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# COMMODITY EXCHANGES: THE CASE FOR ANTITRUST IMMUNITY

## INTRODUCTION

Under the Commodity Exchange Act,<sup>1</sup> the Commodity Futures Trading Commission (CFTC)<sup>2</sup> possesses considerable supervisory authority<sup>3</sup> over the rules and actions of commodity exchanges.<sup>4</sup> Historically, commodity exchanges have been self-regulating.<sup>5</sup> Self-regulation continues as the foundation of the Commodity Exchange Act.<sup>6</sup> Self-regulation, however, may lead to abuses. Where the regulated and the regulators are one and the same,<sup>7</sup> the regulators may establish self-

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1. 7 U.S.C. §§ 1-26 (1982).
  2. The CFTC was established in the Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, 88 Stat. 1389, [hereinafter cited as CFTC Act], which amended the Commodity Exchange Act, *supra* note 1.
  3. Congress substantially increased federal agency authority in the CFTC Act of 1974, *supra* note 2.
  4. There are presently eleven major commodity exchanges in the United States: Chicago Board of Trade, Chicago Mercantile Exchange, Chicago Rice and Cotton Exchange, Commodity Exchange Inc., Kansas City Board of Trade, Mid-America Commodity Exchange, Minneapolis Grain Exchange, New York Coffee, Sugar, and Cocoa Exchange, New York Cotton Exchange, New York Futures Exchange, New York Mercantile Exchange.

The CFTC approved the creation of the National Futures Association (NFA) as a registered futures associations in 1980. Registered futures associations are established pursuant to 7 U.S.C. § 21 (1982). The NFA is essentially to the commodity futures industry what the National Association of Securities Dealers (NASD) is to the securities industry. Both of these registered associations are self-regulatory in nature. Because the NFA is a "self-regulatory" organization, for purposes of this note it will be included when using the term "commodity exchanges" unless otherwise specified.

5. The first commodity exchange, the Chicago Board of Trade, was established around 1850 as the central market for agricultural products, approximately 75 years before the enactment of any federal legislation to regulate the industry. Johnson, *Self-Regulation: A Primer on the Perils*, 27 AD. L. REV. 387, 388 (1975). Two possible reasons exist for the evolution of self-regulatory structures in the commodity exchanges: (1) the markets were centrally-located relative to most participants and (2) the commodity markets were "extremely sensitive to the ebb and flow of public confidence and prohibited activities that would destroy public confidence." *Id.* at 388. See also House Comm. on Agriculture, Report on H.R. 13113, H.R. Rep. No. 975, 93d Cong., 2d Sess. 44-45 (1974) [hereinafter cited as House Report]; 1 P. JOHNSON, COMMODITIES REGULATION 346-47.

Another commentator has stated two advantages to a self-regulatory scheme. First, the members of the regulated industry largely underwrite the cost of regulation. Second, because the regulated are the regulators, self-regulation may be "more sensitive to the true regulatory needs" of the industry than total government regulation. Smythe, *Government Supervised Self-Regulation in the Securities Industry and the Antitrust Laws: Suggestions For An Accommodation*, 62 N.C.L. REV. 475, 475 (1984).

6. The rules and regulations of most commodity exchanges are still much more comprehensive than the Commodity Exchange Act and CFTC regulations. 1 P. JOHNSON, *supra* note 5, at 347.

In the Commodity Futures Trading Commission Act, Congress recognized the continued importance of self-regulation in the overall CFTC regulatory scheme.

The Committee bill does not propose that self-regulatory activities of the exchanges be abolished in favor of continued and direct federal regulation of all aspects of futures trading. However, self-regulation cannot be viewed in this and later decades as an argument against greater Federal regulation. Self-regulation is a commendable and noble concept and useful in such a complex atmosphere as that which surrounds futures trading. It cannot continue to function without a strong Federal regulatory umbrella over self-regulatory activities of the industry. Self-regulation cannot be permitted to be a barrier against public policy and the interests of the American public. Yet, with proper Federal supervisory authority, needed self-regulatory efforts of the exchanges can live a useful life into the 21st Century and, hopefully, beyond.

