DEPARTMENT OF JUSTICE
Antitrust Division

R. HEWITT PATE
Assistant Attorney General

Main Justice Building
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001
(202) 514-2401 / (202) 616-2645 (Fax)
E-mail: antitrust@usdoj.gov
Web site: http://www.usdoj.gov/atr

May 5, 2005

Roseann B. MacKechnie, Esq.
Clerk, United States Court of Appeals
for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square – Room 1702
New York, New York 10007

Re: ***Billing v. Credit Suisse First Boston*, Nos. 03-9284 and 03-9288 (2d Cir.) – Response of the United States to the Court's Request for Views on the Issue of Implied Antitrust Immunity**

Dear Ms. MacKechnie:

This letter brief responds to your March 25, 2005, letter inviting the United States to address the Court's questions on the issue of implied antitrust immunity, questions on which the Securities and Exchange Commission provided its views on March 21, 2005. The United States believes that the Court will find the Commission's detailed description of its authority and regulatory activity in this area helpful. The United States' view of the case law and legal principles applicable to the conduct at issue, however, is somewhat different from the Commission's, and we reach a somewhat different conclusion on the issue of implied immunity.[1]

[1]The United States has primary responsibility for enforcing the federal antitrust laws, which express the Nation's fundamental economic policy in favor of free competition. As reflected in its letter brief submitted at the Court's request, the SEC reached a different conclusion than we do on some aspects of the questions raised by the Court. We reviewed the Commission's letter brief before it was filed, but that brief (unlike this brief for the United States) was not approved by the Acting Solicitor General and does not state the views of the United States.

(1) Does the SEC have the authority, under its enabling statutes, to allow underwriters to engage in the alleged conduct, including a conspiracy to inflate aftermarket securities prices?

As the Commission's letter explains in some detail, "[t]he federal securities laws and the Commission's regulations generally prohibit market manipulation, including the types of tie-in and laddering agreements alleged in the complaints in these actions." SEC Letter at 1.[2] Not surprisingly, "[t]he Commission does not now have pending before it, nor does it currently anticipate any proposals that would permit that sort of conduct." SEC Letter at 1. The Commission has emphasized that it brings enforcement actions against such practices and that it has proposed amending SEC Regulation M, 17 C.F.R. § 240.100-105 (the anti-manipulation rule governing securities offerings) to strengthen the existing prohibitions. *See* SEC Letter at 1-2, 4-6.

The SEC noted that "[t]he precise scope of the Commission's authority to adopt rules or to grant exemptions in [the IPO] area is difficult to delineate in the abstract." *Id.* at 3. The United States also views the question posed by the Court as extremely difficult to answer in the abstract; such questions would normally be answered in a specific context on the basis of a detailed agency record. There is no dispute, however, that the securities laws and SEC regulations have long prohibited tying and laddering because of the serious threats such practices pose both to competition and to the proper functioning of the securities markets. Thus, we find it very difficult to imagine circumstances in which the statutory prerequisites to waiver identified by the SEC in its letter brief (at 2-3) could ever be satisfied for tying and laddering. In any event, the critical—and undisputed—fact for purposes of this case is that the Commission has never authorized tying and laddering, nor has it even considered doing so. Accordingly, the United States believes there is no demonstrated "potential for regulatory permission of the conduct at issue." *In re Stock Exchanges Options Trading Antitrust Litigation*, 317 F.3d 134, 148 (2d Cir. 2003) ("*Options"*) (discussing *Strobl v. New York Mercantile Exchange*, 768 F.2d 22, 27-28 (2d Cir. 1985)).

---

[2]The Commission's enabling statutes include section 17 of the Securities Act of 1933, 15 U.S.C. § 77q, and section 9(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78i. Sections 9(a)(1) through 9(a)(5), 15 U.S.C. §§ 78i(a)(1)-(5), expressly prohibit certain forms of price manipulation. Other forms of manipulation may be regulated or prohibited by the Commission under section 9(a)(6), 15 U.S.C. § 78i(a)(6) (*see Crane Co. v. Westinghouse Air Brake Co.*, 419 F.2d 787, 793-94 (2d Cir. 1969); *Friedman v. Salomon/Smith Barney, Inc.*, 2000 WL 1804719 at *6 (S.D.N.Y. 2000), *aff'd*, 313 F.3d 796 (2d Cir. 2002), *cert. denied*, 540 U.S. 822 (2003)), as well as under section 15(c) of the Exchange Act, 15 U.S.C. § 78o(c). The Commission also has exemption powers under section 28 of the Securities Act, 15 U.S.C. § 77z-3, and section 36 of the Exchange Act, 15 U.S.C. § 78mm, and oversight responsibility for securities industry self-regulatory organizations, that the Commission has suggested might be relevant to the questions posed by the Court. *See* SEC Letter at 2 nn.2-3.

(2) If not, how – if at all – could judgment for plaintiffs in this case impede the SEC's ability to regulate or exempt from regulation any underwriters, securities, or transactions?

