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Barbara D. Gonzo

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**SEC REGULATION AS A PERVASIVE REGULATORY
SCHEME—IMPLIED REPEAL OF THE ANTITRUST
LAWS WITH RESPECT TO NATIONAL SECURITIES
EXCHANGES AND THE NASD**

I. INTRODUCTION

Where an industry is regulated pursuant to a federal statute, antitrust suits challenging certain practices in that industry may conflict with the scheme of regulation created by Congress. In such cases, the courts may hold that a "clear repugnancy" exists between the regulatory statute and the antitrust laws; that is, Congress, in passing the regulatory statute, impliedly repealed the antitrust laws.¹

Two recent Supreme Court decisions, *Gordon v. New York Stock Exchange, Inc.*² and *United States v. National Association of Securities Dealers, Inc.* (NASD),³ have examined the extent to which the Securities Exchange Act exempts the practices of self-regulatory organizations in the securities industry from antitrust challenge. The principal test in determining the extent to which the Act impliedly repealed antitrust laws with respect to the securities industry originated in *Silver v. New York Stock Exchange*,⁴ in which the Supreme Court held that "[r]epeal is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary."⁵ The *Silver* test, far from providing an answer, merely presents a guideline which *Gordon* and *NASD* attempted to follow when faced with questions regarding the activities of securities exchanges and the NASD.⁶

The issue to be examined in this Note is the extent to which, in light of these

1. See *Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 304 (1963); cf. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 351 (1963).

2. 95 S. Ct. 2598 (1975).

3. 95 S. Ct. 2427 (1975).

4. 373 U.S. 341 (1963).

5. *Id.* at 357.

6. Securities exchanges and the NASD, a securities association, are self-regulatory organizations, which develop their own rules to regulate and discipline members. They are in turn supervised by the Securities Exchange Commission pursuant to, respectively, the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78hh (1970), as amended, 15 U.S.C.A. §§ 78a-78kk (Supp. 4, 1975), and the Maloney Act, 15 U.S.C. § 78o-3 (1970), as amended, 15 U.S.C.A. § 78o-3 (Supp. 4, 1975).

A "self-regulatory organization" is defined as "any national securities exchange, registered securities association, or registered clearing agency . . ." Securities Exchange Act of 1934 § 3(a)(26), 15 U.S.C.A. § 78c(a)(26) (Supp. 4, 1975).

NASD is registered with the SEC pursuant to the Maloney Act, *supra*, which was passed to establish supervision of over-the-counter securities brokers and dealers through self-regulation. Choosing not to expand the SEC's regulatory power, Congress established a system whereby dealers and brokers were permitted to form associations which regulated their members. Such associations were to be registered with the SEC. NASD is the only association registered under the Maloney Act. 2 L. Loss, *Securities Regulation* 1361-62, 1365 (2d ed. 1961).

two cases, the securities acts as recently amended⁷ impliedly repeal the antitrust laws with respect to national securities exchanges and the NASD.

II. CASE LAW

Gordon v. New York Stock Exchange, Inc., dealing with the narrow area of fixed commission rates, held that securities exchange practices were exempt from antitrust challenge.⁸ Its companion case, *United States v. National Association of Securities Dealers, Inc.*, determined that the statutorily-mandated regulation of the NASD constitutes a "pervasive regulatory scheme," generally exempting practices of the NASD from the antitrust laws.⁹

In *Gordon*, plaintiff, individually and on behalf of a class of small investors, alleged that a New York Stock Exchange rule, requiring its members to charge fixed minimum commissions for transactions negotiated on the exchange, violated sections one and two of the Sherman Act.¹⁰ Fixed commissions,¹¹ which fall within the category of price fixing, are a per se violation of the Sherman Act.¹² The Supreme Court affirmed the decision of the court below dismissing the complaint.¹³ In so doing, the Court distinguished¹⁴ the interpretation of the *Silver* test set forth in *Thill Securities Corp. v. New York Stock Exchange*.¹⁵ In order to find an implied repeal of the antitrust laws, the court in *Thill* required *factual* proof that subjecting the exchange rule against rebates¹⁶ to antitrust attack would frustrate the purposes of the Exchange Act. Because there was no factual showing that the antirebate rule was necessary to make the Exchange Act work, the court found no implied repeal of the antitrust laws.¹⁷

7. Securities Acts Amendments of 1975, Pub. L. No. 94-29, §§ 1-30, 89 Stat. 97 (1975), codified in 15 U.S.C.A. §§ 78a-78kk (Supp. 4, 1975).

8. 95 S. Ct. 2598, 2615 (1975).

9. 95 S. Ct. 2427, 2450 (1975).

10. 15 U.S.C.A. §§ 1, 2 (Supp. 1, 1975), amending 15 U.S.C. §§ 1, 2 (1970). "Every contract, combination . . . in restraint of trade or commerce among the several States . . . is declared to be illegal . . ." Id. § 1. "Every person who shall monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony . . ." Id. § 2.

11. Fixed commissions are now prohibited pursuant to SEC Reg. 19b-3(a), 17 C.F.R. § 240.19b-3(a) (1975), which provides: "No national securities exchange ("exchange") shall adopt or retain any rule of that exchange that requires, or shall otherwise, directly or indirectly, require its members, or any person associated with its members, to charge any person any fixed rate or commission for transactions effected on, or effected by the use of the facilities of, such exchange." The provisions of this rule became effective generally on May 1, 1975; as to floor brokerage commissions they will become effective on May 1, 1976. Id. § 240.19b-3(e).

12. See *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927).

13. 95 S. Ct. at 2615, affirming 498 F.2d 1303 (2d Cir. 1974).

14. Id. at 2613-14.

15. 433 F.2d 264 (7th Cir. 1970), cert. denied, 401 U.S. 994 (1971).

16. The antirebate rule was an exchange rule which prohibited a member from sharing any of its commissions with nonmembers.

17. The court said: "[I]t must be established that subjecting the antirebate rule to antitrust attack will frustrate the purpose of the Securities Exchange Act or make it substantially

In *Gordon*, the Supreme Court did not consider it necessary to decide as a factual matter whether fixed commission rates were necessary for the smooth operation of the Exchange Act. Rather, the Court found controlling the legal question of 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."¹⁸ If permitting an antitrust suit would create conflicts, "antitrust immunity, as a matter of law, must be implied in order to permit the Exchange Act to function as envisioned by the Congress."¹⁹ The Court felt that the factual question of the wisdom of fixed commission rates would be relevant only if there were no antitrust immunity as a matter of law; that is, if there were no conflict between the antitrust laws and the regulatory scheme.²⁰

To permit attack upon fixed commission rates under the antitrust laws, the Court concluded, would conflict with the regulatory scheme established by Congress in the Securities Exchange Act of 1934. Therefore, the Court determined that under the *Silver* test an implied repeal of the antitrust laws was "necessary to make the Exchange Act work . . ."²¹ In so determining, the Court considered several factors: legislative history, the active SEC supervision of fixed commission rates, and Congress' extension of SEC control of fixed commission rates pursuant to the Securities Acts Amendments of 1975.²²

ineffective." 433 F.2d at 270. Defendant failed to establish that the Securities Exchange Act had impliedly repealed antitrust laws with respect to the antirebate rule since "there is no evidence as to why the antirebate rule must be preserved as 'necessary to make the Securities Exchange Act work.'" *Id.*, quoting *Silver v. New York Stock Exch.*, 373 U.S. 341, 357 (1963). Thus, the rule was held to be subject to antitrust challenge.

