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Allegations Of Collusion Among Financial Institutions—Where We've Been, Where We Are, What We've Learned

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Over the last 15 years, financial institutions have paid billions of dollars to settle claims that they colluded with each other. Below, we discuss four separate matters, beginning with the Nasdaq spread cases in the late 1990s and ending with the more recent Libor and Forex investigations and litigation. We express no view on the merits. Instead, we describe the cases, identify lessons that emerge, and suggest steps that firms, and in some cases regulators, may wish to consider to reduce risks going forward.

I. ALLEGED COLLUSION INVOLVING NASDAQ SPREADS

1. The "First Billion-Dollar Economics Article"

In December 1994, William Christie and Paul Schultz published what the *Economist* later called the "first billion-dollar economics article." The article, titled "Why do Nasdaq Market Makers Avoid Odd-Eighth Quotes?" was based on Christie's and Schultz's analysis of quotations for a sample of 100 Nasdaq stocks. At that time, Nasdaq was the second largest securities market in the United States with well over $2 trillion of trades a year.

Christie and Schultz found that market makers for 71 of 100 stocks reviewed almost never quoted bids or offers in odd-eighth increments. They concluded that this might have been due to implicit collusion by market makers to keep spreads artificially wide—*i.e.*, if stocks were quoted only in even-eighth increments, the spread between the bid and the offer could not fall below 25 cents. After media reports about the article appeared, traders started using odd-eight quotes more frequently. Along with a third co-author, Christie and Schultz published another article that same year, which they called "Why Did Nasdaq Market Makers Stop Avoiding Odd-Eighth Quotes?" Within five years, the Department of Justice, the Securities and Exchange Commission, and class action plaintiffs alleged that all of the largest market makers had colluded to avoid odd-eighth quotes, and the market makers settled.

2. The DOJ, SEC, and Class Actions

The DOJ Antitrust Division's July 1996 complaint alleged that for decades Nasdaq market makers had an "understanding" that kept spreads artificially wide. The DOJ alleged that market makers kept the national best bid or offer—which was the benchmark at which all Nasdaq market makers traded with retail clients regardless of their own quotes—artificially wide by quoting securities only in even-eighth increments. The DOJ stated that the trading convention was not "the result of an express agreement reached among all of the market makers in a smoke-filled room." Nevertheless, after listening to 4,500 hours of taped conversations and talking to hundreds of traders and reviewing quotation data, it found that

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the trading convention was well understood among traders and was enforced through industry-wide peer pressure, phone calls, and "trading around" market makers who did not follow the convention. It also found "moves on request," *i.e.*, traders at one firm asking traders at other firms to change their quotations for the purpose of affecting the market price, and it found requests that traders change their quotes if they were not prepared to trade for more than 1,000 shares at their quotes—both of which it deemed problematic.

The DOJ did not have authority at the time to obtain monetary penalties. It settled for non-monetary relief, including a court order prohibiting market makers from adhering to the quoting convention, preventing market makers from harassing or intimidating other market makers for lowering their spread, requiring firms to designate an antitrust officer, requiring firms to record and listen to no less than 3.5% (up to a maximum of 70 hours per week) of trader conversations, and allowing representative of the Antitrust Division to appear at a firm's office to listen in on trader conversations.

The SEC brought a settled administrative proceeding against 28 broker-dealers in which it imposed $26 million in fines. It also suspended 51 individual traders. Those were the traders who had the misfortune to show up on audiotapes of problematic conversations, even though the SEC staff acknowledged at the time that the conversations were common in the industry and it was mostly happenstance that traders showed up on the tapes. The SEC found repeated instances of traders:

1. Asking traders at other firms to change their quotations, which created a new inside bid or ask price or a misleading appearance of a change in the supply or demand for a stock;
2. Engaging in trades to change the national best bid or offer (NBBO) and then executing customer orders at the less favorable new NBBO price;
3. Failing to execute customer trades at advantageous prices in order to maintain good relations with other market makers: and
4. Failing to honor their quotations.