House Report, *supra* note 5, at 48. The objective of the CFTC Act was to improve the quality of self-regulation and federal oversight rather than to diminish the role of exchange self-regulation. 1 P. JOHNSON, *supra* note 5, at 347.

7. The members of the exchanges promulgate the rules by which they and all members are to abide. When this note discusses commodity exchange self-regulation as it presently exists, it refers to a

servicing, anticompetitive rules.<sup>8</sup> Antitrust laws may correct some of these abuses. Full application of the antitrust laws to commodity exchange rules, however, may sometimes frustrate the self-regulatory objectives of the Commodity Exchange Act.

Self-regulation requires some anticompetitive rules and actions.<sup>9</sup> When the procompetitive antitrust laws and CFTC regulations conflict, however, the antitrust laws should yield. Anticompetitive rules and actions of the Commodity Exchange Act must be immune from antitrust laws if they are necessary to further the objectives of the Act. The United States Supreme Court has implied immunity from antitrust laws for securities exchange rules and actions which the Securities and Exchange Commission (SEC) directly oversees or which are necessary to make the Securities Exchange Act work,<sup>10</sup> as well as rules which the Securities Exchange Act affirmatively requires.<sup>11</sup>

This note contends that the courts should imply an immunity from antitrust laws for the commodity exchange rules and actions similar to the immunity they imply in securities exchange cases. This note will review the few court decisions that address the issue whether the commodity exchange rules and actions which the CFTC may review are immune from the antitrust laws. It then analyzes the rationale and extent of the implied antitrust immunity as applied to the securities exchange rules and actions. After discussing the nature and scope of CFTC oversight of commodity exchange rules and actions, this note will compare the applicable provisions of the SEC and CFTC regulatory schemes. Finally, it explores the scope of the antitrust immunity the courts should imply.

Few courts have addressed the issue of implied antitrust immunity for commodity exchange rules and actions.<sup>12</sup> Most of the recent lower court decisions have merely addressed the issue of whether Congress intended the preemption of

scheme of primary self-regulation by the exchanges with direct regulatory oversight by the CFTC, a federal regulatory agency.

8. "Self-regulatory organizations may be less interested in regulation designed to protect the general public than in regulation crafted to restrict competition and reinforce the dominance of the powerful members of the regulated group." Smythe, *supra* note 5, at 476. See also Asch, *The Antitrust Laws and the Regulated Securities Markets*, 11 ANTITRUST BULL. 209, 210 (1966); Cary, *Self-Regulation in the Securities Industry*, 49 A.B.A.J. 244 (1963).
9. For example, under the Commodity Exchange Act, futures trading is limited to CFTC approved commodity exchange members. See *infra* notes 109 to 110 and accompanying text. The exchanges have rules which limit their total memberships, resulting in a barrier to entry in the commodity futures industry.
10. *Gordon v. New York Stock Exch.*, 422 U.S. 659 (1975); *Silver v. New York Stock Exch.*, 373 U.S. 341 (1963). The scope of the implied antitrust immunity for the securities exchanges is discussed *infra* at notes 40 to 89 and accompanying text.

The Supreme Court has also addressed this issue with regard to the National Association of Securities Dealers, which is subject to SEC review. See *United States v. National Ass'n of Securities Dealers*, 422 U.S. 694 (1975). Because the SEC's power to review the rules of both securities exchanges' and securities dealers' associations is equivalent, the *NASD* decision should also have an impact on the scope of immunity from antitrust laws for securities exchanges. See *infra* notes 70 to 89 and accompanying text.

11. See *United States v. National Ass'n of Securities Dealers*, 422 U.S. 694 (1975), discussed *infra* at notes 70 to 89 and accompanying text.
12. Prior to the CFTC Act, the Supreme Court addressed the issue of an antitrust immunity for the commodity exchanges in *Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289 (1973), and *Chicago Mercantile Exch. v. Deaktor*, 414 U.S. 113 (1973). In *Ricci*, the petitioner, a member of the exchange, alleged that the exchange and others conspired to restrain his business by transferring his exchange membership to another without notice or hearing. He also alleged violations of the exchange's rules and the Commodity Exchange Act.

