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ALERT MEMORANDUM

COVID-19: Antitrust Guidance for Collaboration Between Financial Institutions

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The COVID-19 pandemic raises unprecedented challenges and may require novel solutions on the part of financial institutions, as well as others. As financial institutions look for opportunities to address the difficulties posed by COVID-19, they may consider collaborating with other financial institutions either directly or via trade association activities.

U.S. antitrust law does not ordinarily permit rivals to agree with one another to limit competition or to exchange competitively sensitive information that could facilitate coordination. The COVID-19 pandemic will put pressure on firms to address novel challenges and stabilize the economy. Financial institutions may see potential opportunities to cooperate, either directly or via trade associations, to help address any such challenges. At the same time, financial institutions are under significant scrutiny given market volatility in the wake of COVID-19's global spread, and banks play a critical role in the U.S. government's efforts to promote liquidity in financial markets and make credit available to businesses hurt by the pandemic.

Financial institutions should exercise caution engaging in any collaborative efforts in response to COVID-19 that would under normal circumstances be improper under the antitrust laws. There is no general ability to depart from established antitrust rules simply because of exigent circumstances such as a pandemic. COVID-19 alone does not provide a defense for what would otherwise be impermissible coordination. However, COVID-19 may in some specific cases change how courts, regulators and enforcers weigh the procompetitive benefits against possible anticompetitive effects of an agreement, and thus COVID-19 could help justify specific collaborations. As such, in general we would advise continuing to follow the usual practices regarding engaging with competitors. To the extent there are COVID-19-specific challenges that could be addressed through collaboration, financial institutions should consult with antitrust counsel to consider whether the collaboration would be justified.

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General standard under the antitrust laws

Agreements among competitors that fix prices, allocate markets or customers, or restrict output are judged under the *per se* rule, meaning these types of agreements are viewed as so inherently anticompetitive as to be unlawful without need for further inquiry into the effects on competition. However, other agreements among competitors are judged under the "Rule of Reason" when they have plausible efficiency justifications. The Rule of Reason weighs the potential anticompetitive effects of the agreement against its procompetitive benefits. While it is not always clear when the *per se* or Rule of Reason would apply, the Rule of Reason should apply when the competitor collaboration has a plausible efficiency justification and is not simply a "sham" for per se illegal conduct.

Assuming that the Rule of Reason applies, COVID-19 could affect whether a particular competitor collaboration in response to the pandemic is justified by affecting the relative weight of potential procompetitive justifications and potential anticompetitive effects. The specific impact will depend on the details of the specific arrangement.

Relative risk in potential areas of collaboration

As part of the ordinary course of business, financial institutions engage in arms-length dealing between each other as counterparties, and routinely engage jointly on particular transactions. However, beyond these types of ordinary course joint activities, there can be significant antitrust risk where financial institutions agree on how each financial institution will engage with third parties when it relates to aspects of competition such as pricing, economic terms, underwriting standards, whether or how much to pay employees, etc. However, there is scope for collaboration in a variety of areas to address COVID-19 related challenges:

— **Logistics.** Financial institutions can likely coordinate on logistics for efforts designed to address challenges created by COVID-19. For example, COVID-19 may create strains on staffing, technology, or infrastructures for payment, clearing, and settling. It should be low risk for banks to address such logistical challenges by pooling resources, assuming the banks continue to comply with any security and operational risk obligations. Similarly, there is likely scope for banks to create a centralized hub or portal for applying for emergency loans or modifications, assuming the banks did not agree on the terms of the loans themselves.

— **Collaborations Addressing Liquidity.** It should be low risk for financial institutions to cooperate on restructuring loans that they have jointly made as a result of COVID-19 market disruptions. Market instability may lead to borrowers lacking the necessary liquidity to meet margin or collateral calls. Financial institutions also commonly cooperate to restructure the debt for loans they have made individually in the past, and should be able to continue doing so as they had prior to the advent of COVID-19. However, that cooperation should be limited to the particular loans that need to be restructured, and not evolve into broader agreements about terms financial institutions are willing to offer borrowers in general.

