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Iv. Securities Exchanges And The Antitrust Laws

The court's decision is not inconsistent with § 16(b)'s policy. The lowest price in, highest price out rule is a method of profit computation, not of property valuation. Property valuation is distinct from profit computation; its purchase is to reach a realistic and fair determination of value so that profits can be computed. If property valuation is affected by a policy of squeezing out all possible profits, § 16(b)'s supposed remedial purpose would assume a punitive character.

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IV. SECURITIES EXCHANGES AND THE ANTITRUST LAWS

In enacting the Securities Exchange Act of 1934,[1] Congress created a scheme of self-regulation and agency supervision for the national securities exchanges.[2] By its nature, this regulatory scheme at

57. In another recent case, Kramer v. Ayer, CCH FED. SEC. L. REP. ¶ 95,483 (S.D.N.Y. 1976), it was held that in determining the cost of stock acquired in a merger, the value of the stock given up should include the increase in value attributable to the merger. *Id.* at 99,440-41. In *Kramer*, defendant sold shares of stock he had acquired in a merger less than six months subsequent to the merger. Defendant was liable under § 16(b) because at the time of the merger he became a director of the acquiring corporation. In calculating the amount of profits for which defendant was liable, the court had to determine the value of shares exchanged in the merger for the new shares. Plaintiff argued that any increase in the value of the stock attributable to the merger (merger announced weeks in advance) should not be included in the valuation but should be included in the profits owing the corporation. The court rejected this argument, stating that defendant could not "be held liable for accretion in value of the consideration given that it accrued prior to his becoming an insider." *Id.* at 99,441.

[1] 15 U.S.C. §§ 78a-78hh (1970), *as amended*, 15 U.S.C.A. §§ 78a-78kk (Supp. Aug. 1975).

[2] Section 6 of the 1934 Act, 15 U.S.C. 78f (1970), provides for registration procedures with the Securities Exchange Commission but grants the exchanges substantial freedom in adopting their own rules as long as the rules are consistent with the securities laws. *Id.* § 78f(c). However, section 19, *id.* § 78s, grants the Commission supervisory authority to review and, if necessary to protect investors or to insure fair dealing in securities, to alter or supplement exchange rules in twelve specific areas of exchange regulation. *Id.* § 78s(b). The Securities Acts Amendments of 1975, 15 U.S.C.A. §§ 78a-78kk (Supp. Aug. 1975), significantly increased the supervisory authority of the Commission and restricted the amount of freedom previously given to the exchanges in adopting rules. Amended section 6 precludes an exchange from adopting any rules that impose an unnecessary burden on competition. *Id.* § 78f(b)(8). Amended Section 19 no longer limits SEC supervision to specific areas, but provides that all exchange rules be reviewed and approved by the Commission. *Id.* § 78s(b).

times conflicts with the policy of the antitrust laws.[3] When such a conflict exists, the courts must determine whether Congress intended the regulatory scheme to be paramount to, and thus impliedly repeal, the antitrust laws.[4] Because Congress did not grant the exchanges an express exemption from the antitrust laws, the courts utilize the doctrine of implied repeal in deciding whether an exchange activity is immune from antitrust challenge.[5]

The courts impliedly repeal the antitrust laws in two situations. First, if the courts find that Congress has created a pervasive regulatory scheme over an industry, the presumption is that Congress intended the regulatory scheme to displace the antitrust laws with respect to all regulated activity.[6] Second, even if the courts conclude that a regulatory scheme is not so pervasive as to exempt all industry activity from antitrust scrutiny, a specific statutory provision may repeal the antitrust laws with respect to the particular activity which the statutory provision governs.[7]

In *Silver v. New York Stock Exchange, Inc.*,[8] the Supreme Court held that the Exchange Act did not create a pervasive regulatory scheme over the securities exchanges.[9] Thus, for a particular ex-

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[3] *See* Johnson, *Application of the Antitrust Laws to the Securities Industry* 20 Sw. L. J. 536, 554-55 (1966); Nerenberg, *Applicability of the Antitrust Laws to the Securities Field*, 16 WEST. RES. L. REV. 131, 131-32 (1964).

[4] The issue is whether maintenance of an antitrust suit would be incompatible with the intended operation of the regulatory scheme. Silver v. NYSE, 373 U.S. 341, 358 (1963). Congressional intent is the determining factor. *See* Federal Maritime Comm'n. v. Seatrain Lines, Inc., 411 U.S. 726, 729 (1973); Otter Tail Power Co. v. United States, 410 U.S. 366, 374 (1973).