In *Ricci*, the Court referred to *Silver v. New York Stock Exchange* and stated that it was presented with the "different case" discussed in *Silver*. See *infra* note 53. Although the Court did not imply an antitrust immunity, it applied the doctrine of primary jurisdiction and stayed the antitrust action until the Commodity Exchange Authority could hold proceedings on the Exchange's actions. "[G]iven administrative authority to examine the Ricci-Exchange dispute in the light of the regulatory scheme

the application of the antitrust laws to activities for which there exists a private right of action under the Commodity Exchange Act.<sup>13</sup> These decisions, however, are unrelated to the issues of whether, and to what extent, the courts should imply antitrust immunity for commodity exchange rules and actions.<sup>14</sup>

Although few decisions discuss the existence of an implied antitrust immunity for commodity exchange rules and actions which the CFTC reviews,<sup>15</sup> the decisions support the existence of an immunity similar to the one enjoyed by securities exchanges. For example, in *Jordon v. New York Mercantile Exchange*,<sup>16</sup> the plaintiff alleged that defendant commodity exchange's failure to amend its allegedly defective futures contract rules violated the antitrust laws.<sup>17</sup> The district court, relying upon two Supreme Court decisions regarding the application of antitrust laws to SEC regulations,<sup>18</sup> stated that even if the futures contract rules were anticompetitive on their face, the rules were immune from the antitrust laws.<sup>19</sup>

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and Exchange rules, the antitrust action should be stayed until the administrative officials have had opportunity to act." 409 U.S. at 302.

One commentator has stated that had the Commodity Exchange Authority possessed direct oversight of the specific challenged conduct or the duty to apply the "least anticompetitive means," the Supreme Court would have implied an antitrust immunity for the challenged exchange conduct. Johnson, *Antitrust in the Commodities Field: After Gordon*, 6 HOFSTRA L. REV. 115, 119 (1977).

13. *Goldschmidt v. Hunt*, 556 F. Supp. 123 (N.D. Tex. 1983); *Pollock v. Citrus Assocs.*, 512 F. Supp. 711 (S.D.N.Y. 1981); *Strax v. Commodity Exch.*, 524 F. Supp. 936 (S.D.N.Y. 1981); *Smith v. Groover*, 468 F. Supp. 105 (N.D. Ill. 1979).

In *Pollock*, *Goldschmidt*, and *Strax*, the courts held that the existence of private causes of action under the Commodity Exchange Act does not preempt antitrust claims. The courts relied on two factors: first, the House Agriculture Committee deleted a provision of an earlier version of the CFTC bill which would have provided for an express exemption from the antitrust laws (the courts interpreted this as illustrative of congressional intent to ensure that the antitrust laws were not preempted); second, the courts relied upon the testimony of Peter W. Rodino, Jr., Chairman of the House Judiciary Committee, who stated: "In brief, in successive years, wheat, soybeans, and corn have been subjected to anticompetitive and monopolistic practices in commodity markets and have significantly contributed to food prices charged consumers. These developments indicate the urgency of applying antitrust principles to the commodity markets unequivocally . . ." *Pollock v. Citrus Assocs.*, 512 F. Supp. at 717 (quoting Commodity Futures Trading Commission Act, Hearings on S. 2485, S. 2587, S. 2837 and H.R. 13113 Before the Senate Comm. on Agriculture and Forestry, 93 Cong., 2d Sess. 259 (1974)). The court also stated that Congressman Rodino's testimony helped bring about the inclusion in § 201(b) of the Commodity Futures Trading Commission Act. § 201(b) states: "Nothing in this Section [the entire CEA] shall supersede or limit the jurisdiction conferred on the courts of the United States or any State." CFTC Act, *supra* note 2, at 1395. (codified at 7 U.S.C. § 2 (1972)).

