, at 584–86. Scopino notes that the "antitrust considerations" apply to "100 or so business organizations that are CFTC-regulated swap entities." *Id.* at 584.

332. *Id.* at 655.

333. *Id.* at 657; *see also* Johnson, *supra* note 35, at 240–41 (proposing that regulators appoint independent, third-party monitors or observers to clearinghouse boards to "offer the clearinghouses greater insight into federal agencies' regulatory expectations and provide greater transparency in the regulation of clearinghouses").

334. Scopino, *supra* note 268, at 658.

335. *See supra* Part I.C.

336. *See, e.g.*, *In re* W. States Wholesale Nat. Gas Antitrust Litig., 661 F. Supp. 2d 1172, 1182–83 (D. Nev. 2009) (allowing a private antitrust suit to proceed in a case where the CFTC had actively enforced provisions of the Commodity Exchange Act relating to the same type of conduct alleged in the antitrust suit and holding that "permitting an antitrust action based on price manipulation in the commodities markets compliments [sic], rather than conflicts with, the CEA"); *see also* Jablon, Patel & Nurani, *supra* note 106, at 656 (discussing "the concept of complementary jurisdiction").

337. *See, e.g.*, *supra* notes 129–57 and accompanying text.

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 regulations granting itself wider authority to police competition, neither that agency nor the SEC is equipped to do such policing effectively. Both agencies face severe resource constraints and neither is close to having the necessary specialized personnel (or the funds to hire such personnel) to fulfill a broader competition enforcement mandate.[338] 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. Creating and staffing dedicated competition divisions within these agencies could be an effective solution,[339] but considering ongoing resource shortages, that seems unlikely, at least in the near term. Even if such divisions were established, 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. Further, bureaucratic cultures can be difficult to change, and agencies may resist new roles (such as enhanced competition enforcement) that members perceive to be inconsistent with an organization's core mission.[340] These cultural constraints suggest it would be unrealistic to expect the SEC and CFTC to become effective competition enforcers absent an overhaul of their long-held policy priorities.

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' bureaucratic cultures and insufficient competition-enforcement resources, these markets remain vulnerable to anticompetitive conduct. But another solution is available: regulatory design that protects and promotes competition through structural mechanisms.

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338. *See, e.g.*, Scopino, *supra* note 268, at 654 ("[T]he CFTC has been chronically underfunded and therefore might not have the resources to devote to antitrust-style enforcement actions."); Gary Gensler, Chairman, Commodity Futures Trading Comm'n, Remarks of Chairman Gary Gensler before the International Group of Treasury Associations and the U.S. Chamber of Commerce (Sept, 27, 2013), http://www.cftc.gov/PressRoom/SpeechesTestimony/opagensler-146 [http://perma.cc/AG4V-DTLA] ("[T]he CFTC is currently an underfunded agency . . . . We are far short of the people we need to oversee our new mandate, the swaps market . . . ."); Sam Knight, *With Washington Closely Eyeing Stock Prices, SEC Chairman Bemoans Staff Shortages*, DISTRICT SENTINEL (Feb. 6, 2018), http://www.districtsentinel.com/washington-closely-eyeing-stock-prices-sec-chair-bemoans-staff-shortages/ [http://perma.cc/97TF-3KK9] (reporting that SEC Chairman Clayton told members of the Senate Banking Committee that "[p]ersonnel is [his] biggest challenge at the moment," that he "could use more people in enforcement," and that he "could use more people in trading and markets").

339. *See* Jackson, *supra* note 18.

340. *See* WILSON, *supra* note 296, at 107–09. Wilson described how the FBI and U.S. Department of Agriculture resisted taking on new missions that seemed "to threaten the core culture" of those agencies. *Id.* at 107. He concluded that when agencies have clear missions, "[t]asks that are not defined as central to the mission are often performed poorly or starved for resources." *Id.* at 110.

## 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 problems, the best way to preserve and promote competition may be to create structural protections that provide ex ante bulwarks against anticompetitive conduct. Structural regulation refers to government organization of markets, through statutes or agency action, to achieve a public policy goal.[341] Often the term is used in relation to financial services, media, and telecommunications markets. In financial services, it generally refers to limits on activities financial institutions may undertake.[342] In the media markets, structural regulation typically means ownership limits on media outlets.[343] Open-access requirements imposed on broadband companies to ensure network neutrality also may be described as structural regulation.[344] A similar approach could be effective in the derivatives markets. The CFTC and SEC provided one model for how this might work in their responses to Dodd-Frank's requirement that they consider promulgating rules regarding conflicts of interest in derivatives trading and clearing. The Antitrust Division of the U.S. Department of Justice subsequently suggested refinements to that model. Other structural solutions, including nationalization and utility-type regulation also have been proposed. Using the derivatives markets as a case study, this Section demonstrates how structural regulation can address the competition enforcement gap implied antitrust immunity creates in the financial sector.

### A. *Structural Regulation of the Derivatives Markets*

The CFTC and SEC issued proposed rules in October 2010 addressing conflicts of interest in the derivatives markets.[345] Unlike many other Dodd-

341. *See, e.g.*, Johan den Hertog, *General Theories of Regulation*, *in* ENCYCLOPEDIA OF LAW AND ECONOMICS 223–24 (Boudewijn Bouckaert & Gerrit De Gees eds., 2000) ("'Structural regulation' is used for regulating market structure. Examples are restrictions on entry and exit and rules against individuals supplying professional services in the absence of recognized qualifications."); John Kay & John Vickers, *Regulatory Reform in Britain*, 3 ECON. POL'Y 285, 313 (1988) (defining "structural regulation" as "the determination of which firms or individuals (or types thereof) are allowed to engage in which activities").