18. 95 S. Ct. at 2614. Significantly, the power of the SEC to establish the antirebate rule at issue in *Thill* was not expressly granted in the 1934 Act, whereas the power to fix reasonable rates of commission was so granted. *Id.* at 2613; see Securities Exchange Act of 1934 § 19(b), 15 U.S.C. § 78s(b)(9) (1970), as amended, 15 U.S.C.A. § 78s(b) (Supp. 4, 1975); note 23 *infra*.

19. 95 S. Ct. at 2614.

20. *Id.*

21. *Id.* at 2615.

22. The Court also noted that prior to the Securities Exchange Act of 1934, certain exchanges had the characteristics of monopolies, "not only in the area of commission rates but in a wide variety of other aspects, . . . [yet] remained essentially self-regulating and without significant supervision . . ." *Id.* at 2603. 16G J. von Kalinowski, *Antitrust Laws and Trade Regulation* § 54.02[1] (Business Organizations 1972), noted that prior to the 1934 Act stock exchanges "had the sole responsibility for regulating the transactions and conduct of their members. Total exemption from the antitrust laws was implied because of the function the exchanges served to provide for orderly markets." *Id.* (footnote omitted). The cases cited in support of this conclusion did not expressly exempt exchanges from the antitrust laws, but sometimes went to great lengths to determine that certain restrictive practices did not constitute combinations or conspiracies in restraint of trade. E.g., *Board of Trade v. United States*, 246 U.S. 231 (1918) (exchange rule prohibiting members from purchasing or offering to purchase grain between the close of a trading session and the opening of the exchange the next day at prices greater than the closing bid did not violate antitrust laws); *Board of Trade v. Christie Grain and Stock Co.*, 198 U.S. 236 (1905) (exchange's contracts with members restricting distribution of its information on commodity prices

Considering the legislative history of the 1934 Act, the Court found that the intent of section 19(b)²³ was to give the SEC the power to fix commission rates.²⁴ The Court also analyzed in detail²⁵ the fact that under this section the SEC had actively supervised fixed commission rates, culminating in its promulgation of Securities Exchange Act Rule 19b-3, which prohibited exchanges from requiring their members to charge a fixed rate of commission.²⁶ Since the SEC has actively exercised the jurisdiction given it by Congress, a finding of antitrust immunity was necessary to avoid subjecting exchanges and their members to conflicting interpretations of what constitutes legal conduct.²⁷

Finally, the Court discussed the effect of the Securities Acts Amendments of 1975, which, in amending section 19(b) of the 1934 Act, generally prohibited national securities exchanges from imposing any schedule of fixed commissions on or after June 4, 1975.²⁸ The Court observed that, despite this broad

did not represent an attempt at monopoly); *Anderson v. United States*, 171 U.S. 604 (1898) (exchange rules forbidding members to do business with nonmembers did not violate antitrust laws).

23. Securities and Exchange Act of 1934 § 19(b), 15 U.S.C. § 78s(b) (1970), as amended, 15 U.S.C.A. § 78s(b) (Supp. 4, 1975), provided: "The Commission is further authorized, if after making appropriate request in writing to a national securities exchange that such exchange effect on its own behalf specified changes in its rules and practices, and after appropriate notice and opportunity for hearing, the Commission determines that such exchange has not made the changes so requested, and that such changes are necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange, by rules or regulation or by order to alter or supplement the rules . . . in respect of such matters as . . . (9) the fixing of reasonable rates of commission, interest, listing, and other charges . . ."

24. 95 S. Ct. at 2604. The United States, as amicus curiae, argued that such congressional intent was not apparent: "[t]he statutory language itself does not require a fixed commission system. It says only that the SEC may require changes in rules respecting 'the fixing of reasonable rates of commission.'" Brief for United States as Amicus Curiae at 37, *Gordon v. New York Stock Exch., Inc.*, 95 S. Ct. 2598 (1975). The authority cited for this proposition, *Baxter, NYSE Fixed Commission Rates: A Private Cartel Goes Public*, 22 *Stan. L. Rev.* 675, 690 (1970), argued that section 19(b) "does not authorize the NYSE to do anything . . . [and] does not even advert to the possibility that the NYSE might fix minimum commission rates . . ."

25. 95 S. Ct. at 2604-11. In exercising its jurisdiction, the SEC considered effects on competition. Exchange Act Release No. 34-8239, 33 *Fed. Reg.* 2393 (Jan. 31, 1968), where the SEC, considering proposals of the New York Stock Exchange to alter its rules as to fixed commissions and give-ups, noted: "[a]ny consideration, both of these proposals and of the practices and procedures to which they relate, must include careful attention to their impact upon competition, including competition among securities firms, competition among markets and competition among institutional investors."

26. See note 11 *supra*.

27. 95 S. Ct. at 2614-15. Justice Douglas, concurring, said that mere delegation of authority to the SEC by specific statutory provision was not sufficient to confer antitrust immunity. Active exercise of the SEC's jurisdiction was essential in establishing an implied repeal of the antitrust laws. *Id.* at 2616 (Douglas, J., concurring). The NASD case, on the other hand, found that the SEC's exercise of its jurisdiction was not a prerequisite to an implied antitrust exemption. See text accompanying note 53 *infra*.

28. 15 U.S.C.A. § 78f(e)(1) (Supp. 4, 1975). The amendment further provided that exchanges could fix floor brokerage commissions until May 1, 1976. Thus, the statute does not conflict with rule 19b-3, promulgated by the SEC. See note 11 *supra*.

prohibition, the SEC was given power to permit an exchange to reinstitute rules fixing "reasonable rates of commissions" for transactions prior to November 1, 1976, if the SEC finds such rates to be "in the public interest,"²⁹ and for transactions after November 1, 1976, if the Commission finds that the fixed rates are "reasonable in relation to the costs of providing the service for which such fees are charged . . ."³⁰ and would "not impose any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter . . ."³¹ The Amendment further established a detailed procedure which the SEC must follow before it may decide to permit the reinstatement of fixed commission rates.³²

In a concurring opinion, Justice Stewart noted that "[a]n implied repeal of the antitrust laws may be found only if there exists a 'plain repugnancy between the antitrust and regulatory provisions.'" ³³ In his opinion, that "plain repugnancy" was apparent from examination of the very terms of section 19(b)(9) of the 1934 Act.³⁴ Justice White, in his dissent in *NASD*,³⁵ elaborated on this interpretation of *Gordon*—by stating that since Congress gave the SEC the power to fix reasonable rates of commissions long after price fixing was declared a per se violation of the Sherman Act, Congress' intent to exempt fixed commissions from the antitrust laws was clear.³⁶ Under this interpretation, in areas other than fixed commissions *Gordon* might have little precedential value in determining the extent of antitrust immunity in the securities industry; and in all probability, fixed commissions are a thing of the past.