The court in *Smith v. Groover*, however, reached the opposite result and held that the plaintiffs were preempted from pursuing antitrust remedies where the CEA provided a private right of action. The court stated: "Since plaintiffs have a private right of action under the CEA, their antitrust claims . . . are 'superfluous.' The specific statutory prohibitions contained in the CEA, as amended, must prevail over the general prohibitions of the Sherman Act." 468 F. Supp. at 116. The court acknowledged, however, that "the drafters of the CFTCA intended to leave the antitrust laws intact." *Id.*

14. The issue of exclusive remedies is distinct from that of an implied antitrust immunity for exchange rules and actions where there is direct agency review. This note does not argue that the existence of a cause of action under the Commodity Exchange Act entirely preempts antitrust laws; rather, it urges courts to imply an antitrust immunity for commodity exchange rules and actions which the CFTC directly reviews and which are necessary to make the CFTC regulatory work, or where the statutes expressly authorize anticompetitive acts.
15. *Jordon v. New York Mercantile Exch.*, 571 F. Supp. 1530 (S.D.N.Y. 1983), *rev'd on other grounds sub nom. Sam Wong & Son, Inc. v. New York Mercantile Exch.*, 735 F.2d 653 (2d Cir. 1984); *Seligson v. New York Produce Exch.*, 378 F. Supp. 1076 (S.D.N.Y. 1974), *aff'd sub nom. Miller v. New York Produce Exch.*, 550 F.2d 762 (2d Cir.), *cert. denied*, 434 U.S. 823 (1977).
16. 571 F. Supp. 1530 (S.D.N.Y. 1983), *rev'd on other grounds sub nom. Sam Wong & Son, Inc. v. New York Mercantile Exch.*, 735 F.2d 653 (2d Cir. 1984).
17. 571 F. Supp. at 1535-36.
18. *Gordon v. New York Stock Exch.*, 422 U.S. 659 (1975), and *United States v. National Ass'n of Securities Dealers*, 422 U.S. 694 (1975).
19. "In any event, given the CFTC's extensive authority to approve, alter, and supplement contract rules, such rules are not subject to antitrust challenge." 571 F. Supp. at 1562.

In *Seligson v. New York Produce Exchange*,<sup>20</sup> decided prior to the enactment of the Commodity Futures Trading Commission Act of 1974,<sup>21</sup> the court followed an implied antitrust immunity approach similar to that applied to securities exchanges. The plaintiff, a trustee in bankruptcy of an exchange member-broker, alleged, *inter alia*, that the defendant exchange violated section 1 of the Sherman Act<sup>22</sup> by failing to run an orderly contract market and failing to relieve the threat of extreme market concentration in cottonseed oil futures.<sup>23</sup> The court, however, reasoned that an implied immunity from the antitrust laws for commodity exchanges must exist in order to prevent the frustration of the regulatory goals of the Commodity Exchange Act.<sup>24</sup> The court also applied the limiting principle espoused by the United States Supreme Court in *Silver v. New York Stock Exchange*<sup>25</sup> regarding the scope of the implied antitrust immunity for securities exchange rules and actions.<sup>26</sup>

At the least, *Jordon* and *Seligson* demonstrate that some courts are willing to apply the implied antitrust immunity approach created for securities exchange rules and actions to commodity exchange rules and actions. The commodity exchange and securities exchange regulatory schemes are similar in that both schemes are based on self-regulation<sup>27</sup> and both of the self-regulatory rules of these industries are subject to similar federal agency review.<sup>28</sup> Since the frustration of the goals of the regulatory scheme for commodity exchanges is as harmful as the frustration of the objectives of securities exchange regulation, the courts should apply to commodity exchanges the same approach applied to securities exchanges.<sup>29</sup>

### IMPLIED ANTITRUST IMMUNITY FOR SECURITIES EXCHANGE RULES AND ACTIONS

Securities exchanges currently enjoy a broad implied immunity from the antitrust laws<sup>30</sup> for rules and actions over which the SEC has supervisory authority.<sup>31</sup>

20. 378 F. Supp. 1076 (S.D.N.Y. 1974), *aff'd sub nom.* Miller v. New York Produce Exch., 550 F. 2d 762 (2d Cir.), *cert. denied*, 434 U.S. 823 (1977).

21. See *supra* note 2.

22. 15 U.S.C. § 1 (1982). Section 1 of the Sherman Act prohibits contracts, combinations, or conspiracies in restraint of trade. The plaintiff alleged that both acts of price-fixing and other acts restraining trade were committed. 378 F. Supp. at 1083.

23. 378 F. Supp. at 1083.