[5] There being no express exemption from the antitrust laws, the courts must infer from the regulatory scheme congressional intent to repeal impliedly the antitrust laws with respect to the regulated activity. The courts have developed a number of principles to follow in applying this doctrine. Repeal of the antitrust laws by implication is not favored. Antitrust immunity will be implied only when there exists a "plain repugnancy between the antitrust and regulatory provisions," United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 351 (1963), and even then, only "to the minimum extent necessary [to make the regulatory act work]." Silver v. NYSE, 373 U.S. 341, 357 (1963). *See also* Gordon v. NYSE, 422 U.S. 659, 682-83 (1975); United States v. NASD, 422 U.S. 694, 719-20 (1975). For an example of an express congressional exemption, *see* McLean Trucking Co. v. United States 321 U.S. 67 (1944), holding that § 5(11) of the Interstate Commerce Act, 49 U.S.C. § 5(11) (1970), exempted a merger approved by the ICC from the antitrust laws. 321 U.S. at 73-76.

[6] *See* United States v. NASD, 422 U.S. 694, 733 (1975); *Cf.* Otter Tail Power Co. v. United States, 410 U.S. 366, 374 (1973).

[7] *See* Gordon v. NYSE, 422 U.S. 659, 683 (1975); Silver v. NYSE, 373 U.S. 341, 360-361 (1963).

[8] 373 U.S. 341 (1963).

[9] *Id.* at 360-61.

change practice to be immune from antitrust challenge, there must be a specific statutory provision giving the SEC sufficient regulatory authority over the particular challenged conduct to indicate a congressional intent that the regulatory scheme be paramount to the antitrust laws with respect to this particular activity.[10] When *Silver* was decided, the SEC's authority over securities exchanges was restricted to twelve specific areas of exchange activity,[11] and thus antitrust immunity was dependent on one of these provisions. The Securities Acts Amendments of 1975,[12] however, signficantly increased the SEC's supervisory authority over the exchanges. The amendments' purpose is to create a more competitive securities market by "vesting in the SEC power to eliminate all unnecessary and inappropriate burdens on competition . . . ."[13] Two recent Supreme Court decisions indicate that in expanding the SEC's authority over securities exchanges, the amendments have also expanded the scope of exchange activity which will be immune from the antitrust laws.[14]

In *Gordon v. New York Stock Exchange, Inc.*,[15] plaintiff brought a class action against the New York and American Stock Exchanges alleging that the defendants' practices of fixing minimum commission rates violated the antitrust laws.[16] The Supreme Court dismissed the action, holding that § 19(b)(9) of the 1934 Act,[17] which authorized the SEC to supervise exchange fixing of commission rates, repealed the antitrust laws with respect to this particular exchange practice.[18]

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[10] *Id.*

[11] *See* 15 U.S.C. § 78s(b) (1970).

[12] 15 U.S.C.A. §§ 78a-78kk (Supp. Aug. 1975).

[13] S. REP. No. 94-75, 94th Cong., 1st Sess. 2, 13 (1975).

[14] *See* Baker, *Antitrust Law and Policy in the Securities Industry: A Tale of Two Days in June*, 31 BUS. LAW. 743 (1976) [hereinafter cited as Baker]; Note, *SEC Regulation as a Pervasive Regulatory Scheme - Implied Repeal of the Antitrust Law with Respect to National Securities Exchanges*, 44 FORD. L. REV. 355 (1975) [hereinafter cited as Note, 44 FORD. L. REV. 355]; Note, *Securities Regulations and Antitrust Laws - Implied Repeal of the Antitrust Laws with Respect to Practices of the Securities Industry - Active SEC Review or Pervasive Regulatory Scheme Sufficient to Imply Immunity*, 9 LOYOLA U. L. REV. 226 (1975) [hereinafter cited as Note, 9 LOYOLA U. L. REV. 226].

[15] 422 U.S. 659 (1975).

[16] *Id.* at 660-61.

[17] 15 U.S.C. § 78s(b)(9) (1970), *as amended*, 15 U.S.C.A. § 78s(b) (Supp. Aug., 1975), authorizes the SEC to supervise and, if necessary to protect investors or insure fair dealings in securities, to order changes in exchange rules with respect to "the fixing of reasonable rates of commission . . . ."

[18] 422 U.S. at 691. One commentator, however, has argued that § 19(b) does not authorize the securities exchange to fix commission rates and, therefore, does not repeal the antitrust laws. Baxter, *NYSE Fixed Commission Rates: A Private Cartel Goes Public*, 22 STAN. L. REV. 675 (1970).