NASD, on the other hand, may have considerably broader implications. This case involved the sale and distribution of shares in mutual funds.³⁷ The

29. 15 U.S.C.A. § 78f(e)(1)(A) (Supp. 4, 1975).

30. *Id.* § 78f(e)(1)(B)(i).

31. *Id.* § 78f(e)(1)(B)(ii). In determining whether or not fixed commission rates would impose an unnecessary burden on competition, the SEC must consider "the competitive effects of permitting such schedule or fixed rates weighed against the competitive effects of other lawful action which the Commission is authorized to take under this chapter." *Id.* Thus, the SEC must consider alternatives to fixed commission rates, and allow the reinstatement of such rates only as a last resort.

32. *Id.* § 78f(e)(4). The section also set forth bases for judicial review that are in addition to those specified in section 25(a). *Id.* § 78y(a). Thus, if a court of appeals finds that the Commission, in determining that an interested person is not entitled to cross-examination, or in limiting a petitioner's cross-examination or rebuttal submissions, "has precluded full disclosure and proper resolution of disputed issues of material fact" in the commission hearings, the court may set aside a commission order. *Id.* § 78f(e)(4)(E).

33. 95 S. Ct. at 2616 (Stewart, J., concurring), quoting *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 351 (1963).

34. "Congress [by the terms of section 19(b)(9)] . . . unmistakably determined that, until such time as the Commission ruled to the contrary, exchange rules fixing minimum commission rates would further the policies of the 1934 Act." 95 S. Ct. at 2616 (Stewart, J., concurring).

35. *Id.* at 2450 (1975) (White, J., dissenting).

36. *Id.* at 2453-54.

37. An investment company's business is to invest in the securities of other corporations. *Id.* at 2432. A mutual fund is an investment company that is required by law to redeem its securities on demand. To avoid liquidation through redemption, the mutual funds continuously

United States charged that various defendants, NASD, certain mutual funds, mutual-fund underwriters, and securities broker-dealers, exceeded statutory authorizations when they "agreed to restrict the sale and fix the resale prices of mutual-fund shares in secondary market transactions between dealers, from an investor to a dealer, and between investors through brokered transactions."³⁸ The government's complaint charged that principal underwriters and broker-dealers acting as brokers contracted to maintain the public offering price in secondary market transactions³⁹ and to prohibit interdealer transactions.⁴⁰

Two provisions of the Investment Company Act, heavily relied on by defendants to justify their conduct, restrict the secondary market in investment company shares. Section 22(d) states that "no dealer shall sell any [investment company] security to any person except a dealer . . . except at a current public offering price described in the prospectus."⁴¹ Section 22(f) intimates that a mutual fund could, under proper conditions, restrict the negotiability of its shares.⁴²

The district court dismissed the complaint, concluding that both section 22(d) and 22(f) authorized the conduct complained of. The lower court

issue new shares. The initial distribution of mutual fund shares is conducted by a principal underwriter. Broker-dealers contract with the underwriter to sell the securities to the public. A sales charge, or "load," is commonly added to the price of the securities in each sale to the public. Thus, the "public offering price" includes both the net asset value of the share and the "load." The principal underwriter and broker-dealers share the sales charge as compensation for their efforts. *Id.* at 2432-33. This initial distribution system, the primary market in mutual-fund shares, was not a subject of litigation. The controversy centered around a "potential secondary market in mutual-fund shares." *Id.* at 2433.

38. *Id.* The secondary market, and its possible advantages to investors, are described in Brief for Appellant at 8-10, *United States v. National Ass'n of Sec. Dealers, Inc.*, 95 S. Ct. 2427 (1975). First, "The secondary market consists of transactions in shares that have already passed through at least part of the primary distribution network. It includes an 'interdealer market' and a 'brokerage' market between investors." *Id.* at 8. Broker-dealer firms trade with other dealers in mutual fund shares. Thus, dealers with customers wishing to buy or sell shares can go to these firms. Since section 22(d) of the Investment Company Act, 15 U.S.C. § 80a-22(d) (1970), requires all dealer sales to investors to be at the public offering price, this market does not generally produce any advantage to an investor wishing to buy shares. But where an investor is willing to sell, a dealer may be willing to pay him more than the net asset value, the price at which the fund is required to redeem the shares.

Secondly, brokerage transactions, in which investors sell to each other through brokers, could provide an opportunity for negotiated prices, and perhaps benefit both the buying and the selling investor. Investors in such transactions could save the sales charge that must be paid to the broker-dealer in a transaction on the primary market. Brief for Appellant, *supra* at 9-10.

39. 95 S. Ct. at 2433. The government charged that this was accomplished by vertical restrictions on various secondary market activities. *Id.* at 2434.

40. *Id.* at 2433-34.

41. 15 U.S.C. § 80a-22(d) (1970) (emphasis added).

42. *Id.* § 80a-22(f) (1970), which provides: "No registered open-end [mutual fund] company shall restrict the transferability or negotiability of any security of which it is the issuer except in conformity with the statements with respect thereto contained in its registration statement nor in contravention of such rules and regulations as the Commission may prescribe in the interest of the holders of all of the outstanding securities of such investment company." See note 46 *infra* and accompanying text.

reasoned that section 22(d) applied to transactions where broker-dealers acted as brokers; that is, that section 22(d) required broker-dealers to maintain the public offering price in sales where they acted as brokers.⁴³ Furthermore, it concluded that section 22(f) also authorized restrictions such as those at issue in the case.⁴⁴

The Supreme Court affirmed the holding of the district court, but in doing so rejected the district court's interpretation of 22(d). Section 22(d), the Supreme Court concluded, did not mandate price maintenance in transactions where broker-dealers acted only as brokers.⁴⁵ The Court accepted the district court's interpretation of 22(f), finding that the section authorized restrictions on the distribution of mutual-fund shares, where such restrictions were set forth in the registration statement filed with the SEC, and did not violate SEC rules and regulations.⁴⁶

This conclusion was based on a consideration of the legislative history of the Investment Company Act.⁴⁷ A principal feature of the investment company share distribution system prior to the passage of the Investment Company Act was the "two-price system." The price of a mutual fund share traditionally was based on the net asset value at the end of the last trading day. Thus, an informed individual who knew the net asset value of the mutual fund shares at the end of the trading day knew the sales price that would go into effect the following day.⁴⁸ Using this advance information, the dealer could reap a profit by judiciously buying from distributors or investors, and reselling to investors the following day.⁴⁹ The investor was adversely affected by this practice. He could not engage in the practice himself because he was required to pay a sales charge when buying shares.⁵⁰ Because the investor's initial purchase price was higher, it would be difficult for him to make a profit from buying and selling shares. In addition, all investors holding shares in the mutual fund suffered a diminution in the net asset value of their shares, since the investment company, as a result of the "two-price system," received less for its shares than the net asset value at the time of sale.⁵¹ Therefore restrictions on distribution of mutual fund shares

43. *In re Mutual Fund Sales Antitrust Litigation*, 374 F. Supp. 95, 104-06 (D D.C. 1973), *aff'd sub. nom. United States v. National Ass'n of Sec. Dealers, Inc.*, 95 S. Ct. 2427 (1975).

44. *Id.* at 108-09.

45. 95 S. Ct. at 2439-42.