24. *Id.* at 1107. "The entire regulatory scheme administered by the Exchange would constitute a restraint of trade and violation of the Sherman Act were it not for the limited immunity to antitrust challenge necessary to effectuate an otherwise contradictory congressional act." *Id.*

25. 373 U.S. 341 (1963). See *infra* text accompanying note 46.

26. "[T]he Exchange's actions would not be immune to antitrust attack at this stage of the litigation unless it were established beyond dispute that those actions did not go beyond what was necessary to further the regulatory scheme of the Act." 378 F. Supp. at 1104.

27. See *supra* notes 5-9 and accompanying text and *infra* notes 31-33 and accompanying text.

28. Although the overall regulatory schemes of the securities industry and the commodities industry differ greatly in many respects, the SEC and the CFTC possess similar authority to oversee rules and regulations promulgated and enforcement actions brought by exchanges in the respective industries. See *infra* notes 101-125 and accompanying text.

29. Two commentators have reached similar conclusions. Johnson, *supra* note 12; Special Committee on Commodities Regulation, *Antitrust Immunity Under the Commodity Exchange Act*, 35 REC. A. B. CITY N.Y. 233 (1980).

30. For an excellent discussion of the antitrust immunity for securities exchanges, see Linden, *A Reconciliation of Antitrust Law With Securities Regulation: The Judicial Approach*, 45 GEO. WASH. L. REV. 179 (1977); Smythe, *supra* note 5.

31. The SEC has uniform supervisory authority over self-regulatory organizations which include national securities exchanges, national securities dealers associations, national clearing agencies, and the Municipal Securities Rulemaking Board. 15 U.S.C. § 78c(a)(26) (1982). For purposes of this note, the SEC's authority will be referred to in terms of the SEC's authority over the securities exchanges.

Because of the similarities between SEC regulation of the securities exchanges and CFTC regulation of the commodity exchanges,<sup>32</sup> it is helpful to explore both the rationale behind and the scope of the immunity for the securities exchanges when considering the applicability of such an immunity to the commodity exchanges.

Courts imply antitrust immunity to securities exchange rules and actions for two reasons. First, the securities exchanges have traditionally<sup>33</sup> been self-regulatory organizations<sup>34</sup> although it is true that after the Stock Market Crash of 1929, Congress enacted the Securities Exchange Act to provide for at least some government regulation of the securities exchanges and their members.<sup>35</sup> Second, an implied antitrust immunity promotes consistency between the SEC regulatory scheme and the antitrust laws.<sup>36</sup> The anticompetitive characteristics of exchange self-regulation and SEC oversight, and the procompetitive objectives of the federal antitrust laws, can often be fulfilled without displacement of any part of either scheme.<sup>37</sup> At times, however, a direct conflict arises between these schemes.<sup>38</sup> In such instances, the procompetitive goals of the antitrust laws must yield to exchange self-regulation to ensure that the regulatory scheme contemplated by Congress in the Securities Exchange Act is not frustrated.<sup>39</sup>

The United States Supreme Court first addressed the issues of the existence and extent of the securities exchanges' implied immunity from antitrust laws in

32. See *infra* notes 97 to 126 and accompanying text.

33. The first securities exchange was established in Philadelphia in 1790. Smythe, *supra* note 5, at 480. The New York Stock Exchange was established in 1792. SEC, Report of Special Study of Securities Markets, H.R. Doc. No. 95, 88th Cong., 1st Sess., pt. 295 (1963). The exchanges provided the only regulation of the securities industry until 1934 and, until that time, were treated as nonregulated private clubs not subject to antitrust scrutiny. Note, *Antitrust and the Stock Exchange: Minimum Commission or Free Competition?*, 18 STAN. L. REV., 213, 222-23 (1965); Comment, *An Approach for Reconciling Antitrust Law and Securities Law: the Antitrust Immunity of the Securities Industry Reconsidered*, 65 NW. U. L. REV. 260, 266 (1970).

34. "Self-regulation is a concept more widely cited and relied on in the securities industry than in any other specifically subject to regulation by federal agencies." Cary, *Self-Regulation in the Securities Industry*, 49 A.B.A.J. 244 (1963).