In dismissing, the Court relied on the legislative history of the Exchange Act, which indicated a congressional intent "to leave the supervision of the fixing of reasonable [commission] rates . . . to the SEC."[19] Furthermore, it was noted that the SEC had actively reviewed exchange commission rate practices,[20] and in 1975 abolished fixed rates.[21] Since the SEC had exercised its jurisdiction under § 19(b)(9), application of the antitrust laws to the exchanges would subject them to conflicting standards of conduct.[22] Thus, repeal of the antitrust laws was necessary to reconcile this conflict. The Court also noted that the 1975 amendments to the Exchange Act had continued the SEC's supervisory authority over the area of commission rates, thus indicating that Congress approved of the regulatory scheme which provided for SEC review of rate practices.[23]

In stressing the necessity of impliedly repealing the antitrust laws to make the Exchange Act work, the Court rejected[24] the interpretation of "necessity" made in *Thill Securities Corp. v. New York Stock Exchange, Inc.*[25] There the Seventh Circuit held that in determining if repeal was necessary a court should make a factual determination whether permitting antitrust challenge of the exchange practice would actually "frustrate the purpose of the Securities Exchange Act or make it substantially ineffective."[26] In *Gordon*, the Supreme Court

[19] 422 U.S. at 691. The Court noted that Congress was aware that prior to the 1934 Act there was an established practice of the securities exchanges fixing commission rates and that Congress, by not prohibiting such practice in the 1934 Act, decided to permit the exchanges, subject to SEC supervision, to continue this practice. *Id.* at 663-68.

[20] *Id.* at 668-82. Since 1958 the SEC had been engaged in a continuous review of the effect of fixed commission rates. *Id.* at 668. *But see*, Werner, *Adventure in Social Control of Finance: The National Market System for Securities*, 75 COLUM. L. REV. 1233, 1290-92 (1975).

[21] As of May 1, 1975, fixed commission rates have been prohibited. SEC Reg. 19b-3(a), 17 C.F.R. § 240.19b-3(a) (1975).

[22] 422 U.S. at 689. The Court stated different standards would be applied "because the sole aim of antitrust legislation is to protect competition, whereas the SEC must consider, in addition, the economic health of investors, the exchanges, and the securities industry." *Id. See also* 15 U.S.C. 78s(b) (1970).

[23] *See* § 6(e)(1), 15 U.S.C.A. § 78f(e)(1) (Supp. Aug. 1975). Although § 6(e) generally prohibits fixed rates, it authorizes the SEC to allow fixed rates if reasonable in relation to cost and if they do not unnecessarily burden competition.

[24] 422 U.S. at 686-87.

[25] 433 F.2d 264 (7th Cir. 1970), *cert. denied*, 401 U.S. 994 (1971). In *Thill*, the court held that the exchange's antirebate rule, which prohibited a member of the exchange from sharing a commission with a non-member, was not necessary to make the Exchange Act work.

[26] *Id.* at 270.

ruled that a factual determination whether repeal was necessary was improper. The issue was "a legal question as to whether allowance of an antitrust suit would conflict with the operation of the regulatory scheme which specifically authorizes the SEC to oversee the fixing of commission rates."[27] To insure that the regulatory scheme function as envisioned by Congress, the Court ruled that if subjecting an exchange practice to antitrust suit would conflict with the operation of the regulatory scheme, antitrust immunity must be implied as a matter of law.[28]

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[27] 422 U.S. at 688. This ruling also affects the holding of Ricci v. Chicago Mercantile Exchange, 409 U.S. 289 (1973), which dealt with the question whether a court, presented with an issue of antitrust immunity based on the doctrine of implied repeal, should apply the doctrine of primary jurisdiction and permit an administrative agency to hear the case before the court proceeds. *See* 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 19.01 (1958). In *Ricci*, the Supreme Court held that a district court in which an antitrust suit has been brought should stay its proceeding until completion of administrative review if such a review would aid the court in determining if repeal is necessary to make a regulatory scheme work. 409 U.S. at 302. Administrative review would aid a court in deciding such an antitrust issue because the administrative agency reviewing the case could decide issues of fact concerning the incompatibility between the regulatory scheme and the antitrust laws. *Id.* However, the issue is no longer a factual question, but a legal question. Thus, an initial review of the case by an agency will be of material aid to a court only if the agency's determinations will aid the court in deciding how Congress envisioned the regulatory scheme to work. If the 1975 amendments have created a pervasive regulatory scheme over exchanges, *see* text accompanying notes 49-61, *infra*, there will be no antitrust issue to decide on a case by case approach, and thus an agency will be the only forum, subject to judicial review, in which to hear the case.

[28] *Id.* In a concurring opinion, Justice Douglas noted that active review by the SEC pursuant to the Exchange Act was the determining factor in concluding that repeal was necessary. He stated:

> Only if the SEC is actively and aggressively exercising its powers of review and approval can we be sure that fixed commission rates are being monitored in the manner which Congress intended.

422 U.S. 659, 692 (1975) (Douglas, J., concurring).

Under the Court's holding, it would seem that the antitrust laws can not be permitted to support the regulatory scheme when challenged conduct violates both the Exchange Act and the antitrust laws. Although in such a situation no actual conflict exists between the regulatory scheme and the antitrust laws, application of the antitrust laws would interfere with the intended operation of the Exchange Act. *But see* Baker, *supra* note 14, at 747-48.

