



## ANTITRUST UPDATE

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## Supreme Court Dismisses Antitrust Litigation Against Leading Investment Banks on Grounds of Implied Immunity

The United States Supreme Court this week held that an alleged conspiracy by ten leading investment banks to fix the terms for offerings of securities to investors in hundreds of initial public offerings (IPOs) at the height of the high tech boom in the period 1998-2000 may not be challenged under the antitrust laws. Greatly simplifying past precedent, the Court held "that the securities laws are 'clearly incompatible' with the application of the antitrust laws in this context." *Credit Suisse Securities (USA) L.L.C. v. Billing*, No. 05-1157, 2007 WL 1730141 (June 18, 2007). Sidley Austin LLP represented one of the defendants in this case.

Few areas of antitrust law have proved more resistant to clarity than the doctrine of "implied immunity." As the Court pointed out, sometimes a regulatory statute will expressly preclude application of antitrust law, sometimes it will expressly preserve the application of antitrust law and sometimes it will be silent on the application of antitrust law. Where the statute is silent as to the continued application of antitrust law to the regulated conduct, courts must determine whether Congress intended antitrust enforcement to be displaced by regulation. A line of Supreme Court cases dating back several decades has applied the doctrine of implied immunity to a variety of conduct in the securities industry. Yet the reasoning and results of these cases have been at best confusing and at worst a mystery. In *Credit Suisse*, the Court articulated four factors that led it to conclude that, with respect to the conduct alleged by plaintiffs in that case, the securities laws and antitrust laws are "clearly incompatible" (a phrase that clarifies the "clear repugnancy" standard found in the Court's earlier decisions).

[We] have treated the following factors as critical: (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; and (3) a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct. We also note (4) that in *Gordon* [*Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659 (1975)] and *NASD* [*United States v. National Assn. of Securities Dealers, Inc.*, 422 U.S. 694 (1975)] the possible conflict affected practices that lie squarely within an area of financial market

activity that the securities law seeks to regulate. *Credit Suisse*, No. 05-1157, 2007 WL 1730141, at \*5.

As in other antitrust rulings this term, the Court in *Credit Suisse* continued to focus on the practical consequences of its rulings. In particular, it expressed concern that treble-damage antitrust class actions may chill legitimate capital raising conduct that is expressly encouraged by the SEC or, though discouraged by the SEC today, could be approved by the SEC in the future.

While immunity from antitrust challenge was found in this case, it bears emphasis that the case should not be read as holding that all claims against securities firms, or indeed any firm in a regulated industry, are immune from antitrust challenge. Rather, the Court undertook a searching inquiry

into the pervasiveness of SEC regulation of the IPO allocation process before finding “that all four [of the above factors] ... are present here: (1) an area of conduct squarely within the heartland of securities regulations; (2) clear and adequate SEC authority to regulate; (3) active and ongoing agency regulation; and (4) a serious conflict between the antitrust and regulatory regimes.” *Id.* at \*9. Therefore, while antitrust lawsuits commenced against firms in a regulated industry may be ripe for challenge under the “implied immunity” doctrine, careful scrutiny of the applicable regulatory regime is required to assess the strength of a motion to dismiss such claims. Similarly, firms considering undertaking joint activities on the assumption that the conduct may be immune from antitrust challenge would do well to seek antitrust advice beforehand.

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