The SEC also found that firms failed to reasonably supervise because:

1. They lacked procedures addressing conversations with other firms about requests or offers to move quotations;
2. They lacked guidelines for reviews by supervisory or compliance personnel to uncover potentially improper coordination or collaboration with respect to quotations; and
3. The supervisors knew little about the activities of the traders.

The SEC also stated that traders had improperly shared customer proprietary information (such as the size of customer orders and the identity of the customer) and firm proprietary information (such as the size of their own inventory positions, their intended trading strategies, and future quote movements). It issued a 56-page report of its findings and censured the NASD itself.

The antitrust class action, though filed before either the DOJ or SEC actions, benefitted from plaintiffs' access to information produced by the defendants to the DOJ and SEC. Ultimately, the plaintiffs were able to obtain over three million documents, 10,000 hours of audiotape, and more than 200 depositions. The litigation, brought against 37 defendants in connection with 1,659 securities, eventually settled for $1.027 billion. Plaintiffs' counsel stated at that time that it was the largest antitrust class action recovery in history.

No court ever ruled on the merits of the allegations.

II. ALLEGED COLLUSION INVOLVING THE REINVESTMENT OF MUNICIPAL BOND PROCEEDS

With more than one million different municipal bonds outstanding having an aggregate principal value of more than $3.7 trillion, the municipal bond market is massive. When municipalities raise money through bond offerings, they often reinvest the money they raise until they need to spend it. The federal government and municipalities have alleged that securities firms colluded to rig an ostensibly competitive bidding process used for reinvestment of those proceeds.

1. The Precursor – Alleged "Yield Burning" in No-Bid Contracts

To understand the bid rigging allegations, it is helpful to look back at the "yield burning" cases that the SEC brought in 1999 and 2000 against many of the largest securities firms. In 1995, ex-investment banker Michael Lissack became one of the most successful whistleblowers of all time (ultimately being awarded $30 million) by approaching the SEC with information that firms in the municipal finance industry "burned" (*i.e.*, artificially reduced) the yield on Treasury securities in which municipal bond proceeds were reinvested by excessively marking up the costs of the Treasury securities. He knew, he said, because he himself had engaged in such practices for years while working for a major investment bank.

Between 1999 and early 2000, the SEC and the Financial Industry Regulatory Authority (then NASDR) brought yield burning cases against 21 financial institutions, which paid $170.9 million to the Internal Revenue Service and municipalities to settle the cases. For the most part (though not exclusively), yield burning was alleged to have occurred when a single financial adviser negotiated the terms of the sale of the Treasury securities without competition from other dealers. Thus, greater competition for reinvesting the proceeds of municipal bonds was seen as part of the cure.

Following the yield burning investigations, the Treasury adopted regulations creating a rebuttable presumption that the investments made with municipal bond proceeds were purchased at fair market value if municipalities followed an auction-like process—with dealers competing with each other by submitting bids to issuers to reinvest their municipal bond proceeds. For example, municipalities often invest the proceeds from bond sales in guaranteed investment contracts (GICs), which guarantee repayment of principal and interest for a predetermined period of time. To satisfy the IRS's requirement that municipalities purchase GICs at fair prices, regulations state that GIC providers must not consult with any other potential providers about their bids, must determine their bids without regard to any agreements they have with others, must not submit bids "as a courtesy" to the municipality or any other person, and must not be given a "last look" at other bids before providing their own bid. The municipality must obtain bids from at least three reasonably competitive GIC providers, and the winning bid must be the highest yielding bona fide bid.

2. Alleged Collusion Involving Competitively Bid Contracts

Beginning in 2008, class actions alleging antitrust violations were filed on behalf of state, local, and municipal government entities that purchased GICs and other instruments from nearly three dozen (later reduced to a smaller number) financial institutions. The DOJ Antitrust Division, working with the FBI and the IRS's Criminal Investigation Division, also began investigations, as did the SEC. The government actions and class action complaint generally alleged that defendants engaged in bid rigging by:

1. Engaging in auctions in which the results were pre-determined;
2. Covertly sharing profits or other secret compensation with losing bidders;
3. Paying kickbacks to brokers conducting the auctions;
4. Submitting courtesy bids (deliberately losing bids) to create the appearance of competition where there was none;
5. Agreeing not to bid;
6. Sharing the terms of their respective bids with competitors; and
7. Obtaining secret last looks.