342. *See, e.g.*, ARMOUR ET AL., *supra* note 37, at 505 ("'Structural regulation' refers to measures designed to limit the range of activities that may be carried on by a banking firm.").

343. *See, e.g.*, Barron, *supra* note 37, at 555–59 (discussing structural media regulation, including "multiple ownership rules").

344. *See, e.g.*, Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. TELECOMM. & HIGH TECH. L. 141, 141 (2003) ("Proponents of open access see it as a structural remedy to guard against an erosion of the 'neutrality' of the network as between competing content and applications.").

345. Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities Regarding the Mitigation of Conflicts of Interest, 75 Fed. Reg. 63,732 (proposed Oct. 18, 2010) (to be codified at 17 C.F.R. pts. 1, 37–40) (CFTC); 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

Frank rulemakings, these rules have yet to be finalized.[346] The agencies took slightly different approaches in their proposed rules. As a general matter, the CFTC's proposals required clearinghouses, designated contract markets, and swap execution facilities 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."[347] The CFTC crafted different rules for clearinghouses on the one hand and derivatives exchanges (SEFs and designated contract markets (DCMs)) on the other. Both sets of rules were structured around ownership and voting limits and governance restrictions.[348]

The proposals offered clearinghouses two choices for complying with the CFTC's ownership and voting limits. Option one was to bar any member from owning more than 20% of a clearinghouse's equity or controlling more than 20% of its voting power, and to prohibit "Enumerated Entities" (big banks) together from owning more than 40% of a clearinghouse's equity or controlling more than 40% of its voting power.[349] 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."[350] The second option was for a clearinghouse to cap all members' (including Enumerated Entities') individual equity ownership and voting stakes at 5%.[351] In this scenario, there would be no aggregate ownership and voting cap on Enumerated Entities.[352] In terms of governance, the proposed rules would have required that at least 35% percent of a clearinghouse's board of directors be independent.[353] The same would be true for the executive and risk management committees, and at least 10% of risk

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Regulation MC, 75 Fed. Reg. 65,882 (proposed Oct. 26, 2010) (to be codified at 17 C.F.R. pt. 242) (SEC).

346. *See Final Rules, Guidance, Exemptive Orders and Other Actions: Dodd-Frank Final Rules, Final Guidance, Final Exemptive Orders, and Other Final Actions*, U.S. COMMODITY FUTURES TRADING COMM'N, http://www.cftc.gov/LawRegulation/DoddFrankAct/Dodd-FrankFinalRules/index.htm [http://perma.cc/XW37-QJXH] (last visited Apr. 15, 2019) (providing a list of Dodd-Frank final rules); *Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/spotlight/dodd-frank.shtml [http://perma.cc/PF3R-9EHZ] (last visited Apr. 15, 2019) (same).

347. Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities Regarding the Mitigation of Conflicts of Interest, 75 Fed. Reg. at 63,750 (clearinghouses); *id.* at 63,748-49 (designated contract markets); *id.* at 63,747 (SEFs); *id.* at 63,732 (background).

348. *Id.* at 63,733.

349. *Id.* at 63,750–51. The rule defined "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; "[a] major swap participant," as defined in Dodd-Frank; and "[a]n associated person of a swap dealer or major swap participant." *Id.* at 63,750.

350. *Id.* at 63,751.

351. *Id.*

352. *Id.*

353. *Id.*

management committee members would have to be "representative of customers," which in this context meant "any customer of a clearing member."[354] At least 51% of the nominating committee would have to be independent directors[355] and the chairpersons of the risk management and nominating committees also would have to be independent directors.[356]

The CFTC's proposed conflict-of-interest rules for DCMs and SEFs took a different approach to ownership and voting limits than those for clearinghouses. Rather than offering two options for complying with the limits, the proposed rules simply restricted individual company ownership and voting stakes to 20% and did not include any aggregate cap on big-bank ownership or voting power.[357] Regarding governance, the proposals required DCMs and SEFs to have a regulatory oversight committee composed entirely of independent directors and a membership or participation committee with 35% independent directors.[358] As with clearinghouses, the CFTC proposal would have required DCMs' and SEFs' boards and executive committees to include at least 35% independent directors and their nominating committees to include at least 51% independent directors.[359]

The SEC's approach to these conflicts-of-interest risks was generally similar to the CFTC's, but it included important differences as well. Like the CFTC's proposal, the SEC's proposed rule offered two ownership and voting model choices to clearinghouses.[360] One option capped individual ownership and voting stakes at 20% and had an aggregate ownership and voting cap of 40% on security-based swap clearing agency participants and their related persons (as opposed to a specific cap on big banks).[361] The second option capped individual stakes at 5% but had no aggregate cap.[362] 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 their boards of directors and risk committees (should a clearinghouse choose to have one) have a majority of independent directors and that their nominating committees be composed entirely of independent directors.[363] The SEC's ownership and voting limits on security-based SEFs mirrored the CFTC's approach to exchanges, limiting an individual firm's ownership and voting stakes

354. *Id.* at 63,750.

355. *Id.* at 63,752.

356. *Id.* at 63,750, 63,752.

357. *Id.* at 63,748–49.

358. *Id.*

359. *Id.* at 63,751–52.

360. 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, 75 Fed. Reg. 65,882, 65,930 (proposed Oct. 26, 2010) (to be codified at 17 C.F.R. pt. 242).