46. *Id.* at 2443. The Court rejected the government's argument that the only restrictions which fall within the ambit of section 22(f) are those which appear on the face of the certificate. *Id.* at 2444-47. Brief for Appellant at 46-47, *United States v. National Ass'n of Sec. Dealers, Inc.*, 95 S. Ct. 2427 (1975).

47. 95 S. Ct. at 2435-36.

48. *Id.* at 2437.

49. SEC, Report on Investment Trusts and Investment Companies pt. III, at 861-63 (1940).

50. See note 37 *supra*.

51. SEC, Report on Investment Trusts and Investment Companies pt. III, at 865-66 (1940). The investment company would receive less because at a time when the net asset value and thus the price of the shares were advancing, dealers would be buying shares from the initial distributor at a price based on the previous day's lower net asset value.

were sorely needed. The Court determined that section 22(f) was enacted precisely to permit such controls, which were to be supervised exclusively by the SEC. Moreover, the Court held that the existence of an antitrust exemption for agreements or controls conforming to the provisions of section 22(f) did not depend on whether or not the SEC exercised its regulatory powers, since "[b]y its terms, § 22(f) authorizes properly disclosed restrictions . . . subject to Commission disapproval."⁵² Moreover, SEC approval could be inferred from its silence, since, in the Court's determination, silence represented an SEC judgment that "the contractual restrictions employed by the funds to protect their shareholders were appropriate means for combatting the problems of the industry."⁵³

Finally, the Court considered the question of whether NASD restrictions on secondary market activities, through its rules, interpretations thereof, and information distributed to its members, were exempt from antitrust challenge.⁵⁴ Because section 22(d) and 22(f) did not apply in this instance,⁵⁵ the Court was required to broaden its inquiry. It concluded that the NASD restrictions were exempt from the antitrust laws since, under the Maloney Act,⁵⁶ SEC authority over the NASD constituted a "pervasive" regulatory scheme.⁵⁷ The Court noted that the Maloney Act required the NASD to submit any proposed rule changes to the SEC for approval;⁵⁸ and that, in addition, the SEC could request changes in association rules, and order such changes if its requests were not complied with.⁵⁹ The Court approved of the manner in which the SEC had exercised its authority over association

52. 95 S. Ct. at 2446. Compare *id.* with *Gordon v. New York Stock Exch., Inc.*, 95 S. Ct. 2598, 2616 (1975) (Stewart, J., concurring); see notes 33-34 *supra* and accompanying text.

53. 95 S. Ct. at 2447; see note 27 *supra*.

54. 95 S. Ct. at 2448. The complaint charged that the NASD and its members established and maintained rules inhibiting the development of a secondary or brokerage market, established and maintained rules which induced broker-dealers to enter restrictive sales agreements with principal underwriters, discouraged persons from participating in a brokerage market and suppressed market quotations to prevent their use in the secondary dealer market. *Id.* at 2448 n.42.

55. The precise nature of the allegations by the government in its first count, see note 54 *supra*, was obscured by appellant's concessions in both the district court and the Supreme Court. Nonetheless, the Court stated that it was "clear" that neither sections 22(d) nor 22(f) required or authorized the conduct complained of. 95 S. Ct. at 2448.

56. 15 U.S.C. § 78o-3 (1970), as amended, 15 U.S.C.A. § 78o-3 (Supp. 4, 1975).

57. 95 S. Ct. at 2450. The Court did not mention subdivision (n) of the Act, which provided 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." 15 U.S.C. § 78o-3(n) (1970), as repealed, Securities Acts Amendments of 1975, Pub. L. No. 94-29, § 12(3), 89 Stat. 128 (1975). Observers argued that this provision conferred antitrust immunity on the NASD. *Mazo, Antitrust Courts Versus The SEC: A Functional Allocation of Decisionmaking Roles*, 12 *Harv. J. Legis.* 63, 80 (1974) [hereinafter cited as *Mazo*].

58. 15 U.S.C. § 78o-3(j) (1970), as repealed, Securities Acts Amendments of 1975, Pub. L. No. 94-29, § 12(3), 89 Stat. 128 (1975), and re-enacted in 15 U.S.C.A. § 78s(b)(1) (Supp. 4, 1975).

59. *Id.* § 78o-3(k)(2).

practices and rules by balancing the interests of shareholders with the need to protect the public.⁶⁰

The ultimate holding of the *NASD* case appears to be that NASD activities should be accorded a broad antitrust exemption.⁶¹ Moreover, by indicating that the grant of jurisdiction to the SEC (as in section 22(f) of the Investment Company Act) in itself can establish an implied repeal of the antitrust laws, the Court expanded beyond previous interpretations the concept of implied antitrust exemption.⁶²

Congressional intent determines whether a regulatory statute confers antitrust immunity upon those activities regulated by the statute.⁶³ Where the statute does not grant the regulatory agency jurisdiction to control a challenged practice, generally no congressional intent to confer an exemption can

60. 95 S. Ct. at 2449. The Court noted that both the Maloney and Investment Company Acts conferred broad regulatory authority on the SEC to foster competition, and that the Commission had not failed to exercise this authority. *Id.* at 2450. The Maloney Act required, as a condition for registration of a securities association, that the association's rules be designed "to remove impediments to and perfect the mechanism of a free and open market; and are not designed to permit unfair discrimination between customers or issuers, or brokers or dealers, to fix minimum profits, to impose any schedule of prices, or to impose any schedule or fix minimum rates of commissions, allowances, discounts, or other charges." 15 U.S.C. § 78o-3(b)(8) (1970), as amended, 15 U.S.C.A. § 78o-3(b)(6) (Supp. 4, 1975).

61. In *Silver v. New York Stock Exch.*, 373 U.S. 341, 358 (1963), where the exchange cut off plaintiff's private wires pursuant to its rules, there was no antitrust exemption since the application of an exchange rule, and not the rule itself, was being challenged. The Court held that the SEC had no authority over the specific activity challenged. "[T]he Commission's lack of jurisdiction over particular applications of exchange rules means that the question of antitrust exemption does not involve any problem of conflict . . . with the agency's regulatory power." *Id.* In the *NASD* case, on the other hand, the Court found that SEC jurisdiction over NASD rules created a pervasive regulatory scheme encompassing both rules and applications thereof in the antitrust exemption. 95 S. Ct. at 2449.

62. Justice White, whom Justices Douglas, Brennan and Marshall joined in dissent to the *NASD* holding, warned: "Under that holding, in light of the context of this case, implied antitrust immunity becomes the rule where a regulatory agency has authority to approve business conduct whether or not the agency is directed to consider antitrust factors in making its regularity [sic] decisions and whether or not there is other evidence that Congress intended to displace judicial with administrative antitrust enforcement." 95 S. Ct. at 2451 (White, J., dissenting).