To date, five firms have paid a total of $745 million in fines, regulatory penalties, and disgorgement to settle government actions and private litigation. The DOJ Antitrust Division obtained criminal convictions or guilty pleas involving one corporation and 17 individuals for manipulating the competitive bidding process. The Second Circuit overturned, on statute of limitations grounds, the convictions of three individuals.

III. ALLEGED COLLUSION INVOLVING LIBOR BENCHMARKS

As large as the Nasdaq and municipal bond markets are, they are mere pimples when compared to the London Interbank Offered Rate (Libor), which is the rate at which large banks state that they can borrow short-term funds from other banks. Libor is the key rate in the $450 trillion market for interest rate derivative contracts. Moreover, over $10 trillion in corporate loans, floating rate notes, adjustable rate mortgages, and other loans are pegged to Libor.

1. Submissions of Panel Banks Based on Hypothetical Borrowing Costs

A little background about Libor is necessary to understand the allegations. The purpose of Libor is to provide benchmarks of the average cost to banks of unsecured borrowing from other banks. Libor rates are based on the answer of contributor panel banks to the question: "At what rate could you borrow funds, were you to do so by asking for and then accepting inter-bank offers in a reasonable market size just prior to 11 am?" Note that the question and answer are not anchored in actual transactions, especially since inter-bank lending has become quite rare. Instead, they are based on answers to purely hypothetical questions. This is why Mervyn King, the former Governor of the Bank of England, described Libor as "the rate at which banks do not lend to each other."

Libor is calculated in 10 currencies and 15 borrowing periods, ranging from overnight to 12 months—producing 150 rates each business day. Twenty-eight banks contributed to Libor between 1999 and 2012. The number of panel banks for each currency ranges from six to

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18. U.S. dollar Libor is the most widely recognized benchmark rate in the world. The Libor rate is the average rate of the two middle quartiles, as the top quartile and bottom quartile are excluded from the calculation.

The rules regarding Libor submissions require that contributor banks submit rates without reference to rates submitted by other banks, that the bank staff determining the submissions be responsible for management of the banks' cash rather than the banks' derivative trading book, that they submit rates without reference to the pricing of any derivative financial instrument, and that they submit rates that represent the rates at which they "would be offered funds"—*i.e.*, it is an offering-side rather than a bid-side rate.

2. *"Is Libor Broken?"*

Just as the Christie and Schultz article had triggered concerns about the Nasdaq market 14 years earlier, an April 10, 2008 research report by three analysts, titled "Special Topic: Is Libor Broken?" triggered heightened concerns about Libor. The purpose of the research report was to recommend implementing a trade to hedge against a potential jump in Libor, but the reason given was "Libor may understate actual interbank lending costs by 20-30bp." Comparing Libor to other benchmarks, the analysts suggested that banks were understating their borrowing costs in their Libor submissions in order to bolster the market's perception of their financial strength. Within a few days, the *Wall Street Journal* published a series of articles based on the report and, over the next couple months, the *Financial Times, Reuters,* and *Bloomberg* followed suit. On May 29, 2008, the *Wall Street Journal* reported on the results of its own study, and concluded that banks in the study had reported borrowing costs for their Libor submissions that were 25 basis points lower than what other market measures suggested they should have been. The article contained the caveat that its analysis did not prove misconduct on the part of the banks.

3. *Charges that Libor is Broken*

Beginning in 2011, a number of financial institutions reported that they were under investigation by both U.S. and non-U.S. authorities in connection with their Libor submissions. The DOJ Criminal Division and Antitrust Division, the FBI, the SEC, the CFTC, the New York Attorney General, the Connecticut Attorney General, the UK Financial Conduct Authority (successor to the UK Serious Fraud Office), the European Commission, the Japanese Ministry of Justice, the Japan Financial Services Agency, the Swiss Financial Market Supervisory Authority, the Dutch Public Prosecution Service, and the Dutch Central Bank have participated in these investigations. Multiple class actions were also filed and were consolidated in the Southern District of New York under the caption *In re: Libor-Based Financial Instruments Antitrust Litigation*.