Much has been written concerning the role of self-regulation in the securities industry. See, e.g., Asch, *supra* note 8; Baxter, *NYSE Fixed Commission Rates: A Private Cartel Goes Public*, 22 STAN. L. REV. 675 (1970); Cary, *supra* note 8; Jennings, *Self-Regulation in the Securities Industry: The Role of the Securities and Exchange Commission*, 29 LAW & CONTEMP. PROBS. 663 (1964); Mazo, *Antitrust Courts Versus the SEC: A Functional Allocation of Decisionmaking Roles*, 12 HARV. J. ON LEGIS. 63 (1974); Poser, *Restructuring the Stock Markets: A Critical Look at the SEC's National Market System*, 56 N.Y.U.L. REV. 883 (1981); Pozen, *Competition and Regulation in the Stock Markets*, 73 MICH. L. REV. 317 (1974); Ratner, *Regulation of the Compensation of Securities Dealers*, 55 CORNELL L. REV. 348 (1970); Smythe, *supra* note 5; Comment, *supra* note 33.

35. The rationale of securities regulation "is rooted in two separate conditions: the extreme vulnerability of the investing public, and the significance of industry performance for the national economy." Asch, *supra* note 8, at 210.

Justice Douglas, while Chairman of the SEC, stated the intention of the scheme as one of "letting the exchanges take the leadership with Government playing a residual role. Government would keep the shotgun, so to speak, behind the door, loaded, well-oiled, cleaned, ready for use but with the hope it would never have to be used." W. DOUGLAS, *DEMOCRACY AND FINANCE* 82 (Allen ed. 1940).

36. Because the courts will imply an immunity from the antitrust laws only when necessary to further the policies and objectives of the Securities Exchange Act, the objectives of both Acts are almost always served.

37. Not all the objectives of the Securities Exchange Act require anticompetitive exchange rules. Furthermore, not all of the anticompetitive exchange rules are necessary to effectuate the purposes of the Act.

38. For an example of an anticompetitive exchange rule which the Supreme Court found to be impliedly immune from the antitrust laws, see *Gordon v. New York Stock Exch.*, *infra* notes 60 to 69 and accompanying text.

39. Congress established a regulatory scheme that permits some anticompetitiveness, because in certain instances competing policy interests, such as greater stability in financial markets, supersede the general procompetitive objectives of the antitrust laws. Congress did not intend to see the regulatory scheme yield for the sake of competition alone. Where an anticompetitive rule is necessary to ensure stability in the securities industry, the antitrust law should yield.

*Silver v. New York Stock Exchange*.<sup>40</sup> The petitioner, a nonmember broker-dealer, had contracted with ten members of the New York Stock Exchange (NYSE) for direct private wire connections with their offices.<sup>41</sup> Although the NYSE approved the wire connections on a temporary basis, it later ordered, without a hearing, that the NYSE members disconnect the connections.<sup>42</sup> The petitioner alleged that the NYSE order violated sections 1 and 2 of the Sherman Act.<sup>43</sup>

Although the Supreme Court ultimately found that the NYSE's order violated the Sherman Act,<sup>44</sup> it recognized the need to reconcile the two schemes so as not to frustrate wholly either one.<sup>45</sup> In *Silver* the Supreme Court stated the guiding principle as to whether or not an implied immunity should be found: "Repeal [of the antitrust laws] is to be regarded as implied only to the extent necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary."<sup>46</sup>

Guided by this principle, the Court applied its test for deciding implied immunity issues. First, the Court examined potential direct statutory conflict between the Securities Exchange Act and the antitrust laws for authority of an immunity for the challenged NYSE action,<sup>47</sup> and found no such conflict.<sup>48</sup> Second, the Supreme Court analyzed whether an incompatibility between the policy objectives of exchange self-regulation with SEC review and the objectives of the antitrust laws warranted restricting the range of the antitrust laws.<sup>49</sup> The Court found that the SEC regulatory scheme and the application of the antitrust laws to the challenged NYSE action were compatible<sup>50</sup> and consequently applied the antitrust laws to the challenged NYSE action.<sup>51</sup> Third, the Court assessed whether the

40. 373 U.S. 341 (1963).