63. 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); *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 218-20, modified, 383 U.S. 932 (1966); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 352 (1963); *Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 304-05 (1963); *California v. FPC*, 369 U.S. 482, 485 (1962); *Maryland & Va. Milk Producers Ass'n, Inc. v. United States*, 362 U.S. 458, 466-67 (1960); *United States v. Radio Corp. of America*, 358 U.S. 334, 346 (1959); *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 457 (1945); *McLean Trucking Co. v. United States*, 321 U.S. 67, 79 (1944); *United States v. Borden Co.*, 308 U.S. 188, 201 (1939); *Keogh v. Chicago & Nw. Ry.*, 260 U.S. 156, 163 (1922). Congressional intent may determine whether antitrust immunity is conferred even when the legislative history is "unediting and unilluminating," when the language of the statute itself is "unambiguous." *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 315-16 (1956).

be found.⁶⁴ Similarly, where the regulatory statute provides an express exemption from the antitrust laws, congressional intent is clear⁶⁵ and the jurisdiction of the agency is strictly construed.⁶⁶ For example, in *California v. FPC*,⁶⁷ the Court set aside a Commission order approving a merger,⁶⁸ holding that the FPC could not confer an immunity from the antitrust laws, under section seven of the Natural Gas Act,⁶⁹ at least until such time as a pending antitrust suit under section seven of the Clayton Act⁷⁰ was resolved in federal court.⁷¹

Similarly, where the regulatory statute expressly provides that agency approval of an action will exempt that action from antitrust challenge, the agency must act before immunity arises. Thus, in *United States v. Borden Co.*,⁷² defendants could not rely on a provision of the regulatory statute⁷³ which expressly exempted marketing agreements approved by the Secretary of Agriculture from the antitrust laws, since the agreement had not been acted on by the Secretary.⁷⁴

64. *Silver v. New York Stock Exch.*, 373 U.S. 341, 358-59 (1963). In *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 460 (1945), Georgia sought to enjoin a railroad conspiracy to fix noncompetitive rates which discriminated against sections of Georgia. The state sought only to enjoin the conspiracy, not to set aside ICC approved rate schedules. Since the ICC had no authority over any conspiracy, the injunction was granted. *Id.* at 460-61. The Court, *id.* at 453, distinguished *Keogh v. Chicago & Nw. Ry.*, 260 U.S. 156 (1922), where plaintiff challenged a similar conspiracy but sought damages instead of an injunction. Since the prayer for damages was an attack on the ICC approved rates themselves, relief was denied. The Court in *Keogh* determined that an antitrust exemption was necessary to preserve the ICC's congressionally established regulatory authority. 260 U.S. at 163.

65. *McLean Trucking Co. v. United States*, 321 U.S. 67, 73-79 (1944). In *McLean*, petitioner's demand to set aside an ICC approval of a merger as inimical to competition was rejected, since section 5(11) of the Interstate Commerce Act provided that persons participating in a "transaction approved or authorized under the provisions of this section . . . are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law . . ." *Id.* at 73-76 & n.7.

66. See *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973); *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 217-18 (1966); *California v. FPC*, 369 U.S. 482, 485 (1962); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 316 (1956); *United States v. Borden Co.*, 308 U.S. 188, 198 (1939).

67. 369 U.S. 482 (1962).

68. *Id.* at 490.

69. 15 U.S.C. § 717f(c) (1970).

70. *Id.* § 18 (1970).

71. 369 U.S. 482, 490. The merger involved acquisitions of both stocks and assets, but was approved pursuant to a statutory provision applicable only to the acquisition of assets. The Court noted that "[i]f that administrative action were approved, the Commission would be allowed to do by indirection what it has no jurisdiction to do directly." *Id.*

72. 308 U.S. 188 (1939).

73. Agricultural Marketing Agreement Act of 1937, § 8(b), 7 U.S.C. § 608(b) (1970).

74. 308 U.S. at 201-02. In *Borden*, the Court concluded that "[t]hese explicit provisions [of the statute] requiring official participation and authorizations show beyond question how far Congress intended . . . to render the Sherman Act inapplicable. If Congress had desired to grant any further immunity, Congress doubtless would have said so." *Id.* at 201. This statement intimates that where Congress grants an express antitrust exemption, the courts cannot find an

Where no express statutory provision confers antitrust immunity on the challenged activity, the courts consider a number of factors in determining congressional intent.⁷⁵ Legislative history is evidence of the extent to which Congress viewed competition, or the lack thereof, as necessary for the smooth functioning of the industry. In *Otter Tail Power Co. v. United States*,⁷⁶ the Court held that FPC regulation did not exempt power companies from the antitrust laws, and noted that the legislative history of the Federal Power Act "indicates an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest."⁷⁷ In *Pan American World Airways, Inc. v. United States*,⁷⁸ on the other hand, the Court used the same type of analysis and found an implied exemption; it noted that Congress, in enacting the regulatory statute involved,⁷⁹ wanted to put an end to destructive competition.⁸⁰

Another important factor is the extent to which the statute requires the regulatory agency to consider the antitrust laws and effects on competition when making its determinations. If the regulatory statute requires the agency to consider only if its action is in the "public interest"⁸¹ and not potential effects on competition, the courts tend to find no antitrust immunity.⁸² In *Otter Tail*, where defendant power company was charged with antitrust violations for refusing to sell power wholesale to other power companies, defendants claimed that since the FPC had jurisdiction over such actions an implied antitrust exemption was applicable. In deciding whether to exercise its jurisdiction, the FPC was required to consider only whether its action was "necessary or appropriate in the public interest."⁸³ Therefore, the Court concluded, there was no indication in this instance that Congress, by granting

additional implied exemption from the antitrust laws in those instances where the express exemption does not apply. But see *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363 (1973); *Pan American World Airways, Inc. v. United States*, 371 U.S. 296 (1963).

75. See, e.g., *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374 (1973); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 352 (1963); *Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 301 (1963); *United States v. Radio Corp. of America*, 358 U.S. 334, 339-46 (1959).

76. 410 U.S. 366 (1973).

77. *Id.* at 374.

78. 371 U.S. 296 (1963).

79. Federal Aviation Act, 49 U.S.C. § 1301 et seq. (1970).

80. 371 U.S. at 301.

81. The distinction is not a clear cut one. The courts have held that an agency, in considering whether it is acting in the public interest, must examine effects on competition. *Baker, Competition and Regulation: Charles River Bridge Recrossed*, 60 Cornell L. Rev. 159, 162 (1975); see *Gulf States Util. Co. v. FPC*, 411 U.S. 747 (1973); *Federal Maritime Comm'n v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968); *Denver & R.G.W.R.R. v. United States*, 387 U.S. 485 (1967); *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 90 (1953); Note, *Antitrust and the Securities Industry: Lessons from the Shipping Industry*, 55 Cornell L. Rev. 96, 107 (1969).

82. See, e.g., *Otter Tail Power Co. v. United States*, 410 U.S. 366, 373-75 (1973); *United States v. Radio Corp. of America*, 358 U.S. 334, 350-52 (1959); *Macom Prod. Corp. v. American Tel. & Tel. Co.*, 359 F. Supp. 973, 976 (C.D. Cal. 1973).