In cases brought to date, the government has alleged:

1. Traders, through electronic messages, telephone conversations, and in-person conversations, requested that Libor submitters at their own and at other firms provide benchmark interest rates that would benefit the traders' trading positions, and that Libor submitters sometimes accommodated these requests;
2. Firms sometimes enlisted cash brokers to disseminate misinformation to other contributor panel banks regarding Libor and to request other submitters to move their submissions to benefit the requesting firm's trading positions;

3. During the financial crisis, banks submitted Libor benchmarks that under-reported actual borrowing costs—for example, banks told submitters to stay "within the pack" of other contributor panel banks and to avoid being an outlier; and
4. Managers were often aware of the above conduct.

The then-Chairman of the CFTC, Gary Gensler, went so far as to say, "Libor—central to borrowing, lending and hedging in our economy—has been readily and pervasively rigged."

4. Partial Settlements

The investigations have proven far more expensive even to begin to resolve than the cases discussed above. In June 2012, a British Bank paid $453 million to resolve proceedings brought by the DOJ, CFTC, and UK Financial Services Authority (FSA), after which both its CEO and chairman resigned. In December 2012, a Swiss Bank agreed to pay $1.5 billion to resolve actions brought by the DOJ, CFTC, FSA, and Swiss Financial Markets Authority. At the same time, its Japanese affiliate agreed to plead guilty to felony wire fraud. In February 2013, a British banking and insurance holding company agreed to pay $612 million to resolve actions brought by the DOJ, the CFTC, and the FSA, while its Japanese affiliate pled guilty to felony wire fraud in connection with manipulating Japanese Yen Libor. In September 2013, the world's largest interdealer broker, headquartered in London, agreed to pay $87 million to resolve actions brought by the CFTC and the FCA. In October 2013, a Dutch multinational banking and financial services company agreed to pay more than $1 billion to resolve actions brought by the DOJ, CFTC, FCA, and the Dutch Public Prosecution Service. Its chairman also resigned. These settlements alone cost just five firms $3.6 billion, and far more firms are still being investigated.

Although each of the actions primarily alleged manipulation of *non*-U.S. dollar Libor benchmarks, by *non*-US banks, through activities conducted largely *outside* the United States, the DOJ and CFTC have imposed the lion's share of monetary sanctions. The DOJ settlements also required defendants to admit to an extensive Statement of Facts and to "accept responsibility" for their employees' misconduct. In two cases, the DOJ insisted that defendants enter into deferred prosecution agreements and, as noted above, in two others required affiliates to plead guilty to criminal misconduct.

In December 2013, the European Commission added to the pain by fining seven banks a total of $2.3 billion in connection with their Libor and other submissions. The European Commission has developed extensive guidelines on "horizontal cooperation agreements." The Guidelines focus not merely on "agreements" prohibited by U.S. antitrust laws, but on "information exchanges" among competitors. For example, the Guidelines provide, "Private exchanges between competitors of their individualized intentions regarding future prices or quantities would normally be considered and fined as cartels because they generally have the object of fixing prices or quantities." The European Union also has issued extensive guidelines for setting fines in antitrust cases, which give significant weight not only to the duration of the misconduct, but also to a company's "relevant sales." This dramatically increases the risk to companies with large market share. The sanction guidelines also create enormous incentives for firms to disclose antitrust violations by providing leniency to firms that first reveal "the existence of cartels." For example, in its press release disclosing the $2.3 billion in fines, the European Commission noted that one firm would have been fined more than all of the other firms combined, but instead paid nothing and received "full immunity for revealing the existence of the cartels."

The DOJ and foreign governments have also brought criminal charges against a number of traders in connection with Libor submissions.

5. Private Litigation

The private litigation is still at an early stage. In the main action, Judge Buchwald dismissed the antitrust claims on the ground that the plaintiffs had failed to allege facts showing that their injuries were attributable to practices that were, in fact, anti-competitive, but she allowed some commodities manipulation claims to proceed. It remains to be seen whether the case can survive challenges to class certification. It also remains to be seen how other substantial individual cases will fare, including a March 2014 case brought by the Federal Deposit Insurance Corporation as receiver for 38 failed institutions against dozens of financial institutions and the British Bankers Association, and actions brought by various investment companies, federal credit unions, and the Federal National Mortgage Association.