This question, the United States submits, must be considered in light of the relevant legal principles and the particular practices challenged in the complaint. Because "[t]he antitrust laws represent a fundamental national economic policy," "[i]mplied antitrust immunity is not favored, and can be justified only by a convincing showing of *clear repugnancy* between the antitrust laws and the regulatory system." *Nat'l Gerimedical Hosp. and Gerontology Ctr. v. Blue Cross of Kansas City*, 452 U.S. 378, 388 (1981) (emphasis added; internal quotation marks and citations omitted); *accord*, *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, 682 (1975); *Options*, 317 F.3d at 148. The "proper approach" to immunity questions requires "reconcil[ing] the operation of both statutory schemes with one another rather than holding one completely ousted." *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963).

Antitrust immunity cannot "be presumed from the mere existence of overlapping authority." *Options*, 317 F.3d at 148. And even where conflicts between the antitrust laws and the regulatory scheme warrant immunity as to some allegations of a complaint, the "baseline principle" is that repeal of the antitrust laws is implied "'only if necessary to make the [regulatory law] work'" and "'even then only to the minimum extent necessary.'" *Id.* at 145 (quoting *Silver*). While this Court in *Options* held that the history of regulatory approval was sufficient to create immunity, even with respect to conduct currently prohibited by regulation,[3] that holding does not depart from the well-established rule that the mere existence of overlapping regulatory authority does *not* suffice to create immunity. *Id.* at 148. *Options* involved practices that the SEC had in the past authorized, and the Court noted that the Commission might choose to again permit those practices in the future. In that circumstance, the Court found conflict arising from "an overall regulatory scheme that empowers the agency to allow conduct that the antitrust laws would prohibit." *Id*. at 149.[4]

Absent a demonstrated potential for conflict, however, it is presumed that Congress intended that both the regulatory scheme and the antitrust laws apply. Accordingly, what is required is a "fairly fact-specific inquiry," *Friedman v. Salomon/Smith Barney, Inc.*, 313 F.2d 796, 799 (2d Cir. 2002), *cert. denied*, 540 U.S. 822 (2003), focused on the allegations of the

---

[3]The United States filed amicus briefs in *Options* arguing that implied immunity should be limited to conduct that was expressly or implicitly approved or permitted under the regulatory scheme at the time it occurred. The *Options* panel took a broader view; this Court denied rehearing en banc. Although the United States disagrees with the result in *Options*, we recognize that it is binding on the panel in this case.

[4]*See also Gordon v. New York Stock Exchange*, 422 U.S. 659, 691 (1975) (implied immunity found for past commission fixing that was authorized under the regulatory scheme when it occurred, where Congress had "explicitly provided that the SEC, under certain circumstances and upon the making of specified findings, may allow reintroduction of fixed rates").

particular case, to determine whether there is a conflict or potential for "'*conflicts* between the antitrust laws and a[n authorized] regulatory scheme,'" arising from express or implicit approval or from the "potential for regulatory permission of the conduct at issue." *Options*, 317 F.3d at 148 (quoting *Strobl*, 768 F.2d at 27 (alteration in *Options*)).

In this case, the district court correctly held that the doctrine of implied immunity bars antitrust challenges to syndication and related practices expressly or implicitly approved by the SEC under the securities laws. *See In re Initial Public Offering Antitrust Litigation*, 287 F. Supp. 2d 497, 506-10 (S.D.N.Y. 2003) ("*IPO*"). As to those practices, there is conflict, and an antitrust judgment would impede the SEC's exercise of its regulatory authority. But the complaints also include challenges to alleged laddering and tie-in agreements that, as the Commission's response to the Court's questions confirms, the Exchange Act proscribes and the SEC recognizes as clear violations of the securities laws that it has never approved or even considered approving. Thus, the United States believes there is no demonstrated "potential for regulatory permission" of those practices, *Options*, 317 F. 3d at 148, and, therefore, sees no proper basis for finding a conflict. In these circumstances, enforcement of the antitrust laws as to the laddering and tying allegations does not interfere with the SEC's ability to regulate or exempt from regulation. The district court's holding that the SEC's "sweeping power to regulate" was sufficient to create a potential conflict with the antitrust laws, *IPO*, 287 F. Supp. at 506, amounts to an impermissible finding of antitrust immunity based on "the mere existence of overlapping authority," *Options*, 317 F.3d at 148.