361. *Id.*

362. *Id.*

363. *Id.* at 65,931.

to 20% but lacking an aggregate ownership cap.[364] As with clearinghouses, the SEC's proposed rules would have imposed stricter governance standards than the CFTC on security-based SEFs, requiring a majority of independent directors on their boards and executive committees (should a SEF choose to have one) and 100% independent directors on their regulatory oversight and nominating committees.[365]

The agencies called for comments on these proposed rules and they received a range of responses.[366] 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.[367] 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.[368] 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 and SEFs meant that the proposal might not do enough to mitigate the risk that big banks could use control of these platforms to harm competition in the derivatives markets.[369] The Division was concerned that the big banks might exercise such control "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."[370]

Caps on both individual and aggregate big-bank ownership of DCMs and SEFs would, in the Division's view, "be the most effective structural approach to protecting competition in the derivatives markets."[371] Aggregate ownership caps were important because the big banks have "very similar incentives to limit access and to otherwise" restrict competition.[372] The Division observed that, in its experience, "structural protections, like aggregate ownership limits, are likely" to better protect competition "and require less oversight than relying

364. *Id.*

365. *Id.* at 65,931–32.

366. *See Comments for Proposed Rule 75 FR 63732*, U.S. COMMODITY FUTURES TRADING COMM'N, http://comments.cftc.gov/PublicComments/CommentList.aspx?id=861 [http://perma.cc/rt7n-57t7] (last visited Apr. 15, 2019) (providing a list of all comments the CFTC received regarding its proposed rule); *Governance and Conflict of Interest Controls for Clearing Agencies, Swap Execution Facilities and Exchanges: Title VII Provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/comments/df-title-vii/governance/governance.shtml [http://perma.cc/YY4V-KSL8] (last visited Apr. 15, 2019) (providing a list of all comments the SEC received regarding its proposed rule).

367. Department of Justice of the United States of America, Comment Letter on Proposed Rule on Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities Regarding the Mitigation of Conflicts of Interest (Dec. 28, 2010).

368. *Id.* at 2.

369. *Id.* at 1–2, 4.

370. *Id.* at 3.

371. *Id.* at 5.

372. *Id.*

solely on ongoing regulatory restrictions."[373] Further, the Division suggested that aggregate ownership caps might promote the creation of multiple DCMs and SEFs, increasing competition in these markets.[374] 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), the Division argued that competition for the market would be beneficial for market participants.[375]

Regarding the CFTC's governance proposals for DCMs and SEFs, the Division asserted that requiring these entities' boards and all their committees to have a majority of independent directors and their nominating committees to be 100% independent would lower the risk that these platforms would anticompetitively deny access to competitors or otherwise harm competition in the derivatives markets.[376]

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 at higher profit margins) and to restrict access to new clearinghouse members or decline clearing certain instruments to harm competitors.[377] 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 boards, 100% independent directors on their nominating committees, and a majority of independent directors on their risk management and executive committees.[378]

The Division's comments on the SEC's proposed rules were similar but less extensive than its suggestions to the CFTC.[379] 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 concern 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 and voting cap to its proposed rules governing these entities.[380] An aggregate cap on big banks, the Division asserted, would significantly lower the risk that they could anticompetitively restrict competitors' access or harm competition in other ways, and it also would incentivize firms to promote new SEFs and Exchanges, enhancing competition among trading platforms.[381]

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373. *Id.* at 6.

374. *Id.* at 5.

375. *Id.* at 7.

376. *Id.* at 8.

377. *Id.*

378. *Id.* at 9.

379. *See* Department of Justice of the United States of America, Comment Letter on Proposed Rule on 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 (Dec. 28, 2010).

380. *Id.* at 4.

381. *Id.* at 6.

In contrast to the Department of Justice's objections to the agencies' proposed rules, the big banks and certain other participants in the derivatives markets opposed the rules because in their view they were too restrictive and intrusive. In its comments on the CFTC's proposed rulemaking, Deutsche Bank argued that while individual entity ownership limits set at 20% "would adequately address conflicts concerns," an aggregate cap on big-bank ownership of clearinghouses and exchanges would "exacerbate, rather than diminish" conflicts, particularly for clearinghouses.[382] 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."[383] 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."[384] "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."[385]

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.[386] In Deutsche Bank's view, the result would be "entrench[ing] the most powerful clearinghouses and increas[ing] the likelihood of their monopolistic behavior."[387] This argument mirrors objections to the essential facilities doctrine that forced sharing removes incentives to invest in creating such facilities in the first place.[388]

Instead of employing ownership caps, Deutsche Bank asserted that conflicts of interest should be addressed through governance restrictions "requiring clearinghouses to have boards of directors whose composition represents the interests of a variety of market participants (including a number of independent

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382. Letter from Ernest C. Goodrich, Managing Dir., Legal Dep't, Deutsche Bank AG, and Marcelo Riffaud, Managing Dir., Legal Dep't, Deutsche Bank AG, to David A. Stawick, Sec'y, Commodity Futures Trading Comm'n, and Elizabeth Murphy, Sec'y, Sec. & Exch. Comm'n 11 (Oct. 6, 2010) [hereinafter October 6 Letter from Ernest C. Goodrich and Marcelo Riffaud to David A. Stawick and Elizabeth Murphy], http://www.sec.gov/comments/df-title-vii/swap/swap-21.pdf [http://perma.cc/YDB3-MVTB].

383. *Id.*

384. *Id.* at 11–12.

385. *Id.* at 12.