For example, in Schaefer v. First Nat'l. Bank, 509 F.2d 1207, 1299-1300 (7th Cir. 1975), *cert. denied*, 96 S. Ct. 1682 (1976), the Seventh Circuit held that the antitrust laws were not applicable to a stock manipulation scheme regulated by § 10(b) and § 17 of the Exchange Acts, 15 U.S.C. §§ 78j(b), 77q (1970). Even though the manipulation scheme violated both the antitrust laws and § 10(b) and § 17, the court reasoned that § 10(b) and § 17 evidenced congressional intent to deal with stock manipulation under the Exchange Act only. Application of the antitrust laws in *Schaefer* would have

The facts in *Gordon* required repeal of the antitrust laws because of a clear repugnancy between the antitrust laws and a specific statutory provision of the Exchange Act.[29] The Court's grant of antitrust immunity was restricted to the particular activity, fixing commission rates, regulated by a specific statutory provision, § 19(b)(9). Such a holding was necessary under the Exchange Act, which limited SEC supervisory authority over exchanges to twelve delineated areas.[30] The Securities Acts Amendments of 1975, however, significantly increased the SEC's authority over securities exchanges. Section 19 no longer limits SEC authority over exchanges to specific areas, but grants the SEC authority to review all proposed rules[31] and order adoption of new rules or changes in existing ones[32] in all areas of exchange practices. Thus, the amendments have expanded the scope of the specific statutory provision which the *Gordon* Court concluded mandated repeal of the antitrust laws.[33]

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interfered with the operation of the Exchange Act because the antitrust laws provide different enforcement sanctions to punish persons for and deter others from engaging in the proscribed conduct than § 10(b) and § 17. *Compare* sanctions provided by the antitrust laws, 15 U.S.C.A. § 1 (Supp. Mar. 1975), *amending* 15 U.S.C. § 1 (1970) (Wrongdoer is deemed guilty of felony and subject to fine of one million dollars if a corporation, or if an individual, one hundred thousand dollars, or three years imprisonment, or both.); 15 U.S.C. § 15 (1970) (Wrongdoer is liable civilly to an injured party for three times actual damages.) *with* sanctions available under § 10(b) and § 17, where a private right of action is implied for recovery of actual damages by the injured person caused by the fraud. *See* Affiliated Ute Citizens v. United States, 406 U.S. 128, 154-55 (1972); Superintendent v. Bankers Life & Cas. Co., 404 U.S. 6, 13 (1971); 6 L. Loss, SECURITIES REGULATION 3869-73 (Supp. 1969) (§ 10(b)); Smith v. Jackson Tool & Die, Inc., 419 F.2d 152 (5th Cir. 1969) (§ 17). Thus, a "legal" conflict justifying repeal of the antitrust laws would seem to exist whenever the antitrust laws provide for different standards to judge the propriety of challenged conduct, Gordon v. NYSE, 422 U.S. 659, 689 (1975), or different enforcement sanctions to regulate conduct than provisions of the Exchange Act dealing with the same conduct. *Cf.* Schaefer v. First Nat'l. Bank, 509 F.2d 1287, 1299-1300 (1975).

[29] *See* 422 U.S. at 692 (Stewart, J., concurring).

[30] *See* 15 U.S.C. § 78s(b) (1970).

[31] 15 U.S.C.A. § 78s(b) (Supp. Aug. 1975).

[32] *Id.* § 78s(c).

[33] *See also* Harding v. American Stock Exchange, Inc., CCH FED. SEC. L. REP. ¶ 95,461 (5th Cir. Mar. 8, 1976), where the Fifth Circuit held that an exchange's delisting of a stock pursuant to § 19(b)(3), 15 U.S.C. § 78s(b)(3) (1970), was immune from antitrust challenges. The court cited *Gordon* for support, stating:

> This is the same section which authorized the SEC to review the fixing of commission rates. Section 19(b) thus gives the SEC direct review over delisting activity.

Id. at 99,334. Although the court's ruling was restricted to an exchange's delisting activity, the decision indicates that any activity regulated by § 19 will be immune from the antitrust laws.

