

The Justice Department Challenges Morgan Stanley: The Antitrust Risks of Arranging Derivatives

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The recent enforcement action brought by the Department of Justice ("DOJ") against Morgan Stanley raises novel questions about when a derivative agreement may violate antitrust laws and when a bank or broker involved in arranging the derivative(s) may be liable. Derivatives are contracts whose value depend on, or are derived from, the value of an underlying asset. In this case, Morgan Stanley signed contracts whose value depended on the price for electrical generating capacity in the New York City market. Morgan Stanley signed two separate contracts, each with a major supplier of that capacity: KeySpan Corporation ("KeySpan"), the largest provider of electrical generating capacity in New York City, and Astoria Generating Company ("Astoria"), a smaller provider that added capacity in 2006.