386. *Id.* at 13.

387. *Id.*

388. 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."); *see also* U.S. DEP'T. OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT 128–29 (2008), http://www.justice.gov/sites/default/files/atr/legacy/2008/09/12/236681_chapter7.pdf [http://perma.cc/6ZAR-9JXM] ("[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.").

directors), a risk committee and an independent advisory committee."[389] 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."[390] Because clearinghouse members risk their capital, Deutsche Bank asserted "that they [should] have the decisive input into risk management decisions" and "should be involved at a minimum in vetting and approving membership decisions."[391]

Other big banks and important players in the derivatives markets echoed Deutsche Bank's arguments. Morgan Stanley opposed the aggregate 40% 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.[392] It also urged that the agencies should eliminate the 35% 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.[393] In any event, Morgan Stanley advised that independent directors are not necessary for risk committees because "[m]arket forces should . . . prevent anticompetitive behavior" involving "margin requirements and standards for membership eligibility."[394] JPMorgan Chase also opposed the aggregate ownership cap and asserted that individual ownership stakes should be capped at 10% rather than 5%.[395] It took issue with the governance restrictions too, arguing that the 35% independent director requirement for boards of directors would be "problematic to implement in practice" because it would be difficult to find independent directors with the requisite expertise.[396] The bank proposed instead a requirement that "no single class of interested parties achieves more than a [sic] 65% of the seats on the board."[397] The Depository Trust and Clearing Corporation (DTCC) agreed with Deutsche Bank that conflicts of interest

389. October 6 Letter from Ernest C. Goodrich and Marcelo Riffaud to David A. Stawick and Elizabeth Murphy, *supra* note 382, at 13.

390. Letter from Ernest C. Goodrich, Managing Dir., Legal Dep't, Deutsche Bank AG, and Marcelo Riffaud, Managing Dir., Legal Dep't, Deutsche Bank AG, to David A. Stawick, Sec'y, Commodity Futures Trading Comm'n, and Elizabeth Murphy, Sec'y, Sec. & Exch. Comm'n 5 (Nov. 8, 2010), http://www.sec.gov/comments/s7-27-10/s72710-9.pdf [http://perma.cc/G99B-2Q6R].

391. *Id.* at 5–6.

392. Letter from James Hill, Managing Dir., Morgan Stanley, to David A. Stawick, Sec'y, Commodity Futures Trading Comm'n, and Elizabeth M. Murphy, Sec'y, Sec. & Exch. Comm'n 1–3 (Nov. 17, 2010), http://www.sec.gov/comments/s7-27-10/s72710-67.pdf [http://perma.cc/R77P-BYHU].

393. *Id.* at 4.

394. *Id.* at 5.

395. Letter from Barry L. Zubrow, Exec. Vice President & Chief Risk Officer, JPMorgan Chase, to David A. Stawick, Sec'y, Commodity Futures Trading Comm'n, and Elizabeth M. Murphy, Sec'y, Sec. & Exch. Comm'n 5 (Nov. 17, 2010), http://www.sec.gov/comments/s7-27-10/s72710-70.pdf [http://perma.cc/R9CZ-V4E4].

396. *Id.* at 3.

397. *Id.*

should be addressed through governance requirements.[398] DTCC went so far as to argue that ownership and voting limitations on clearinghouses and exchanges should be "eliminated in their entirety."[399]

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, were misplaced at best and cynical at worst. The allegations in the *In re Credit Default Swaps Antitrust Litigation* case, which the banks settled for almost $2 billion, 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 centrally cleared.[400] The 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."[401] "Under the guise of risk committee meetings," the big banks "imposed rules restricting participation in ICE that were designed to prevent a transition to exchange trading" because such a transition would have lowered their bid-ask spreads and reduced their profits.[402] Similarly, "[a]s a condition of their joining" CME's clearinghouse, the "Dealer-Defendants demanded to control CME's risk committee" and, "[o]perating 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."[403] These allegations are consistent with scholarship finding that, due to big-bank control, clearinghouses may "set high bars to . . . membership" so that rival dealers will be excluded.[404] This strategy appears to have been effective: membership in major clearinghouses has remained static in recent years.[405]

The ongoing *In re Interest Rate Swaps Antitrust Litigation* case highlights other alleged strategies the big banks employed to harm competition in the derivatives markets. The plaintiffs in that case asserted that the banks conspired first to forestall the development of electronic exchanges for interest rate swaps and later to boycott three such emergent exchanges to shut them down.[406] According to the plaintiffs, the banks recognized that the key to preventing the

398. Letter from Larry E. Thompson, Gen. Counsel, Depository Tr. & Clearing Corp., to Mary Schapiro, Chairman, Sec. & Exch. Comm'n, and Gary Gensler, Chairman, Commodity Futures Trading Comm'n, at 2 (Nov. 15, 2010), http://www.sec.gov/comments/df-title-vii/swap-data-repositories/swapdatarepositories-13.pdf [http://perma.cc/AMD5-CMAU].

399. *Id.*

400. *In re* Credit Default Swaps Antitrust Litig., No. 13md2476, 2014 WL 4379112, at *1–6 (S.D.N.Y. Sept. 4, 2014).

401. *Id.* at *5.

402. *Id.*

403. *Id.*

404. Chang, *Second-Generation Monopolization*, *supra* note 23, at 697; *see also* Johnson, *supra* note 35, at 222–23 ("Restricting access to clearinghouse membership creates a market opportunity for the dealers who successfully obtain membership . . . [by] protect[ing] the fees that large dealers earn for brokering transactions on behalf of excluded . . . dealers.").