— **Agreement on Forbearance or Other Creditor's Rights.** Financial institutions might also want to agree on more general modifications to the terms they have offered their customers in light of COVID-19. For example, financial institutions might want to agree with one another to offer forbearances on loans or to refrain from exercising creditor rights such as foreclosure. This agreement could have significant procompetitive benefits: any one bank's decision about whether to offer forbearance might have little impact on market stability if other banks do not do the same, while multiple banks agreeing to offer forbearance could help stabilize the market. To the extent banks are agreeing to modify the terms of existing loans, the antitrust risks could be lower because the competition among the banks to obtain those loans has already occurred. But it would likely create material antitrust risk for banks to agree on the terms for new loans. The antitrust risks could also vary based on the nature of the terms being modified: it would be higher risk to agree on modifications to terms such as the interest rate or other economic terms,

and lower risk to agree on other types of modifications such as agreeing to a time-period when the banks will offer forbearance and refrain from foreclosure.

— **Collaborations in Implementing Stimulus Programs.** It should be low risk for financial institutions to collaborate on implementing the logistics or exchanging information on best practices for carrying out the various stimulus programs that are expected in the coming days and weeks. For example, financial institutions could exchange best practices information for identifying and working with troubled borrowers that might benefit from a government-mandated program. As discussed above, it would be higher risk for financial institutions to agree on terms of, for example, loans, but in many cases the relevant terms are likely to be set by the stimulus program itself and the banks would simply be implementing the terms set by the government.

— **Governmental Lobbying.** Competitors are free under the antitrust laws to jointly petition the government. As stimulus programs are proposed, financial institutions can cooperate to seek particular provisions or treatment under the law, regulations, or programs. Financial institutions could similarly coordinate efforts to lobby regulatory bodies to delay impending deadlines that could be challenging to meet given the COVID-19 outbreak.

— **Encouragement Not Enough.** Note that public encouragement to proceed with particular activity or the perception that particular activity would be socially desirable is not alone a sufficient defense to what would otherwise be improper under the antitrust laws. Federal agencies, state governments, or other stakeholders may encourage financial institutions to, for example, offer small-dollar loans. That is not tantamount to permission to *coordinate* on small-dollar loans. Absent a clear legal mandate from the government, otherwise anticompetitive activity is likely not immune from antitrust challenge.

— **Information Exchange.** There is no broad basis under currently-established antitrust principles for businesses to exchange competitively sensitive information in response to COVID-19. However, there is significant room for competitors to exchange best practices on how to handle COVID-19. For example, financial institutions may exchange information on the specific sources of risk in their business, how to protect employees and customers, or how to implement remote work consistent with regulatory requirements.

Practical considerations

Below are some practical considerations for financial institutions to consider prior to engaging in any collaborations with rivals.

— **Remind employees that antitrust policies remain in force, and the situation does not provide an excuse for antitrust violations.** This reminder could be particularly important given potential pressure from stakeholders to collaborate and speculation about softening of antitrust rules.

— **Consider seeking guidance and approval from other government authorities.** It may be appropriate for financial institutions to seek support or guidance from relevant regulatory bodies and self-regulatory organizations ("SROs"). For financial institutions, these include the federal banking agencies (the Federal Reserve Board, the Comptroller of the Currency, and the Federal Deposit Insurance Corporation), markets regulators and SROs (the Securities and Exchange Commission, FINRA, the Commodity and Futures Trading Commission, and the National Futures Association), the Consumer Financial Protection Bureau, and state regulators (such as the New York State Department of Financial Services). Financial institutions may also consider consulting with the Antitrust Division of the Department of Justice ("DOJ") or other antitrust regulators with which the institution deals.

— **Establish and document the procompetitive rationale for the collaboration.** What seems obviously justified today in the middle of the storm could look different in the eyes of a regulator or plaintiff's lawyer years down the

road when the crisis is over. Thus, it is particularly important to document the procompetitive rationale for any competitor collaboration. Moreover, given the focus of regulators on avoiding price gouging and other exploitation of the crisis, it is critical to ensure that the purpose of any collaboration is clear so that it is not misunderstood or misrepresented later.

— **Maintain visibility over staff.** With shifts to teleworking, there may be a risk that staff transition to using new means of communications (*e.g.*, personal IM software) that could escape your business surveillance tools. In these circumstances, you might consider reiterating the importance of using prescribed means of communication and assess the risk of employee communications being outside the reach of internal investigations.

We recognize the COVID-19 outbreak may give rise to challenging issues, and the situation continues to evolve. We will continue to monitor developments and are here to help. Please visit our Resource Center for further information.

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