Application of the *Gordon* rationale to the amendments indicates that since the SEC has supervisory authority over all areas of exchange activity pursuant to a specific statutory provision, all exchange practices may enjoy antitrust immunity. The legislative history of the amendments evidences a congressional intent to vest in the SEC complete authority to supervise all exchange activity.[34] Moreover, the SEC must take an active part in reviewing and approving all exchange rules[35] and may order changes in exchange rules to insure that exchange activity is not harmful to the investing public.[36] Finally, the basis of any SEC decision includes consideration of antitrust factors.[37] Thus, under *Gordon*, repeal of the antitrust laws as to all exchange practices would seem necessary if the 1975 amendments are to operate as envisioned by Congress. However, analysis of the amendments in terms of *Gordon*—basing repeal on a plain repugnancy created by a specific statutory provision—may not be necessary. *Gordon's* companion case indicates that the 1975 amendments may have created a pervasive regulatory scheme over exchanges thereby indicating a congressional intent to repeal the antitrust laws' application to securities exchanges generally.

The 1975 decision *United States v. National Association of Securities Dealers, Inc.*[38] dealt with a conflict between the regulatory scheme over securities associations created by the Maloney Act[39] and the antitrust laws. In *NASD*, the government charged that NASD and its members had conspired to restrict the secondary dealer market and the brokerage market in the purchase and sale of mutual fund shares by adopting rules which had anti-competitive effects.[40] After

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[34] *See* S. REP. No. 94-75, 94th Cong., 1st Sess. 2, 13 (1975).

[35] Whereas prior to the 1975 amendments an exchange rule did not require previous SEC approval, 15 U.S.C. § 78f(c) (1970), under the amendments, the SEC must actually review and approve all rules before they become effective. 15 U.S.C.A. § 78s(b) (Supp. Aug. 1975).

[36] 15 U.S.C.A. § 78s(c) (Supp. Aug. 1975).

[37] The Commission may not register any exchange if its rules unnecessarily burden competition. 15 U.S.C.A. § 78f(b)(8) (Supp. Aug. 1975). Additionally, the Commission may not order an exchange to adopt or amend a rule unless it is satisfied the rule will not burden competition. *Id.* § 78w(a)(2).

[38] 422 U.S. 694 (1975).

[39] 15 U.S.C. § 78o-3 (1970), *as amended*, 15 U.S.C.A. § 78o-3 (Supp. Aug. 1975). The case also involved conflicts between the regulatory scheme over investment companies created by the Investment Company Act, 15 U.S.C. §§ 80a-1 *et. seq.* (1970), *as amended*, 15 U.S.C.A. §§ 80a-1 *et seq.* (Supp. Aug. 1975), and the antitrust laws. *See* note 40 *infra*.

[40] 422 U.S. at 730-32. The government also charged that certain mutual funds, mutual fund underwriters, and broker-dealers had contracted to maintain the public

reviewing the extent of the SEC's supervisory authority over NASD, the Court concluded that NASD's rules and its enforcement of them were exempt from antitrust scrutiny.[41]

The Court noted that the SEC had extensive authority over NASD.[42] The Commission controlled the registration of securities associations,[43] reviewed all proposed rules and rule changes,[44] and could

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offering price of a mutual fund share in brokerage transactions and to prohibit interdealer transactions in certain mutual fund shares. *Id.* at 702. After reviewing the legislative history of the Investment Company Act, the Court concluded that § 22(f) of the Act, 15 U.S.C. § 80a-22(f) (1970), immunized these agreements from antitrust attack. 422 U.S. at 706-30.

The Court noted that prior to the enactment of the 1940 Act, a principle feature of the mutual fund distribution system was the two-price system. *Id.* at 720-30. Inherent in this system were many abuses. Because the price of a mutual fund share was based on the net asset value of the share determined at the end of the previous trading day, an informed individual could calculate the present day's price and the following day's price. This individual could thus engage in riskless trading in a secondary market during the interim between the two trading days at the expense of the other shareholders. *Id.* at 706-09. Restrictions on the transferability of mutual fund shares were needed to eliminate the two-price distribution system. The Court concluded that Congress enacted § 22(f) to permit such restrictions, which were to be approved by the SEC. The Court held, therefore, that the section displaced the antitrust laws. *Id.* at 721-30. The Court also noted that because the section authorized the restrictions unless disapproved by the SEC, antitrust immunity was not dependent on exercise of the Commission's regulatory authority. *Id.* at 726. This aspect of the case is more fully discussed in Note, 44 FORD. L. REV. 355, *supra* note 14 at 359-63; Note, 9 Loyola U. L. Rev. 226, *supra* note 14 at 240-46.