41. *Id.* at 343.

42. *Id.* at 344.

43. *Id.* at 345. More specifically, the petitioner alleged that the NYSE conspired to restrain petitioners from using the private wire connections and ticker service. *Id.*

44. *Id.* at 365.

45. *Id.* at 357. "The proper approach to this case, in our view, is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted." *Id.*

After acknowledging that Congress did not provide an express antitrust exemption for securities exchanges, the *Silver* Court stated that "it is a cardinal principle of construction that repeals by implication are not favored." *Id.* (citation omitted).

46. *Id.*

47. "Although the Act gives to the Securities and Exchange Commission the power to request exchanges to make changes in their rules . . . and implicitly, therefore, to disapprove any rules adopted by an exchange . . . it does not give the Commission jurisdiction to review particular instances of enforcement of exchange rules." *Id.* at 357 (citations omitted). "Moreover, the 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 or coextensiveness of coverage with the agency's regulatory power." *Id.* at 358 (citations omitted).

48. *Id.*

49. *Id.* at 358. "The issue is only that of the extent to which the character and objectives of the duty of exchange self-regulation contemplated by the Securities Exchange Act are incompatible with the maintenance of an antitrust action." *Id.*

50. There is nothing built into the regulatory scheme which performs the antitrust function of insuring that an exchange will not in some cases apply its rules so as to do injury to competition which cannot be justified as furthering self-regulative ends. . . . Such unjustified self-regulatory activity can only diminish public respect for and confidence in the integrity and efficacy of the exchange mechanism [those goals which the Court espoused as the purposes and objectives of SEC review of stock exchange self-regulation]. Some form of review of exchange self-policing, whether by administrative agencies or by the courts, is therefore not at all incompatible with the fulfillment of the aims of the Securities Exchange Act.

*Id.* at 358-59. The *Silver* Court further stated that "[d]enial of [the antitrust laws'] applicability would defeat the Congressional policy without serving the policy of the Securities Exchange Act." *Id.* at 360.

51. *Id.* at 361.

NYSE action was legal even though it fell within the scope of the antitrust laws.<sup>52</sup> Finding no justification, the Court held that the NYSE's order to disconnect the wire connections violated the antitrust laws. The Court stated, however, that if the SEC had had direct review of NYSE orders, it might have reached a different decision.<sup>53</sup>

Lower federal courts have interpreted the *Silver* decision in many ways and have held different aspects of its analysis to be dispositive of the question of implied antitrust immunity.<sup>54</sup> One lower federal court, for instance, held that whether an opportunity for a hearing and adequate notice were provided to those parties adversely affected by the challenged exchange rule was dispositive of whether an implied repeal existed.<sup>55</sup> Many lower courts have reasoned that an implied immunity is justified because the exchange rule or action is subject to SEC review.<sup>56</sup> In *Thill Securities Corp. v. New York Stock Exchange*,<sup>57</sup> however, the Seventh Circuit Court of Appeals explicitly rejected this view and stated that the potential of SEC review does not alone warrant an immunity from antitrust

52. *Id.* In finding no justification for NYSE's actions, the Court stressed the lack of adequate hearing and notice requirements in the SEC's review of securities exchange actions. *Id.*

53. Were there Commission jurisdiction and ensuing judicial review for scrutiny of a particular exchange ruling, as there is under the 1938 Maloney Act amendments to the Exchange Act to examine disciplinary action by a registered securities association . . . a different case would arise concerning exemption from the operation of laws designed to prevent anticompetitive activity, an issue we do not decide today.

*Id.* at 358 n. 12. "Should review of exchange self-regulation be provided through a vehicle other than the antitrust laws, a different case as to antitrust exemption would be presented." *Id.* at 360. The Court further stated:

Given the principle that exchange self-regulation is to be regarded as justified in response to antitrust charges only to the extent necessary to protect the achievement of the aims of the Securities Exchange Act, it is clear that no justification can be offered for self-regulation conducted without provision for some method of telling a protesting nonmember why a rule is being invoked so as to harm him and allowing him to reply in explanation of his position. No policy reflected in the Securities Exchange Act is, to begin with, served by denial of notice and an opportunity for hearing. Indeed, the aims of the statutory scheme of self-policing—to protect investors and promote fair dealing—are defeated when an exchange exercises its tremendous economic power, without explaining its basis for acting, for the absence of an obligation to give some form of notice and, if timely requested, a hearing creates a great danger of perpetration of injury that will damage public confidence in the exchange. The requirement of such a hearing will, by contrast, help in effectuating antitrust policies by discouraging anticompetitive applications of exchange rules which are not justifiable as within the scope of the purposes of the Securities Exchange Act.