405. Chang, *Second-Generation Monopolization*, *supra* note 23, at 697–98.

406. *In re* Interest Rate Swaps Antitrust Litig., 261 F. Supp. 3d 430, 441 (S.D.N.Y. 2017).

emergence of electronic exchanges was to prevent central clearing of OTC products.[407] The plaintiffs contended that the banks therefore moved to control the interest rate swaps clearing structure.[408] They did this by seizing governance control of an interest rate swaps clearinghouse, SwapClear, and then using that control to ensure that only big banks could join the clearinghouse.[409] The plaintiffs also claimed that subsequently, once electronic exchanges emerged post-Dodd-Frank, the banks conspired to deny liquidity to those exchanges and refused to clear trades entered on those platforms.[410] The conspiracy's goal, the plaintiffs contended, was to preserve the OTC trades on which the banks made their biggest profits.[411] Again, this course of conduct is consistent with the Antitrust Division's theories of how the big banks could conspire to harm competition in the derivatives markets.

This is not to say there is no merit to concerns that, absent control over clearinghouse decisionmaking, 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% of risk committee members be independent should be taken with a strong dose of skepticism, considering the history of these markets. Still, there are legitimate concerns about the efficacy and wisdom of the CFTC's and SEC's proposed approaches. Professor Sean Griffith has argued that the proposed voting caps would be both ineffective and potentially dangerous.[412] Ineffective because dealers can control clearinghouses through their "virtual lock on trading volume" and dangerous because, if the caps were effective, they would increase moral hazard.[413] Professor Griffith also was skeptical of the independent director requirements. He argued that none of the parties who could serve as independent directors—small dealers, nondealer shareholders, and end users—have the proper incentives to manage or reduce systemic risk.[414] This does not mean that independent directors would lack the correct incentives to address the competition problems the clearinghouses pose, but for those who prioritize systemic risk ahead of competition, that would be a secondary consideration. Instead of the CFTC and SEC approaches to structural

407. *Id.* at 451–52.

408. *Id.*

409. *Id.*

410. *Id.* at 456 (explaining that "[m]ost dealers, however, refused to provide liquidity to Javelin[,]" as a successful all-to-all platform "would imperil . . . the supracompetitive bid/ask spreads they extracted from the buy side").

411. *Id.* at 447–48 (explaining plaintiffs' allegations that banks pursued "a 'dealer consortium' strategy" to "protect the 'dealer community' from the threat to profitability presented by electronic exchanges").

412. Griffith, *supra* note 29, at 1219.

413. *Id.* at 1219–20 ("If voting caps function as intended, they will limit the ability of dealers to exert a level of control commensurate with the risk they bear. Instead, nondealer equity holders, who suffer loss only after the dealer-funded reserves have been exhausted, will enjoy significantly greater control than the amount of risk they bear.").

414. *Id.* at 1224–25. Griffith also contended that data and experience show that independent boards are not guarantors of effective governance and that "independent directors have not demonstrated any special ability to monitor or manage risk." *Id.* at 1226.

regulation, Professor Griffith proposed a supervisory-board structure designed to represent both the public interest in managing systemic risk and the commercial interests of clearinghouse shareholders.[415] In this scheme, clearinghouses would have two types of directors: supervisory directors (chosen by the federal financial regulatory agencies), who would monitor and manage systemic risk, and traditional directors (elected by clearinghouse owners), who would represent the shareholders' interests.[416]

Ownership and governance rules are not the only available structural approaches 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. A former deputy governor of the Bank of England and member of the G20 Financial Stability Board's Steering Group, 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; that the global nature of the derivatives markets can make it unclear which country's central government would provide the clearing service; and that clearinghouses should be allowed to fail, as long as their failure does not threaten systemic stability.[417] 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 challenges and costs, including the difficulties inherent in centralized price setting and the risk that competition and innovation in clearing would be retarded.[418]

Several structural approaches to the competition and systemic risk challenges clearinghouses (and exchanges) present have been proposed. It is

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415. *Id.* at 1227.

416. *Id.* at 1235–37.

417. Paul Tucker, Are Clearing Houses the New Central Banks? 9–10 (April 11, 2014) (unpublished manuscript), http://www.chicagofed.org/~/media/others/events/2014/annual-over-the-counter-derivatives-symposium/tucker-clearinghouses-new-central-banks-tucker-2014-pdf [http://perma.cc/ELQ3-DFN9]. 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 70 (November 2016) (unpublished manuscript), http://cms.ineteconomics.org/uploads/downloads/Clearinghouses_FINAL_ONLINE.pdf [http://perma.cc/DQA5-ZNLR] (noting that 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").

418. As Professor Felix Chang has observed, it would be "very difficult for regulators to effectively 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 [hereinafter Chang, *Systemic Risk Paradox*].

beyond the scope of this Article to recommend one over the others. That being said, for reasons discussed above,[419] it likely makes sense to place significant value on the Antitrust Division's recommendations, as the expert antitrust agency. If asked to develop, from scratch, structural regulations for the derivatives markets, collaboration between the sector regulators (the SEC and CFTC) and the competition experts (the Department of Justice and FTC) would be a sensible approach. The Antitrust Division's comments on the SEC's and CFTC's proposed rules are an approximation of what such an approach would produce and therefore they may be the best existing model for structural regulation of these markets. In any event, regardless of the form it takes, the argument for structural regulation appears to have a strong grounding in the available evidence.