[41] The Court stated that it saw "no meaningful distinction between the association's rules and the manner in which it construes and implements them." *Id.* at 733. The Court's rationale for this statement was that "[e]ach is equally a subject of SEC oversight." *Id.* However, though the SEC has authority to review, and disapprove, association rules, 15 U.S.C. § 78o-3(j) (1970), *as amended* 15 U.S.C.A. § 78s(b) (Supp. Aug. 1975), it does not have authority to review an association's proceedings under its rules except with respect to disciplinary proceedings. 15 U.S.C. § 78o-3(g) (1970), *as amended*, 15 U.S.C.A. § 78s(d) (Supp. Aug. 1975). But, an association may not adopt rules unless they meet strict requirements, 15 U.S.C. § 78o-3(b) (1970), *as amended*, 15 U.S.C.A. § 78o-3(b) (Supp. Aug. 1975), including a requirement that they "remove impediments to and perfect the mechanism of a free and open market." 15 U.S.C. § 78o-3(b)(8) (1970), *as amended*, 15 U.S.C.A. § 78o-3(b) (Supp. Aug. 1975). To the extent that the manner in which an association enforces its rules determines whether the rules satisfy these requirements, the SEC does review association interpretations and enforcements of its rules. *See* 15 U.S.C. § 78o-3(b) (1970), *as amended*, 15 U.S.C.A. § 78s(h) (Supp. Aug. 1975), which states that the "Commission may . . . suspend the registration of any association if it finds that the rules thereof do not conform to the requirements of this subsection . . . ."

[42] 422 U.S. at 730.

[43] 15 U.S.C. § 78o-3(b) (1970), *as amended*, 15 U.S.C.A. § 78o-3(b) (Supp. Aug. 1975). In particular, the SEC must be satisfied that the rules of an association are

order an association to adopt a new rule or amend an existing rule.[45] In addition, any SEC decision in these areas was based on the protection of the public interest which the Commission indicated included a consideration of the effects its decision would have on competition.[46] The Court concluded that this authority was sufficient to create a pervasive regulatory scheme over securities associations and evidenced a congressional intent "to lift the ban of the Sherman Act from association activities approved by the SEC."[47]

The *NASD* decision, unlike the *Gordon* decision, did not restrict its holding to a particular activity regulated by a specific statutory provision. Rather, based on a determination that the Maloney Act created a pervasive regulatory scheme, it implied antitrust immunity to all NASD activities.[48] By indicating what amount of authority

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designed "to protect investors and the public interest, and to remove impediments to and perfect the mechanism of a free and open market. . . ." 15 U.S.C. § 78o-3(b)(8) (1970).

[44] 15 U.S.C. § 78o-3(j) (1970), *as amended*, 15 U.S.C.A. § 78s(b) (Supp. Aug. 1975).

[45] 15 U.S.C. § 78o-3(k) (1970), *as amended*, 15 U.S.C.A. § 78s(c) (Supp. Aug. 1975).

[46] *See* National Ass'n of Sec. Dealers, Inc., 19 S.E.C. 424, 486-87 (1945). Many agencies and courts now consider antitrust factors as part of the public interest standard. *See* Baker, *Competition and Regulation: Charles River Bridge Recrossed*, 60 CORN. L. REV. 159, 162-63 (1975). *But see* United States v. NASD, 422 U.S. 694, 736-38 (1975) (White, J., dissenting).

[47] United States v. NASD, 422 U.S. 694, 733 (1975). The Court stated that to subject "activities so directly related to the SEC's responsibility" to an antitrust suit would impose two different standards for conduct on the NASD and repeal was thus necessary to reconcile the conflicting standards. *Id.* at 735.

The Court did not cite subsection (n), 15 U.S.C. § 78o-3(n) (1970), which states that "[i]f any provision of this section is in conflict with any provision of any law of the United States in force on June 25, 1938, the provision of this section shall prevail." One commentator has suggested that this section of the Maloney Act repeals the antitrust laws with respect to securities associations. Mazo, *Antitrust Courts Versus the SEC: A Functional Allocation of Decision Making Roles*, 12 HARV. J. LEGIS. 63, 80 (1974).

[48] A comparison of the two regulatory schemes involved in *Gordon* and *NASD* reveals that the Maloney Act authorized more extensive SEC regulation over securities associations than the unamended Exchange Act authorized over exchanges. Under the Maloney Act, the SEC could not register an association unless its rules removed impediments to and perfected "the mechanism of a free and open market." 15 U.S.C. § 78o-3(b)(8) (1970). The SEC, therefore, considered the effects on competition of an association's rules before registering it. The Exchange Act, on the other hand, did not require the SEC to consider antitrust factors before registering an exchange. *Id.* § 78f (1970). Additionally, the Maloney Act required an association to file with the SEC all proposed rules for Commission approval, *id.* § 78o-3(j), while under the Exchange Act an

constitutes a pervasive regulatory scheme, the Court constructed a standard which can be used in determining whether other regulatory schemes are pervasive. The elements of that standard are: (1) control of registration of the regulated organization, (2) authority to review and disapprove all proposed rules or rule changes, (3) power to order the adoption of any rule concerning any area of organization activity, or the amendment or deletion of any existing rule, and (4) consideration of antitrust factors as part of the basis for the regulatory agency's decision with respect to the above three elements.[49] Analysis of the 1975 Securities Acts Amendments under this standard indicates that the amendments have also created a pervasive regulatory scheme over exchanges.[50]