IV. ALLEGED COLLUSION INVOLVING FOREIGN EXCHANGE RATES

With daily transactions of between $4.7 trillion and $5.3 trillion, the foreign exchange market (Forex) is the largest and most actively traded market in the world. On June 12, 2013, *Bloomberg*, in an article titled, "Traders Said to Rig Currency Rates to Profit Off Clients," reported that, according to five dealers with knowledge of the practice, "Traders at some of the world's biggest banks manipulated benchmark foreign-exchange rates used to set the value of trillions of dollars of investments."

Within months, at least a dozen authorities across the United States, Europe, and Asia opened investigations of more than 15 banks, with the FCA alone reportedly assigning at least 50 people to work on the investigation. There have been no enforcement actions, no adjudications, and no settlements at this stage. Nevertheless, regulators have described the allegations as serious. Martin Wheatley, the chief executive of the FCA, stated at a Parliamentary hearing that the Forex allegations are "every bit as bad as they have been with Libor." Mark Carney, the Bank of England governor, said that the Forex allegations were "as serious as Libor, if not more so." Joaquin Almunia, the European Union competition commissioner, stated, "Perhaps manipulation is not the exception but the rule." Swiss Finance Minister Eveline Widmer-Schlumpf said, "It's a fact that foreign exchange manipulation was committed." In the United States, the DOJ Antitrust and Criminal Divisions, the CFTC, the SEC, the New York Department of Financial Services, and the Federal Reserve all opened investigations. Ten banks suspended, placed on leave, or fired over 20 traders. Reportedly, many traders had exchanged information in chat rooms with colorful names like "The Cartel," "The Bandits' Club," "One Team, One Dream," and "The Mafia."

1. The Calculation of Foreign Exchange Benchmarks Based on Transactions in a 60-Second Window

Unlike the Libor benchmarks, the foreign exchange benchmarks—commonly referred to as "rates" or "fixes"—are based on actual transactions. WM/Reuters calculates the exchange rates for approximately 160 different currencies. The rates are calculated based on the median price of actual trades executed every second from 30 seconds before to 30 seconds after the time of the fix. The London 4 pm fix is the benchmark of choice for a large number of asset managers. Many banks agree to trade at these rates as an accommodation to clients, many corporations value their currency holdings at these rates, and many equity and bond index funds use the rates in portfolio valuation and performance management. The rates also serve as reference rates for pricing forwards and other contracts. Although foreign exchange rates are based on actual rather than hypothetical transactions, the fact that they are calculated in a 60-second window means that trades executed during the window may be more significant than trades executed at any other time.

Although the market for currency trading is enormous, it is fairly concentrated. London is the largest hub for foreign-currency transactions with roughly 40 percent of the trading volume, followed by New York (19 percent) and Singapore (6 percent). Seven firms account for 70 percent of the foreign exchange market.

2. Areas of Interest

A February 16, 2014 article in the *Financial Times*, which has closely followed the government investigations, states that regulators are looking for the following:

1. Sharing information about individual client orders;
2. Front-running client orders by using their knowledge of client orders to build up positions ahead of the 60-second window;
3. "Banging the close" by placing a large number of small orders before and around the fix to move the price;
4. "Painting the screen" by engaging in fake transactions with other traders during the fixing period to manipulate the exchange rates;
5. "Hunting for the stops" by buying or selling currencies to move exchange rates to a level where stop-loss orders are triggered; and
6. Personal account trading in which traders use private money to trade ahead of market-moving clients orders.

3. Class Action Allegations

Several antitrust class actions have been filed in the United States District Court for the Southern District of New York on behalf of persons who traded foreign currency with defendants on the basis of WM/Reuters rates. Plaintiffs allege that traders colluded to artificially increase or decrease exchange rates by concentrating orders in the 60-second window in order to benefit themselves at the expense of their clients. For example, if a bank was a net buyer, it might (allegedly) seek to reduce the closing fix to reduce the price at which it was committed to buy and then, when the price moved higher after the fix, sell its position at the higher price. The complaints are extremely light on allegations based on first-hand knowledge, resting instead on the June 2013 *Bloomberg* article and other articles, firms' suspensions of traders, the commencement of investigations, and a few sound bites from regulators' public statements.