### 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 sector-regulator competition enforcement. But can the same be said of the comparison to structural regulation of the types discussed above? The difficulty of prevailing on the sorts of antitrust claims that arise in markets involving competitive bottlenecks suggests that structural regulation indeed may do a better job safeguarding competition than antitrust enforcers or private plaintiffs suing under the antitrust laws can do under current law.

One proposed approach to the bottleneck problems clearinghouses and exchanges pose is to address them through antitrust's essential facilities doctrine.[420] 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.[421] An oft-cited articulation of the elements of this type of claim is found in the Seventh Circuit's decision in *MCI Communications Corp. v. AT&T*.[422] That court identified in the case law four

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419. See *supra* Section III for a discussion of the comparative strengths of the expert antitrust agencies and sector regulators regarding competition enforcement.

420. *See, e.g.*, Chang, *Systemic Risk Paradox*, *supra* note 418, 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"); Felix B. Chang, *Financial Market Bottlenecks and the "Openness" Mandate*, 23 GEO. MASON L. REV. 69, 73 (2015) (arguing that "the regulatory mechanism for ensuring open access to derivatives clearinghouses must be bolstered by a reinvigorated essential facilities doctrine").

421. *See, e.g.*, 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."); 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." (quoting A.D. NEALE, THE ANTITRUST LAWS OF THE UNITED STATES 66–69, 127–31 (2d ed. 1970))).

422. 708 F.2d 1081 (7th Cir. 1983).

elements that plaintiffs must show to prevail on an essential facilities claim: "(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."[423]

The problem with relying on the essential facilities doctrine is that it is highly disfavored among courts and commentators.[424] Professor Phillip 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."[425] 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.[426] Certain of these objections apply squarely in the case of clearinghouses. If potential members believe they will be forced ultimately to offer open access to their clearinghouse, they may be unwilling to make the significant capital investments starting and maintaining a clearinghouse would require.[427] Further, even when courts are willing to consider liability under the essential facilities doctrine, the four-part test is difficult for plaintiffs to satisfy.[428]

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423. *MCI Commc'ns*, 708 F.2d at 1132–33.

424. *See, e.g.*, Chang, *Systemic Risk Paradox*, *supra* note 418, 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, 360 (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").

425. Areeda, *supra* note 388, at 841.

426. *See, e.g.*, Allen Kezsbom & Alan V. Goldman, *No Shortcut to Antitrust Analysis: The Twisted Journey of the "Essential Facilities" Doctrine*, 1996 COLUM. BUS. L. REV. 1, 2 ("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."); Daniel F. Spulber & Christopher S. Yoo, *Mandating Access to Telecom and the Internet: The Hidden Side of* Trinko, 107 COLUM. L. REV. 1822, 1843–45 (2007) (arguing that "[w]hen competitive entry is possible, the essential facilities doctrine can have a detrimental impact on incentives to invest in alternative network capacity" and that "[c]ompelled access also dampens the incentives of the essential facilities defendant to invest in improvements in its facilities").

427. *See, e.g.*, October 6 Letter from Ernest C. Goodrich and Marcelo Riffaud to David A. Stawick and Elizabeth Murphy, *supra* note 382, 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.").

428. Pitofsky et al., *supra* note 223, at 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 Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 410–11 (2004) ("This conclusion [in the 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." (citations omitted)).

Essential facilities allegations are closely related to refusal-to-deal claims,[429] which also are challenging for plaintiffs. Unilateral refusals to deal are rarely actionable.[430] Claims asserting unlawful concerted refusals to deal are sometimes successful but still can be difficult for plaintiffs to win.[431] One suggestion for addressing this problem is to apply the theory of parallel exclusion to exclusionary conduct by clearinghouse members.[432] Professors C. 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."[433] In situations where members of a clearinghouse's risk committee "arrive independently at policies" that exclude competitors, under current antitrust case law, courts may have little recourse to prevent the conduct.[434] If the decisions indeed are made independently, section 1 of the Sherman Act would not apply.[435] Courts might be able to 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, there is a risk that big

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429. Essential facilities and refusal-to-deal claims often are analyzed together. *See, e.g.*, *Trinko*, 540 U.S. at 410–11; Covad Commc'ns Co. v. BellSouth Corp., 374 F.3d 1044, 1047 (11th Cir. 2004) (noting that the plaintiff's essential facilities and refusal-to-deal claims "relied on the same set of alleged facts"); *see also* VBR Tours, LLC v. Nat'l R.R. Passenger Corp., No. 14–cv–00804, 2015 WL 5693735, at *9 (N.D. Ill. Sept. 28, 2015) (interpreting *Trinko* as "suggesting that the essential facilities doctrine falls partly if not wholly within the refusal-to-deal rubric" (citing *Trinko*, 540 U.S. at 398)).

430. *See, e.g.*, Duty Free Ams., Inc. v. Estée Lauder Cos., 797 F.3d 1248, 1265 (11th Cir. 2015) ("It is by now well settled that '[a] unilateral refusal to deal is [generally] not unlawful.'" (alterations in original) (quoting Mr. Furniture Warehouse, Inc. v. Barclays Am./Commercial Inc., 919 F.2d 1517, 1522 (11th Cir. 1990))).

431. In *Northwest Wholesale Stationers, Inc. v. Pacific Stationary & Printing Co.*, 472 U.S. 284 (1985), the Supreme Court placed limits on per se treatment of concerted refusals to deal. *Nw. Wholesale Stationers*, 472 U.S. at 297–98. It explained that its past decisions had applied the per se rule to group boycotts where "the boycotting firms 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.

