News Release

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COURT URGED NOT TO APPLY ANTITRUST LAW TO INVESTMENT BANKERS

(Credit Suisse Securities (USA) LLC v. Billing)

The Washington Legal Foundation (WLF) yesterday urged the U.S. Supreme Court not to permit plaintiffs' attorneys to seek to impose new restraints on the securities industry by bringing antitrust suits against investment bankers for the manner in which they conduct IPOs.

In a brief filed in *Credit Suisse Securities (USA) LLC v. Billing*, WLF argued that the securities industry is already fully regulated under the Securities Exchange Act of 1934 and other securities laws, and that permitting another layer of regulation would likely lead to conflicting rules. WLF's brief was drafted with the pro bono assistance of lawyers with Orrick, Herrington & Sutcliffe LLP, including Howard M. Ullman, James A. Meyers, Antony P. Kim, Garret G. Rasmussen, Erin L. Bansal, Cathy Lui, and Daniel Tyukody.

The underlying suits, filed against ten leading investment banks, arise out of initial public offerings (IPOs) for internet and technology stocks during the "bubble" market of the late 1990s. The suits allege that the defendants conspired to impose anticompetitive charges on prospective IPO purchasers and to inflate the aftermarket prices of offered securities. The suits allege that those activities constituted an antitrust conspiracy in restraint of trade, in violation of the Sherman Act.

It is uncontested, however, that the defendants' practices are heavily regulated under federal securities laws and by rules established by the Securities and Exchange Commission (SEC). WLF argued in its brief that when Congress adopted comprehensive securities laws, it intended thereby largely to displace application of the antitrust laws to the securities industry.

The district court dismissed the case on that ground, but the Second Circuit reinstated it. The Supreme Court subsequently agreed to review the Second Circuit's decision. WLF's brief urged the Supreme Court to reverse the appeals court's decision. Interestingly, in the lower courts, the SEC and the U.S. Department of Justice (DOJ) were on opposite sides of the case. The SEC agreed with the defendants that their underwriting practices should be deemed impliedly immune from the antitrust laws, while DOJ sided with the plaintiffs.

"The actions about which the plaintiffs complain are necessarily immune from antitrust attack because they are actively regulated by the SEC under three broad grants a statutory authority," WLF Chief Counsel Richard Samp said after filing WLF's brief. "Subjecting the defendants to antitrust liability would pose an actual or potential conflict with the SEC's regulatory scheme," Samp said.

In its brief, WLF argued that subjecting the defendants to antitrust enforcement not only was contrary to congressional intent, but also was bad public policy. WLF argued that layering treble-damage antitrust suits on top of the already robust SEC regulatory framework threatens to deter conduct that is beneficial and even crucial to the proper functioning of U.S. equity markets. WLF argued that, given the mounting perception abroad that U.S. markets are replete with excessive regulatory and litigation risks, the specter of antitrust liability would only further diminish the attractiveness and competitiveness of the U.S. with respect to global capital-raising activities.

WLF is a public interest law and policy center with supporters in all 50 states. It devotes a substantial portion of its resources to promoting tort reform and reining in excessive litigation.

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For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302. A copy of WLF's brief is posted on its website, www.wlf.org.