Viewed in the context of the relevant case law, the SEC's active efforts to enforce the regulatory prohibitions neither conflict with nor relieve defendants of their obligations to comply with the federal antitrust laws. In our view, the antitrust laws create no impediment to the SEC's ability to regulate and to enforce the securities laws with respect to the proscribed conduct, and implied immunity for laddering and tying would be particularly inappropriate because it is difficult to imagine any scenario in which the prerequisites for an exemption to the consistent securities law prohibitions on such conduct could ever be satisfied.[5] Indeed, the United States is

---

[5]Congress plainly did not reserve to the SEC the sole right to challenge conduct subject to SEC regulation. A conclusion that the federal antitrust laws are impliedly repealed would not insulate the conduct from private actions under the securities laws, for example. Moreover, a variety of state law remedies might be available. *See, e.g., CTS Corp. v Dynamics Corp. of Am.*, 481 U.S. 69 (1987) (federal securities laws do not generally displace state securities laws). Indeed, although the district court below dismissed state antitrust claims, *IPO*, 287 F.Supp. 2d at 524; Special App. 65-71, it failed to justify that result under the preemption standards set forth by the Supreme Court. In *California v. ARC America Corp.*, 490 U.S. 93, 100-01 (1989), the Court explained that state laws will be preempted only by (a) an express statutory preemption provision; (b) a showing that it is "'clear and manifest'" that "Congress intends that federal law occupy a given field"; or (c) a showing that state law "actually conflicts with federal law, that is, when compliance with both state and federal law is impossible, or when the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* (citations omitted). Moreover, Congress included in the securities laws a

concerned that the district court's overly expansive view of implied immunity, if accepted, could impede even joint efforts, like those the Commission and the Department of Justice have successfully undertaken in the past, to protect competition and consumers in the nation's vitally important financial markets by enforcing the securities laws *and* the antitrust laws.[6]

(3) In light of your answers to (1) and (2), are defendants-appellees entitled to implied antitrust immunity in this action?

The United States submits that, under established principles, the district court erred in dismissing the complaints in their entirety under Rule 12(b)(6) on the basis of implied immunity.[7] We conclude that defendants-appellees are entitled to implied immunity for conduct expressly or implicitly approved by the securities laws or SEC regulations. Under the holding in *Options,* immunity may also extend to conduct where there is a demonstrated "potential for

---

savings provision, mandating that, with the narrow exception of certain state class actions, "the rights and remedies provided . . . shall be in addition to any and all other rights and remedies that may exist at law or in equity." Securities Act § 16(a), 15 U.S.C. § 77p(a); *see also* Exchange Act § 28(a), 15 U.S.C. § 78bb(a) (similar savings clause). There is no reason to believe that Congress intended to immunize conduct prohibited by the securities laws from scrutiny under the federal antitrust laws, which "represent a fundamental national economic policy," *Nat'l Gerimedical Hosp. and Gerontology Ctr. v. Blue Cross of Kansas City*, 452 U.S. 378, 388 (1981) (quotations and citations omitted), while leaving that same conduct subject to challenge under state antitrust and other laws.

[6]*See, e.g.*, SEC, "SEC and Department of Justice Sanction Four Options Exchanges for Anticompetitive Conduct," Press Release No. 2000-126 (Sept. 11, 2000) (www.sec.gov/news/press/2000-126.txt); U.S. Dept. of Justice, "Justice Department Files Suit Challenging Anticompetitive Agreement Among Options Exchanges," Press Release No. 00-530 (Sept. 11, 2000) (www.usdoj.gov/atr/public/press_releases/2000/6452.htm); Complaint (filed Sept. 11, 2000), and Stipulated Final Judgment (filed Dec. 6, 2000), *United States v. American Stock Exchange, LLC* (D.D.C. No. 00-2174 (www.usdoj.gov/atr/cases/f6400/6468.htm; www.usdoj.gov/atr/cases/f201200/201201.htm); Competitive Impact Statement, *United States v. Alex Brown & Sons, Inc.*, No. 96-5313 (S.D.N.Y. filed July 17, 1996) (www.usdoj.gov/atr/cases/f0700/0739.htm) (DOJ and SEC collaborated in evidence collection for simultaneous investigation of Nasdaq securities trading); Competitive Impact Statement, *United States v. Steinhardt Management Co.*, No. 94-9044 (www.usdoj.gov/atr/cases/f0800/0819.htm) (S.D.N.Y. filed Dec. 16, 1994) (DOJ and SEC reached global settlement under antitrust and securities laws regarding conspiracy to restrain trading in certain Treasury notes).

[7]The United States expresses no view as to the merits of plaintiffs' antitrust complaints.

regulatory permission," 317 F.3d at 148.[8] But the allegations of tying and laddering—practices that are strictly prohibited under the securities laws and that the SEC has never permitted or proposed to permit—should not be dismissed on implied immunity grounds.

Three copies of this letter are enclosed for distribution to the panel considering this case. If you have any questions, please call Catherine G. O'Sullivan, Chief, Appellate Section, Antitrust Division, United States Department of Justice, at 202-514-1531.

Respectfully submitted,

R. Hewitt Pate
Assistant Attorney General

Cc: Christopher Lovell, Esq., lead counsel for plaintiffs
Robert B. McCaw, Esq., lead counsel for defendants

Giovanni P. Prezioso, General Counsel, SEC

[8]As noted above, *see supra* note 3, the United States disagrees with the result in *Options,* but we recognize that it is binding on the panel in this case.