432. *See* Chang, *Second-Generation Monopolization*, *supra* note 23, at 660–61.

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

434. Chang, *Second-Generation Monopolization*, *supra* note 23, at 716.

435. *See* 15 U.S.C. § 1 (2018). This was the outcome in a portion of *In re Interest Rate Swaps Antitrust Litigation*. The court found that allegations of parallel conduct in the period 2007 to 2012 to prevent the emergence of all-to-all interest rate swap trading platforms were insufficient to make out a plausible section 1 conspiracy claim. *In re Interest Rate Swaps Antitrust Litig.*, 261 F. Supp. 3d 430, 463–72 (S.D.N.Y. 2017). It held that "shards of parallel conduct do not give rise to an inference of an agreement to block all-to-all trading" and that "each Dealer had good reason to independently discourage . . . development of a new trading paradigm that threatened, some day, to cannibalize their trading profits." *Id.* at 464.

banks can harm competition in the derivatives markets free from the threat of antitrust liability.[436]

Structural regulation of derivatives clearinghouses and exchanges avoids the problems antitrust enforcement faces in these markets. The risk that exclusionary conduct by clearinghouse members working through risk committees or otherwise might fall into gaps in the antitrust laws is much less worrisome if the big banks cannot control risk committees or other levers of power in derivatives clearinghouses and exchanges. Absent that control, the big banks will find it difficult to exclude rivals. The structural solution would not require relying on uncertain ex post regulatory enforcement to ensure competition is protected. Sufficiently strict ownership caps, governance restrictions, or other forms of structural regulation 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 rules.[437] It may prove difficult to convince big banks to contribute sufficient capital to clearinghouses over which they do not have ultimate control.[438] Without big-bank contributions, clearinghouses may face a liquidity shortage and may not be able to serve their systemic risk function.[439] It is unclear, however, how much of a problem this will pose in practice. Under the agencies' proposed rules, for example, big banks still can own significant stakes in clearinghouses and exchanges.[440] And as a group, big banks can own up to 40% or even 100% of a clearinghouse or exchange.[441] True, the rules' governance restrictions limit the big banks' control,[442] 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

436. Chang, *Second-Generation Monopolization*, *supra* note 23, at 738 ("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 control over systemic risk.").

437. *See supra* notes 382–99 and accompanying text.

438. *See, e.g.*, October 6 Letter from Ernest C. Goodrich and Marcelo Riffaud to David A. Stawick and Elizabeth M. Murphy, *supra* note 382, 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."); *see also* Griffith, *supra* note 29, at 1219–20 (explaining that imposing voting caps on big banks theoretically might cause them "not [to] provide capital to clearinghouses," resulting in clearinghouses being "unfunded or underfunded," but also arguing that such an outcome is "unlikely . . . because the voting-interest cap is likely to be totally ineffective at limiting the control of large dealers").

439. Griffith, *supra* note 29, at 1220 (noting the argument that if clearinghouses are "unfunded or underfunded" then there is the risk that they "will not develop into the robust bulwarks against systemic risk that policy-makers intend for them to become").

440. *See supra* notes 348–65 and accompanying text.

441. *See supra* notes 348–65 and accompanying text.

442. *See supra* notes 348–65 and accompanying text.

advantages to membership.[443] In sum, the competition-related benefits of structural regulation are strong and the drawbacks 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. Contemporary antitrust enforcement typically has one goal: eliminating unlawful barriers to competition to increase output of goods and services—thereby lowering prices—and spur innovation.[444] In many markets, this goal may be 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 business.[445] He observed that "[o]utput maximization 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.[446] To address this problem in antitrust law, Crane identified what he termed "net-harm markets," which he described as markets where "(1) [t]he consumption of the good at any level of output produces greater total internal and external costs than internal and external benefits; or (2) [a]t the output level determined by a competitive market, consumption of the good produces greater total costs than total benefits."[447] 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.[448] 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."[449] Crane advised that in "net-harm markets, the antitrust agencies and courts should apply the antitrust laws to 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, "the antitrust laws should not be used to increase that product's consumption."[450]

443. *See* October 6 Letter from Ernest C. Goodrich and Marcelo Riffaud to David A. Stawick and Elizabeth M. Murphy, *supra* note 382, at 12–13 (describing profits and other benefits of clearinghouse membership, including "a compression mechanism" providing "capital benefits . . . for all of a clearinghouse's clearing members").

444. *See* Daniel A. Crane, *Harmful Output in the Antitrust Domain: Lessons from the Tobacco Industry*, 39 GA. L. REV. 321, 340–41 (2005) ("[O]utput remains the Holy Grail of modern antitrust enforcement.").

445. *Id.* at 341.

446. *Id.* at 344.

447. *Id.* at 346.

448. *Id.* at 357–58.

449. *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 antitobacco advertising, frequent government warnings on the dangers of tobacco consumption, numerous federal and state statutory schemes, federal and state regulations, and federal and state antitobacco litigation." *Id.* at 357–58.

450. *Id.* at 367.

Are derivatives a net-harm market? As Crane noted, it is difficult to determine quantitatively if a market produces greater costs than benefits.[451] There is persuasive evidence that the derivatives markets were responsible for a significant portion of the damage the 2008 financial crisis caused.[452] 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."[453] The derivatives markets also provide important economic benefits, however, allowing companies to hedge risks, thereby expanding the amount of available credit in the economy.[454] Whether those benefits outweigh the harms derivatives already have caused and may cause in the future likely is impossible to say with mathematical certainty.