The 1975 Amendments include both securities exchanges and associations in one regulatory scheme,[51] which was modeled on the 1938 Maloney Act.[52] Under the amendments, the SEC controls the registration of exchanges,[53] reviews, and approves or disapproves all pro-

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exchange could adopt any rule as long as it was consistent with the rules and regulations of the Act and an exchange was not required to file proposed rules with the SEC. *Id.* § 78f(c). Finally, the Maloney Act authorized the SEC to review and change association rules concerning any area of association activity, *id.* § 78o-3(k), while the Exchange Act only authorized SEC review power to amend exchange rules in specifically defined areas. *Id.* § 78s(b).

[49] United States v. NASD, 422 U.S. 694, 730-33 (1975).

Dissenting, Justice White, joined by Justices Brennan, Douglas, and Marshall, criticized the majority holding on the ground "that, without more, agency power to approve, and [even] agency approval itself, do not confer antitrust immunity [upon regulated activity]." *Id.* at 741, (White, J., dissenting). He thought that repeal should only be implied when the agency is directed to consider effects on competition. *Id.* at 742-43. He stated:

> [S]uch an immunity can be implied only if Congress has clearly supplanted the antitrust laws and their model of competition with a differing competitive regime, defined by particularized competitive standards and enforced by an administrative agency . . . .

Id. at 743.

[50] The Securities Acts Amendments of 1975 direct the SEC to consider the effects on competition any association or exchange rule will have. *See* 15 U.S.C.A. §§ 78f(b)(8), 78o-3(b)(9) (Supp. Aug. 1975), which state that the SEC may not register any exchange or association whose rules unnecessarily burden competition, and *id.* § 78w(a)(2), which states that the SEC cannot order an exchange or association to adopt or amend a rule if it unnecessarily burdens competition. Therefore, it would seem that the amendments satisfy the criticisms of the NASD dissenters. *See* note 49 *supra*.

[51] *Compare* registration requirements, 15 U.S.C.A. § 78(f) (Supp. Aug. 1975) (exchanges) *with id.* § 78o-3(a)(b) (associations). Both registered exchanges and associations are regulated pursuant to § 19, *id.* § 78(s). *See also*, S. REP. No. 94-75, 94th Cong. 1st Sess. 127 (1975).

[52] S. REP. No. 94-75, 94th Cong., 1st Sess. 27 (1975).

[53] 15 U.S.C.A. § 78f (Supp. Aug. 1975).

posed exchange rules,[54] orders the exchange to adopt new rules or amend existing rules,[55] and considers anti-competitive factors when making decisions.[56] Thus, under *NASD*, the authority over exchanges vested in the SEC is sufficient to create a pervasive regulatory scheme. More important, however, is the indication in the legislative history of the amendments that Congress intended to repeal the antitrust laws' application to securities exchanges by creating a pervasive regulatory scheme.

The Senate Report on the amendments noted that a major purpose of the 1975 amendments was to increase competition in the securities markets.[57] Congress provided for this increased competition by "vesting in the SEC power to eliminate all unnecessary and inap-

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[54] *Id.* § 78s(b). No proposed rule or rule change may take effect unless approved by the SEC, *id.* § 78s(b)(1), subject to certain exceptions, *id.* § 78s(b)(3). Under the prior Maloney Act, an association's proposed rule or rule change would become effective in 13 days unless disapproved by the SEC. 15 U.S.C. § 78o-3(j) (1970). Thus, a rule might have become effective without the SEC ever affirmatively having approved the rule or exercised its jurisdiction. This was a major criticism of the NASD holding by the dissent. *See* 422 U.S. at 745 (White, J., dissenting). The amendments, by requiring the SEC to exercise its jurisdiction, would seem to satisfy this complaint, since the amendments have provided for the increased regulatory authority the dissenters thought was lacking to create a pervasive regulatory scheme. *See also* S. REP. NO. 94-75, 94th Cong., 1st Sess. 13 (1975), stating it was Congress' intent to obligate the SEC to exercise its power of approval.

[55] *Id.* § 78s(c).

[56] *Id.* §§ 78f(b)(8) (registering and approving exchange rules); § 78w(a)(2) (ordering exchange to adopt, amend, or delete rules). *See also* S. REP. No. 94-75, 94th Cong., 1st Sess. 14 (1975), which states that the amendments are "designed to force the Commission to focus with particularity on the competitive implications of each regulatory requirement."

[57] The goal of the 1975 amendments is to create a national market system, utilizing the latest communications and data processing facilities, that would

> provide fair and honest mechanisms for the pricing of securities, . . . assure that dealing in securities is fair and without undue preferences or advantages among investors, . . . ensure that securities can be purchased and sold at economically efficient transaction costs, and . . . provide, to the maximum degree practicable, markets that are open and orderly.

