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ANTITRUST UPDATE:

Second Circuit Issues Significant Decisions Limiting Application of Antitrust Laws in Securities

The Second Circuit recently rejected two attempts by plaintiffs to challenge, under Section 1 of the Sherman Act, conduct already subject to scrutiny by the Securities and Exchange Commission. Both decisions hold that conduct is impliedly immune from the antitrust laws if Congress has given the Commission jurisdiction to permit or prohibit the challenged conduct, and the Commission has exercised that jurisdiction. The impact of these decisions, however, is not limited to securities, but extends to other highly regulated industries.

Friedman v. Salomon Smith Barney, 313 F.3d 796 (2d Cir. 2002), involved a challenge to certain underwriters' and brokerage firms' policies designed to discourage "flipping," the rapid resale of IPO shares. The defendants allegedly violated the antitrust laws by agreeing on policies to deny future IPO allocations to customers found to have sold IPO shares during a certain period following an IPO. The defendants argued that the doctrine of implied immunity exempted their conduct from challenge under the antitrust laws.

The Second Circuit observed that implied immunity requires a "plain repugnancy" between the antitrust laws and the Commission's regulatory scheme. The Commission need not have compelled or approved the challenged conduct in order for the requisite repugnancy to exist. Rather, the Court held, it is enough if the Commission "has jurisdiction over the challenged activity and deliberately [chooses] not to regulate it." *Id.* at 801. The court had little trouble finding that practices designed to prevent or retard declines in an IPO stock's price, such as the defendants' anti-flipping policies, were immune from antitrust scrutiny: Congress expressly gave the Commission power to permit or prohibit such practices; the Commission had examined policies discouraging flipping, including the competitive effects of such policies, and it had declined to prohibit them.

In re: Stock Exchanges Options Trading Antitrust Litigation, 2003 WL 77100 (2d Cir. Jan. 9, 2003) held that even conduct that Commission regulations prohibit is immune from the antitrust laws, so long as the Commission has the power to permit the conduct if it so chooses.

This case involved an alleged conspiracy among the U.S. options exchanges to prevent certain equity options from being traded on more than one exchange. During the relevant time period, Commission regulations prohibited each "exchange from reach[ing] an agreement with one or more other exchanges to refrain from multiple trading." The plaintiffs (and the DOJ Antitrust Division, as *amicus curiae*) argued that the alleged conduct was not immune from antitrust scrutiny because there was no "plain repugnancy" with the Commission's regulatory scheme: an agreement to prohibit multiple listing would be condemned by

both the Commission's current regulations and the Sherman Act.

The Second Circuit rejected these arguments. It explained that the question "does not turn on whether the antitrust laws conflict with the current view of the regulatory agency; rather, it turns on whether the antitrust laws conflict with an overall regulatory scheme that empowers the agency to allow conduct that the antitrust laws would prohibit." *Id.* at 12. The court observed that Congress had granted the Commission authority to permit or prohibit multiple trading; indeed, over the years, the Commission has taken various positions on the issue: sometimes permitting multiple trading and sometimes prohibiting it. Therefore, the court concluded, the Commission, not a federal court applying the antitrust laws, should regulate the defendants' alleged conduct: "We see no way to reconcile that SEC authority, which may be exercised to permit agreements for exclusive listing of equity options, with the antitrust laws." *Id.* at 13.

While determinations of whether particular conduct is impliedly immune from the antitrust laws are very fact specific, we expect these two decisions to be widely cited in cases involving regulated industries.

Wilmer, Cutler & Pickering represented successful defendants in both of these recent Second Circuit cases: Salomon Smith Barney in *Friedman*, and the Pacific Exchange in *In re Stock Exchanges Options Trading Antitrust Litigation*.

If you have any questions about these decisions, or any other issues concerning U.S. or foreign antitrust/competition law, please contact us at (202) 663-6000.

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