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4. Obstacles for Plaintiffs

Like the Libor class actions, the Forex class actions will face significant obstacles. First, they are pending before the same court (although a different judge) that dismissed *all* of the Libor antitrust claims on the ground that plaintiffs could not establish that they were injured by anticompetitive behavior.

Second, it may be impossible to obtain class certification. It is difficult to imagine how plaintiffs can show that common issues will predominate in a case where, at different moments in time, some members of the class would benefit from higher benchmarks, others would benefit from lower benchmarks, the benchmarks (according to plaintiffs' theory) could be artificially high one day and artificially low the next, and it is extraordinarily difficult to determine the cause of any particular benchmark on any particular day being too high or too low.

For example, in *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154 (3rd Cir. 2001), investors filed a class action alleging that they were harmed because Nasdaq market makers executed their orders at the National Best Bid or Offer rather than on Instinet, which allegedly would have provided less costly executions. In affirming the denial of class certification, the Third Circuit stated that determining economic harm would "vary from class member to class member," would "require proof of the circumstances surrounding each trade," and would involve "individual questions [that] are overpowering." "This Herculean task," the court concluded, "involving hundreds of millions of transactions, counsels against finding predominance." Determining when Forex rates are too high, when they are too low, whether the conduct that contributed to them being high or low at a particular moment in time was improper, and what impact they had on each member of the class across the different products potentially affected would be an even more Herculean task. It would be even less suited to class certification than the case that the Third Circuit declined to certify in *Newton*.

It could also be impossible to show on a class-wide basis which of the alleged practices constitute illegitimate collusion and which constitute, for example, legitimate hedging strategies for traders committing their firms' capital to accommodate clients by agreeing to purchase from and sell to clients at a guaranteed price. Many of the issues would be difficult to resolve in any type of case. The following are just a few of the examples:

1. What is the definition of collusion in these markets? For example, if a trader effectively broadcasts to the market that he or she is going long in the hope that it will convince others to join in, creating an even bigger upside move, will those who act on that information be deemed to have colluded?

2. Where is the line between engaging in rational, permissible trading behavior in light of a perceived pricing weakness in pricing structure (*e.g.*, the Forex 60-second window) and impermissibly abusing that weakness to a firm's benefit, especially where the weakness is obvious and it can reasonably be expected that all market participants are competing for price with full knowledge of the weakness. Is market structure not a legitimate determinant of trading behavior? What is the government's responsibility to fix a weakness rather than selectively prosecute particular traders for otherwise engaging in an economically rational response to a weakness in a highly competitive market?

3. What is the definition of manipulation when the mores of the market, just as in poker (and, under the American Bar Association's standards of professional responsibility,

settlement negotiations between lawyers), expect traders to engage in bluffing, misdirection, and other tactics to disguise one's position and trading intentions?