S. REP. No. 94-975, 94th Cong., 1st Sess. 3, 7-12 (1975). *See* 15 U.S.C.A. § 78k-1 (Supp. Aug. 1975); Werner, *Adventure in Social Control of Finance: The National Market System for Securities*, 75 COLUM. L. REV. 1233 (1975). Increased competition was viewed as a necessity to achieve these goals, and thus became a goal in itself. S. REP. No. 94-75, 94th Cong. 1st Sess. 12-14 (1975). Although competition was not the paramount purpose of the amendments, the Commission must balance the anticompetitive effects of any decision against the purposes of the amendments that would be furthered and the cost of doing so. *Id.* at 13-14.

propriate burdens on competition . . . ."[58] Additionally, the report states that SEC approval of an exchange rule "would constitute a determination . . . that the rule was within the permitted purposes . . . of the Exchange Act."[59] Finally, the Conference Report is further evidence that Congress intended securities exchange activity to be subject only to review within the regulatory scheme created by the amendments and not the antitrust courts. The conferees recognized that this new regulatory scheme would conflict with the antitrust laws. However, they were confident the courts would avoid actual conflicts. If the courts failed to reconcile the regulatory and competitive needs of the securities industry, the conferees noted that Congress would consider further legislation.[60]

Under either *NASD's* pervasive regulatory scheme analysis or *Gordon's* specific statutory provision analysis, the Securities Acts Amendments of 1975 have granted to the securities exchanges broad antitrust immunity. Because it only becomes necessary to consider whether particular exchange activity is exempted from the antitrust laws by a specific provision of the Exchange Act when it is determined that the Act has not created a pervasive regulatory scheme,[61] the courts should first analyze the amendments in light of *NASD*. Application of the *NASD* standard to the amendments indicates that securities exchanges are now subject to a pervasive regulatory scheme and thus exempt from the antitrust laws. Whether this regulatory scheme and the resulting antitrust immunity will frustrate the policy of the antitrust laws is not known.[62] However, the amendments and

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[58] S. REP. No. 94-75, 94th Cong., 1st Sess. 2, 13 (1975).

[59] *Id.* at 28.

[60] CONF. REP. No. 94-229, 94th Cong., 1st Sess. 100-01 (1975). Further evidence that Congress intends to grant the securities exchanges total antitrust immunity is that the amendments increased the scope of judicial review of SEC actions. Previously, an aggrieved party could appeal only an SEC order, 15 U.S.C. § 78y (1970), *see* PBW Stock Exchange, Inc. v. SEC, 485 F.2d 718, 723 (3rd Cir. 1974), *cert. denied*, 416 U.S. 969 (1974), but under the amendments, an aggrieved party may appeal both an order, 15 U.S.C.A. § 78y(a) (Supp. Aug. 1975), and a rule, *id.* § 78y(b), to the Federal Court of Appeals. Because the SEC is directed to consider antitrust factors in reaching any decision as to the propriety of exchange activity, the reviewing circuit court will also review the anti-competitive effects which the exchange's action will have. Thus, included with this new regulatory scheme is a judicial determination whether any exchange activity unnecessarily or inappropriately burdens competition. This provision for judicial review provides an alternative remedy to the antitrust courts and thus renders a separate antitrust suit superfluous. *See* Pan American World Airways, Inc. v. United States, 371 U.S. 296, 309 (1963); Gordon v. NYSE, 498 F.2d 1303, 1311 (2d Cir. 1974), *aff'd.* 422 U.S. 659 (1975); *cf.* Silver v. NYSE, 373 U.S. 341, 358 n.12 (1963).

[61] *See* Silver v. NYSE, 373 U.S. 341, 360-61 (1963).

[62] Under the prior regulatory scheme, the SEC did not always act affirmatively

their legislative history demonstrate that Congress chose the SEC and not the antitrust courts as the vehicle through which to regulate competition in the securities industry.

RUSSELL L. HEWIT

to insure competition. One commentator termed the SEC a "tame watchdog" and noted that the SEC had taken a passive, rather than an active, role in regulating securities exchanges. *See* Jennings, *Self-Regulation in the Securities Industry: The Role of the Securities and Exchange Commission*, 29 LAW AND CONTEMP. PROB. 663, 664-65 (1964). However, hopefully this will no longer be a problem. Under the amendments, the SEC must take an active rolė in regulating exchanges. *See* 15 U.S.C.A. § 78s(b) (Supp. Aug. 1975) (requiring SEC approval of exchange rules before it becomes effective); S. REP. No. 94-75, 94th Cong., 1st Sess. 13 (1975) (noting that amendments were to force SEC to exercise its authority).