83. 410 U.S. 366, 373 (1973), quoting 16 U.S.C. § 824a(b) (1970).

the FPC jurisdiction, intended to exempt defendants from the antitrust laws.⁸⁴

The fact that the regulatory agency is required to consider the effects on competition does not necessarily mean that the agency has exclusive jurisdiction; antitrust remedies in the courts may also be available. If, for example, the regulatory agency is "not required to give [antitrust] factor[s] any particular weight [or to] hold a hearing . . . and there is no specific provision for judicial review of [its] decision[s],"⁸⁵ the mere fact that the agency is required to consider effects on competition is not determinative.⁸⁶

A third factor in determining congressional intent is whether the regulatory statute creates a pervasive regulatory scheme over the industry which is the subject of an antitrust suit.⁸⁷ Where there is no pervasive system of regulation, there is little likelihood that the holding of a court in an antitrust suit would conflict with the determination of the administrative agency. Thus, the regulatory statute and the antitrust laws may be reconciled, and no implied antitrust exemption is necessary.⁸⁸ On the other hand, where, as in the *NASD* case, the activity challenged falls within a pervasive regulatory scheme, one may assume that it was Congress' intent to exempt that activity from the operation of the antitrust laws.⁸⁹

In *Silver v. New York Stock Exchange*,⁹⁰ the Court concluded that the Securities Exchange Act did not create a pervasive regulatory scheme, at least with respect to securities exchanges.⁹¹ Therefore, the Court was required to consider further whether a limited implied antitrust exemption extended to the specific acts challenged in the complaint.⁹² In *Gordon*, where the rules and practices of securities exchanges were also involved, a specific statutory provision created SEC jurisdiction over the rule in question. Thus, the Court in *Gordon* did not have to reach the broad question of whether SEC control

84. 410 U.S. at 373-74.

85. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 351 (1963) (footnote omitted). The extent of judicial review is a factor to be considered. If the plaintiff can seek relief from the administrative agency, and judicial review of its determination is available, the court is more likely to dismiss the antitrust suit, and advise plaintiff to seek relief from the administrative agency. See *Gordon v. New York Stock Exch., Inc.*, 498 F.2d 1303, 1311 (2d Cir. 1974), *aff'd*, 95 S. Ct. 2598 (1975).

86. 374 U.S. at 351-52.

87. *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374 (1973); *United States v. Radio Corp. of America*, 358 U.S. 334, 350 (1959).

88. See *Silver v. New York Stock Exch.*, 373 U.S. 341, 358 (1963).

89. 95 S. Ct. at 2450.

90. 373 U.S. 341 (1963).

91. *Id.* at 360-61.

92. *Id.* at 357. Plaintiff alleged that defendant violated Sherman Act sections 1 and 2, 15 U.S.C. §§ 1-2 (1970), as amended, 15 U.S.C.A. §§ 1-2 (Supp. 1, 1975), when it cut off plaintiff's private wires without notice. 373 U.S. at 345. The Court found no antitrust exemption applicable. The action challenged was not an exchange rule itself, but the application thereof, which did not fall within the jurisdiction of the SEC. *Id.* at 357-60.

Where the SEC has no jurisdiction over the subject of the suit, it is generally agreed that no antitrust immunity applies. Cf. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 135 (1973). See note 64 *supra* and accompanying text.

over the rules of the exchange constituted a pervasive regulatory scheme.⁹³ Since the Court did not have to decide that exchange rules were pervasively regulated, *Gordon* did not foreclose the possibility of antitrust challenge of other exchange rules in the courts.⁹⁴

But the *NASD* case, in finding a pervasive regulatory scheme,⁹⁵ perhaps foreclosed that possibility with respect to both NASD rules and their applications. The decision in the *NASD* case was based in part on the Maloney Act,⁹⁶ which, prior to the Securities Acts Amendments of 1975, arguably authorized more extensive SEC regulation over securities associations than the Securities Exchange Act of 1934 authorized over securities exchanges. The Court observed⁹⁷ that the Maloney Act charged the SEC with the protection of both the public interest and the interests of shareholders⁹⁸ while the Exchange Act, prior to the recent amendments, only required the SEC to "insure fair dealing and to protect investors."⁹⁹ Moreover, the Maloney Act, unlike the Securities Exchange Act of 1934, required that the SEC register only those securities associations whose rules "remove impediments to and perfect the mechanism of a free and open market; and are not designed to permit unfair discrimination . . . to fix minimum profits, to impose any schedule of prices, or to impose any schedule or fix minimum rates of commissions . . ." ¹⁰⁰ Therefore, before registering a securities association, the SEC was required to consider effects on competition;¹⁰¹ but similar provisions did not appear in that part of the statute delineating the SEC's regulatory authority over registered exchanges.¹⁰² In addition, a securities association was required to file any changes in its rules with the SEC,¹⁰³ which also was authorized to abrogate any rule of a registered securities association.¹⁰⁴ Until 1975, SEC authority over exchange rules under Securities Exchange Act section 19(b) was more narrowly circumscribed. Section 19(b) expressly authorized the SEC to effectuate changes in exchange rules in certain enumerated areas, and then only after the exchange had failed to comply with SEC requests that it effectuate such changes on its own behalf.¹⁰⁵

Under the Securities Acts Amendments of 1975, the provisions for regula-

93. 95 S. Ct. at 2614.

94. An earlier lower court case, however, stated that since the SEC has jurisdiction over exchange rules, the SEC has exclusive jurisdiction. See *Kaplan v. Lehman Bros.*, 250 F. Supp. 562, 566 (N.D. Ill. 1966), *aff'd*, 371 F.2d 409 (7th Cir.), *cert. denied*, 389 U.S. 954 (1967).

95. 95 S. Ct. at 2449.

96. *Id.* The Court also relied on its reading of the Investment Company Act of 1940, 15 U.S.C. §§ 80a-1 to -52 (1970); see notes 41-53 *supra* and accompanying text.

97. 95 S. Ct. at 2449.

98. See 15 U.S.C. § 78o-3(b)(8) (1970), as amended, 15 U.S.C.A. § 78o-3(b)(6) (Supp. 4, 1975).

99. *Id.* § 78f(d) (1970), as amended, 15 U.S.C.A. § 78f(d) (Supp. 4, 1975).

100. *Id.* § 78o-3(b)(8) (1970), as amended, 15 U.S.C.A. § 78o-3(b)(6) (Supp. 4, 1975).

101. See notes 81-86 *supra* and accompanying text.

102. See 15 U.S.C. § 78f (1970), as amended, 15 U.S.C.A. § 78f (Supp. 4, 1975).

103. *Id.* § 78o-3(j) (1970), as repealed, Pub. L. 94-29, § 12(3), 89 Stat. 128 (1975), and re-enacted in 15 U.S.C.A. § 78s(b) (Supp. 4, 1975).

104. *Id.* § 78o-3(k)(1) (1970), as repealed, Pub. L. 94-29, § 12(3), 89 Stat. 128 (1975), and re-enacted in 15 U.S.C.A. § 78s(c) (Supp. 4, 1975).

105. *Id.* § 78s(b), as amended, 15 U.S.C.A. § 78s(b) (Supp. 4, 1975).

tion of securities exchanges and associations now are substantially the same, and are patterned after those contained in the Maloney Act.¹⁰⁶ Arguably certain of these amendments encompass securities exchanges within a pervasive regulatory scheme.