V. LESSONS LEARNED

1. At the big picture level, the most obvious lesson is that when traders who regularly work with one another stand to benefit individually by cooperating collectively, firms need to be particularly vigilant to ensure that cooperation does not cross the line into improper collusion. A December 19, 2013 *Bloomberg* article noted, for example, that spot currency trading is conducted in a small and close-knit community, and that many of the traders and brokers live near each other and stay in touch over dinner, on weekend excursions, or with regular rounds of golf at local clubs. There is nothing improper about that, but it carries with it obvious risks.
2. Similarly, firms need to be especially clear about what information traders may and may not share about the firms' and clients' orders, inventory, trades, and intentions. Providing clarity in these markets can be difficult because regulators themselves have offered little guidance. However, the effort needs to be made.
3. The risk of collusion is greatest when detection is the most difficult. When billions or trillions of dollars of transactions are affected by the tiniest of changes in benchmarks, there might be a natural temptation to try to move those benchmarks ever so slightly. Absent very clear, repeated, enforced guidance from firms, traders may mistakenly look at practices by traders at other firms to determine the scope of acceptable conduct.
4. Even firms that have nothing to do with Libor should review the non-monetary relief requirements that regulators have imposed on those with whom they have settled. In connection with the Libor-related settlements with the DOJ and CFTC, settling defendants have agreed to undertakings requiring, among other things:
    a. The development of rigorous methodologies for setting benchmark rates (with many of the requirements set forth in the orders);
    b. Physical separation of and limitations on communications between submitters and derivatives traders;
    c. Training of submitters and derivatives traders to ensure that traders do not influence the submissions to favor their trading positions;
    d. Documentation of the basis for submissions;
    e. Daily supervisory review of submissions;
    f. Maintaining audiotape recordings of communications regarding the submissions;
    g. Maintaining audiotape recordings of communications of traders who primarily deal in derivative products that reference a benchmark interest rate;
    h. A monitoring system to identify any off-market submissions;
    i. Internal audits;
    j. External audits;
    k. Periodic review of electronic communications and audio recordings;

l. Requirement that compliance personnel be physically present on the trading floor at least monthly; and

m. A mechanism for escalating complaints.

We are not remotely suggesting adopting all of these requirements, but they provide a useful checklist of things to consider.

5. Similarly, firms need to consider whether they have sufficient in-house antitrust expertise. For a time, the DOJ Nasdaq settlements with market makers required that each defendant retain an antitrust compliance officer, that the antitrust compliance officer brief traders semi-annually on the requirements of antitrust laws, and that each trader certify he or she had read and agreed to abide by the terms of the proposed order. Firms whose business models involve the potential for collusion among traders should consider hiring compliance officers with substantial antitrust expertise.

6. Firms also need to have detailed policies and procedures regarding conversations traders may have with traders at other firms, guidelines for supervisory reviews of potentially problematic communications, and supervisors who both understand the traders' activities and legal requirements applicable to their conduct.

7. Firms need to carefully reexamine the medium they permit traders to use for communications. For example, Internet chat rooms, in which traders from different firms share information and express views that are forever preserved for posterity and litigants, pose risks that may outweigh their usefulness. A handful out of millions of messages can be used to create a very different impression than the messages as a whole. Moreover, the cost of retrieving and reviewing millions of messages related to Libor and Forex in order to respond to regulatory inquiries is potentially staggering.

8. Firms also need to consider that information exchanged through trade association meetings may, on rare occasions, be problematic. The Bank of England discontinued meetings of the chief dealers subgroup of its Foreign Exchange Joint Standing Committee after it became known that possible manipulation of benchmark exchange rates had been discussed at a meeting. It suspended a staff member and is reviewing whether its officials may have condoned improper practices.

9. The benchmark creators themselves need to periodically reassess whether the methods for calculating benchmarks can be improved. For example, how sensible is it for Libor benchmarks to be based on the answers to hypothetical questions rather than to be anchored in actual transactions? How sensible is it for currency exchange benchmarks to be based on a 60-second window rather than random periods throughout the trading day?

10. We live in a data-collection/data-analysis world, and regulators and industry groups need to explore whether they should be using data-driven approaches to detecting early signs of potential collusion. Catching a problem early is clearly beneficial for all involved.

11. Finally, regulators need to ask themselves whether they could do a better job at providing guidance. As just one example, could they provide clarity on what constitutes "collusion" and "manipulation" in markets where bluffing (including trades that are counter to an overall trading strategy and give misleading signals to other market

participants who are trying to discern their competitors' market positions or trading intentions) can be a rational and perhaps necessary element of trading to prevent competitors from detecting market positions, vulnerabilities, or trading intentions.

In short, the Nasdaq, municipal bond reinvestment, Libor, and Forex cases show that firms need to focus on the potential for collusion across all product areas. There is no magic bullet for eliminating the risk of collusion because it may often be impossible for even the most diligent firms to detect. Nevertheless, by understanding the magnitude of the risk and considering a combination of the procedures discussed above, firms stand the best chance of at least reducing the risk going forward. Given the billions already paid to resolve these cases and the billions more that may be paid in the future, time spent on prevention is time well-spent.

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