To the extent Dodd-Frank represents a public policy consensus on the treatment of derivatives, it is that to reduce systemic risk the vast majority of derivatives should be traded on transparent exchanges and centrally cleared.[455] 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.[456] That being said, there is no explicit mandate in Dodd-Frank to reduce the overall output of derivatives trades similar to government

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451. *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.").

452. *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) ("[I]t 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." (citation omitted)); Brian J.M. Quinn, *The Failure of Private Ordering and the Financial Crisis of 2008*, 5 N.Y.U. J.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.").

453. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-180, FINANCIAL REGULATORY REFORM: FINANCIAL CRISIS LOSSES AND POTENTIAL IMPACTS OF THE DODD-FRANK ACT (2013), http://www.gao.gov/assets/660/651322.pdf [http://perma.cc/TQE9-7FGA].

454. *See* Quinn, *supra* note 452, at 607 ("Derivative transactions can be valuable and efficiency-enhancing transactions. Parties can enter into such transactions 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.").

455. *See supra* notes 216–22 and accompanying text.

456. *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.").

pronouncements in the tobacco markets. Nonetheless, because certain derivatives may threaten systemic safety, derivatives markets potentially are net-harm markets for which antitrust, with its goal of increasing output and innovation, is an awkward fit.

While tobacco products generally are considered uniformly harmful, derivatives contracts can be beneficial in many circumstances.[457] The challenge is to discourage swaps that unduly increase systemic risk, while permitting or encouraging benign and beneficial swaps. Antitrust enforcers are not attuned to these distinctions and, indeed, are not concerned with them.[458] Antitrust's role is to increase output and innovation, not to pick and choose between financial products.[459] Financial regulators are much better positioned to distinguish helpful and harmful swaps.[460]

Under Crane's model, antitrust enforcers and courts would give the derivatives markets different antitrust treatment than non-net-harm markets.[461] 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.[462]

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457. *See, e.g.*, David Miller, *Perfect Hedge: Adding Precision to the Proposed SEC Rule on Investment Company Use of Derivatives with a Hedging Exception*, 59 B.C. L. REV. 1471, 1474 (2018) ("Despite the risks, derivatives are seen as beneficial and important instruments for capital markets."); Mark D. Sherrill, *In Defense of the Bankruptcy Code's Safe Harbors*, 70 BUS. LAW. 1007, 1014–15 (2015) (describing the benefits of the derivatives markets).

458. Antitrust enforcers are focused on protecting competition, not pursuing other regulatory goals. *See, e.g.*, *Antitrust Enforcement and the Consumer*, *supra* note 8 ("Antitrust laws protect competition."); *see also* Herbert Hovenkamp, *Progressive Antitrust*, 2018 U. ILL. L. REV. 71, 97 ("The antitrust policy that is easiest to justify sticks to its essentially neoclassical roots, which means pursuing maximum output by maintaining market competition.").

459. *See, e.g.*, William J. Kolasky, Deputy Ass't Att'y Gen'l, U.S. Dep't of Justice, Comparative Merger Control Analysis: Six Guiding Principles for Antitrust Agencies—New and Old 1–2 (Mar. 18, 2002), http://www.justice.gov/atr/file/519826/download [http://perma.cc/C84V-LZ7N] ("Antitrust enforcers should not be in the business of picking winners or protecting losers . . . . The mission of an antitrust authority should, therefore, be to protect competition in all of its forms and varieties because competition is the one surefire way of guaranteeing that society's resources will be put to their most efficient use—keeping costs and the resulting prices low, and encouraging firms to innovate.").

460. *See, e.g.*, EDWARD R. MURPHY, CONG. RESEARCH SERV., R43087 WHO REGULATES WHOM AND HOW? AN OVERVIEW OF U.S. FINANCIAL REGULATORY POLICY FOR BANKING AND SECURITIES MARKETS (2015), http://fas.org/sgp/crs/misc/R43087.pdf [http://perma.cc/C5J3-7L4J] (explaining in an introductory "Summary" section that "[d]erivatives trading is supervised by" the CFTC, and Dodd-Frank "granted the CFTC and SEC authority over large derivatives traders"); *Statement of Commissioner Bart Chilton on Regulation of Credit Default Swaps*, U.S. Commodity Futures Trading Comm'n (June 10, 2010), http://www.cftc.gov/PressRoom/SpeechesTestimony/chiltonstatement100808 [http://perma.cc/9KYL-8TRQ] ("The CFTC, as the expert agency in this area, has the experience and background to appropriately regulate these transactions . . . .").

461. *See* Crane, *supra* note 444, at 387.

462. Professors Eric Posner and Glen Weyl have argued for a different type of regulatory solution to the problems increased innovation and output of derivatives pose. Posner & Weyl, *supra* note 275, at 1309–10. Posner and Weyl proposed the creation of an equivalent to the FDA for regulating financial derivatives. *Id.* "[F]inancial innovators" would be required to "submit proposed new financial products to the government for approval before they may sell them to the public." *Id.*

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.[463] In doing so, the sector regulators can judge how much competition and innovation is healthy in these markets and they can decide which swaps to promote (with the goal of increasing output and lowering price) and which to discourage.

While many regulated markets likely do not raise similar concerns about toxic products, the advantages of structural regulation we see in the derivatives sector nonetheless 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.

## CONCLUSION

Concentration appears to be increasing in the financial sector and the broader economy. In this context, 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 protecting 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.

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.

463. Silver v. N.Y. Stock Exch., 373 U.S. 341, 358 (1963) (finding 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").