III. THE SECURITIES ACTS AMENDMENTS OF 1975

The legislative history of the amendments indicates that the changes were a reaction to a "languor" in the securities industry, which Congress felt was caused by unnecessary restraints on competition, and unnecessary barriers to free trading.¹⁰⁷ The goal of the amendments was to create a "national market system" which would maximize both the ability of securities markets to absorb trading imbalances and the opportunity of the investor to buy and sell his securities to his greatest advantage;¹⁰⁸ ideally this goal was to be achieved through the use of the latest communications and data processing equipment, and by encouraging competition.¹⁰⁹

As noted in the Conference Report, Congress for the most part adopted the Senate's version of the amendments, which gave the SEC greater discretion in setting up this "national market system" than would have been granted by the House version.¹¹⁰ To resolve the problem of "the absence of effective control of market developments and operations by the [SEC],"¹¹¹ Congress granted the SEC the power to break down barriers to competition.¹¹² It is submitted that Congress intended to stimulate competition in the securities industry by establishing pervasive regulation by the SEC.¹¹³

The amendments to the Maloney Act, which amplify requirements that the SEC consider effects on competition when registering a securities association, are further indication that Congress intended to displace the antitrust laws with a pervasive scheme of SEC regulation. Presumably to stimulate competi-

106. See Securities Exchange Act §§ 6, 19, 15 U.S.C.A. §§ 78f, 78s (Supp. 4, 1975). The amendments require the SEC, in regulating exchanges and associations, to consider effects on competition, see 15 U.S.C.A. § 78f(b)(8) (Supp. 4, 1975), and to provide for substantially uniform regulation over each. See Pt. III *infra*.

107. S. Rep. No. 94-75, 94th Cong., 1st Sess. 1 (1975).

108. *Id.* at 7. H. Conf. Rep. No. 94-229, 94th Cong., 1st Sess. 91-92 (1975), elaborated on the goals of the amendments: "[t]o provide fair and honest mechanisms for the pricing of securities, to assure that dealing in securities is fair and without undue preferences or advantages among investors, to insure that securities can be purchased and sold at economically efficient transaction costs, and to provide, to the maximum degree practicable, markets that are open and orderly."

109. S. Rep. No. 94-75, 94th Cong., 1st Sess. 8 (1975); see Securities Exchange Act of 1934 § 11A, 15 U.S.C.A. § 78k-1 (Supp. 4, 1975).

110. H. Conf. Rep. No. 94-229, 94th Cong., 1st Sess. 92 (1975).

111. S. Rep. No. 94-75, 94th Cong., 1st Sess. 1 (1975).

112. *Id.* at 2.

113. The Conference Report, recognizing that under the new statute antitrust challenges to rules of self-regulatory organizations in the courts could subject such rules to conflicting standards, warned that if the courts could not reconcile antitrust laws with the regulatory statute, further legislation would be in order. H. Conf. Rep. No. 94-229, 94th Cong., 1st Sess. 100-01 (1975).

tion, the Maloney Act limits a securities association's authority to promulgate restrictive regulations and provides that a securities association shall not be registered by the SEC if its rules regulate "matters not related to the purposes of this chapter or the administration of the association."¹¹⁴ Moreover, the SEC may not register a securities association whose rules "impose any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter."¹¹⁵

However, the most significant change is that, by virtue of the amendments, securities associations and exchanges are now subject to substantially the same regulatory scheme.¹¹⁶ The amended section 19 of the Securities Exchange Act,¹¹⁷ delineating the SEC's regulatory power, now applies to both securities associations and exchanges. The amended version of section six of the Securities Exchange Act,¹¹⁸ relating to the registration of securities exchanges, is also substantially similar to the amended provisions of the Maloney Act.¹¹⁹

The new regulatory scheme, embracing both the NASD and securities exchanges, extends the power of the SEC, allows for greater participation by interested parties in SEC decisions, and presents greater opportunities for judicial review of SEC determinations, most notably with respect to rules and regulations promulgated by the NASD and securities exchanges.¹²⁰

114. Securities Exchange Act of 1934 § 15A(b)(6), 15 U.S.C.A. § 78o-3(b)(6) (Supp. 4, 1975).

115. *Id.* § 15A(b)(9), 15 U.S.C.A. § 78o-3(b)(9) (Supp. 4, 1975). The amendments also limit an association's power to restrict its membership. Under the old law, an association could restrict its membership on a "specified geographical basis," 15 U.S.C. § 78o-3(b)(3) (1970), or in accordance with "specified and appropriate standards with respect to the training, experience, and such other qualifications of such person as the association finds necessary or desirable. . . ." *Id.* § 78o-3(b)(5). The amendments, on the other hand, specifically delineate those grounds for which a registered securities association may deny a registered broker or dealer membership, 15 U.S.C.A. § 78o-3(g) (Supp. 4, 1975), and also provide "[t]hat no registered securities association may deny membership to a registered broker or dealer by reason of the amount of such type of business done by such broker or dealer or the other types of business in which he is engaged." *Id.* § 78o-3(g)(4).

116. See note 106 *supra* and accompanying text.

117. 15 U.S.C.A. § 78s (Supp. 4, 1975).

118. *Id.* § 78f (Supp. 4, 1975).

119. Compare Securities Exchange Act of 1934 § 6, 15 U.S.C.A. § 78f (Supp. 4, 1975) with *id.* § 15A(a)-(b), 15 U.S.C.A. § 78o-3(a)-(b) (Supp. 4, 1975).

120. The only significant difference is related to restrictions on membership. Securities Exchange Act of 1934 § 15A(b)(3), 15 U.S.C.A. § 78o-3(b)(3) (Supp. 4, 1975), provides that any registered broker or dealer may be a member of a securities association, subject to certain listed limitations. Section 6(c)(4), 15 U.S.C.A. § 78f(c)(4) (Supp. 4, 1975), applicable to securities exchanges, provides generally that an exchange may limit the number of its members. The Senate Report notes that these differences are of historical origin. S. Rep. No. 94-75, 94th Cong., 1st Sess. 25 (1975).

Under the new law, the Commission must publish notice of a national securities exchange or association's application for registration and offer "interested persons an opportunity to submit written data, views, and arguments concerning such applications." Securities Exchange Act of 1934 § 19(a)(1), 15 U.S.C.A. § 78s(a)(1) (Supp. 4, 1975). The amendments also provide that if the self-regulatory organization imposes any disciplinary sanction on a member, or limits any person's access to the services provided by the organization, it must notify the SEC; such sanction is subject to

Prior to the amendment, exchanges were not specifically required to submit copies of their rule changes to the SEC for approval.¹²¹ A securities association was required to file proposed changes in its rules with the SEC¹²² and if the SEC did not, by order, disapprove of the rule, the rule would go into effect after thirty days.¹²³ Since a decision by the SEC to refrain from taking an action is not reviewable in the courts,¹²⁴ the SEC could foreclose the possibility of judicial review by allowing a rule to go into effect without its approval.¹²⁵ Under the new law, an exchange or association rule can go into effect only if the SEC approves of it by order, which order is reviewable by the court of appeals.¹²⁶

Furthermore, under the new law the SEC "by rule, may abrogate, add to, and delete from . . . the rules of a self-regulatory organization . . .,"¹²⁷ after publishing notice thereof and giving interested persons an opportunity to present their views orally and in writing.¹²⁸

Section 25 of the Securities Exchange Act¹²⁹ which provided for judicial review of SEC determinations, was amended to extend the scope of such review. The old law expressly provided for judicial review of SEC orders only.¹³⁰ Under the Administrative Procedure Act one possibly could seek review of SEC

review by the SEC on the Commission's motion or on the motion of an aggrieved party. *Id.* § 19(d)-(f), 15 U.S.C.A. § 78s(d)-(f) (Supp. 4, 1975). These provisions, with minor changes, are based on the Maloney Act, 15 U.S.C. § 78o-3(f)-(h) (1970), as repealed, Pub. L. 94-29, § 12(3), 89 Stat. 128 (1975). The amendments reflect a congressional awareness that, despite historical differences between membership in an exchange and in the NASD, "these organizations must be required to conform their activities to fundamental standards of due process." S. Rep. No. 94-75, 94th Cong., 1st Sess. 25 (1975).

121. See 15 U.S.C. § 78f (1970), as amended, 15 U.S.C.A. § 78f (Supp. 4, 1975); *id.* § 78s, as amended, 15 U.S.C.A. § 78s (Supp. 4, 1975).

122. *Id.* § 78o-3(j) (1970), as repealed, Pub. L. 94-29, § 12(3), 89 Stat. 128 (1975), and re-enacted in 15 U.S.C.A. § 78s(b)(1) (Supp. 4, 1975).

123. *Id.*

124. *Kixmiller v. SEC*, 492 F.2d 641, 645 (D.C. Cir. 1974) (*per curiam*).

125. See *Pozen, Competition and Regulation in the Stock Markets*, 73 Mich. L. Rev. 317, 329 n.63 (1975); *Mazo*, *supra* note 57, at 96-97.

126. See Securities Exchange Act of 1934, § 25(a), 15 U.S.C.A. § 78y(a) (Supp. 4, 1975).

127. *Id.* § 19(c), 15 U.S.C.A. § 78s(c) (Supp. 4, 1975).

128. The unamended version of the Maloney Act, 15 U.S.C. § 78o-3(k)(1) (1970), as repealed, Pub. L. 94-29, § 12(3), 89 Stat. 128 (1975), provided that the SEC could abrogate the rule of a registered securities association by order "after appropriate notice and opportunity for hearing." There was no similar provision applicable to securities exchanges. The intent of the amendment was to give the SEC "clear authority to amend any self-regulatory organization's rules in any respect consistent with the objectives of the Exchange Act . . ." S. Rep. No. 94-75, 94th Cong., 1st Sess. 31 (1975). 15 U.S.C. §§ 78s(b), 78o-3(k)(2) (1970) provided that the SEC could supplement or alter the rules of an exchange or securities association after the exchange or association failed to comply with the SEC's request that it effectuate the changes on its own behalf; these were deleted from the amended act. Pub. L. 94-29, § 12(3), 89 Stat. 128 (1975); see Securities Exchange Act of 1934 § 19, 15 U.S.C.A. § 78s (Supp. 4, 1975).

129. 15 U.S.C. § 78y (1970), as amended, 15 U.S.C.A. § 78y (Supp. 4, 1975).

130. *Id.*

determinations other than orders.¹³¹ However, in *PBW Stock Exchange, Inc. v. SEC*,¹³² the court held that SEC rules were not reviewable, since section 25 of the Securities Exchange Act provided only for judicial review of orders.¹³³

The amendment to section 25 specifically provides, however, that "a person adversely affected by a rule of the Commission promulgated pursuant to" listed sections of the Securities Exchange Act may seek review in the court of appeals.¹³⁴ Arguably, the increased opportunities under the amended statutes for judicial review of SEC determinations¹³⁵ is a factor indicating a congressional intent to create a total antitrust exemption.¹³⁶

IV. CONCLUSION

Since the Securities Acts Amendments of 1975 extend to securities exchanges the regulatory scheme which formerly embraced only securities associations, it is submitted that the extensive antitrust exemption found by the Court in *United States v. National Association of Securities Dealers, Inc.*,¹³⁷ applies to exchange rules and their applications as well as to the association rules and applications thereof which were at issue in *NASD*. Whether the courts will so hold remains to be seen. *Gordon v. New York Stock Exchange, Inc.*¹³⁸ shed very little light on this question. While the Court in that case took the new amendments into account, its determination was based upon its finding of a clear repugnancy between the antitrust laws and

131. 5 U.S.C. §§ 702, 704 (1970); see *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967); *Independent Broker-Dealers' Trade Ass'n v. SEC*, 442 F.2d 132, 139 (D.C. Cir.), cert. denied, 404 U.S. 828 (1971). The Administrative Procedure Act provides in part: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702 (1970). "[F]inal agency action for which there is no other adequate remedy in a court [is] subject to judicial review." *Id.* § 704.

132. 485 F.2d 718 (3d Cir. 1973), cert. denied, 416 U.S. 969 (1974).

133. *Id.* at 723; see *Mazo*, supra note 57, at 97. A rule is that "part of the administrative process that resembles a legislature's enactment of a statute" and must be applied or enforced before it has any particular effect on individuals. An order, on the other hand, "resembles a court's decision of a case," and directly affects individuals. K. Davis, *Administrative Law* § 5.01 (3d ed. 1972).

134. 15 U.S.C.A. § 78y(b)(1) (Supp. 4, 1975) (emphasis added).

135. However, judicial review of SEC rules is still limited. Amended section 25 further provides that, on review of an SEC order or rule, findings of fact of the Commission, "if supported by substantial evidence, are conclusive." *Id.* §§ 78y(a)(4), (b)(4) (Supp. 4, 1975). With respect to judicial review of rules, "[t]he court shall affirm and enforce the rule unless the Commission's action in promulgating the rule is found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitation, or short of statutory right; or without observance of procedure required by law." *Id.* § 78y(b)(4).

136. This is so because such review provides an alternative remedy to suit under the antitrust laws. See *Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 309 (1963); *Gordon v. New York Stock Exch., Inc.*, 498 F.2d 1303, 1311 (2d Cir. 1974), *aff'd*, 95 S. Ct. 2598 (1975); cf. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 352 (1963).

137. 95 S. Ct. 2427 (1975).

138. 95 S. Ct. 2598 (1975).

the former section 19(b)(9) of the Securities Exchange Act, which has been omitted in the amended statute.¹³⁹

However, the Securities Acts Amendments, which extend the power of the SEC over securities associations as well as exchanges, require the SEC to consider effects on competition, and allow more opportunities for judicial review of SEC action, are further evidence that the rules and practices of the NASD *and* securities exchanges are now totally exempt from antitrust challenge in the courts.¹⁴⁰

Barbara D. Gonzo

139. See text accompanying note 28 *supra*.

140. *Jacobi v. Bache & Co.*, No. 74-2001 (2d Cir., August 5, 1975) suggests a different approach; namely, that the court apply a rule of reason, even when faced with what would generally be considered a *per se* violation of the antitrust laws. *Id.* at 5373, 5377-78. However, the challenged conduct was an exchange prohibition against the use of a service charge in computing compensation in employment agreements; the court noted that this lay at the periphery of the SEC's jurisdiction. *Id.* at 5376.