*Id.* at 361-62.

54. See, e.g., *Schaeffer v. First Nat'l Bank of Lincolnwood*, 509 F.2d 1287 (7th Cir. 1975), *aff'g* 326 F. Supp. 1186 (N.D.Ill. 1970), *cert. denied*, 425 U.S. 943 (1976); *Thill Securities v. New York Stock Exch.*, 433 F.2d 264 (7th Cir. 1970), *cert. denied*, 401 U.S. 994 (1971); *Abbott Securities Corp.*, 384 F. Supp. 668 (D.D.C. 1974); *Gordon v. New York Stock Exch.*, 366 F. Supp. 1261 (S.D.N.Y. 1973), *aff'd*, 498 F.2d 1303 (2d Cir. 1974), *aff'd*, 422 U.S. 659 (1975); *Eisen v. Carlisle & Jacquelin*, 54 F.R.D. 565 (S.D.N.Y. 1972), *rev'd on other grounds*, 479 F.2d 1005 (2d Cir. 1973), *vacated*, 417 U.S. 156 (1974); *Kaplan v. Lehman Bros.*, 250 F. Supp. 562 (N.D.Ill. 1966), *aff'd*, 371 F.2d 409 (7th Cir.), *cert. denied*, 389 U.S. 954 (1967).

55. *Eisen v. Carlisle & Jacquelin*, 54 F.R.D. 565 (S.D.N.Y. 1972), *rev'd on other grounds*, 479 F.2d 1005 (2d Cir. 1973), *vacated*, 417 U.S. 156 (1974). The decision was based upon the *Silver* Court's language that the exchange action may have been justified irrespective of the fact that the antitrust laws were to be applied. See *supra* note 53. One commentator asserted the analysis of the procedure issue was incorrect because the Court took too narrow of an implied repeal approach and thus added this "justification" question to the legal issue of whether an implied repeal is necessary. Linden, *A Reconciliation of Antitrust Law With Securities Regulation: The Judicial Approach*, 45 GEO. WASH. L. REV. 179, 195 (1977).

56. *Schaeffer v. First Nat'l Bank of Lincolnwood*, 509 F.2d 1287 (7th Cir. 1975), *aff'g* 326 F. Supp. 1186 (N.D. Ill. 1970), *cert. denied*, 425 U.S. 943 (1976); *Abbott Securities Corp. v. New York Stock Exch.*, 384 F. Supp. 668 (D.D.C. 1974); *Gordon v. New York Stock Exch.*, 366 F. Supp. 1261 (S.D.N.Y. 1973), *aff'd*, 498 F.2d 1303 (2d Cir. 1974), *aff'd*, 422 U.S. 659 (1975); *Kaplan v. Lehman Bros.*, 250 F. Supp. 562 (N.D. Ill. 1966), *aff'd*, 371 F.2d 409 (7th Cir.), *cert. denied*, 389 U.S. 954 (1967).

57. 433 F.2d 264 (7th Cir. 1970), *cert. denied*, 401 U.S. 994 (1971).

laws.<sup>58</sup> Before it would impliedly repeal the antitrust laws, the Seventh Circuit required a showing that the application of antitrust laws to the challenged exchange rule or action would frustrate the purposes of the Securities Exchange Act.<sup>59</sup>

In *Gordon v. New York Stock Exchange*,<sup>60</sup> the United States Supreme Court attempted to clarify the confusion surrounding *Silver v. New York Stock Exchange*. In *Gordon*, the petitioner had alleged that the New York and the American Stock Exchanges' rules requiring members to charge fixed commission rates for transactions under \$500,000 violated sections 1 and 2 of the Sherman Act.<sup>61</sup>

The Supreme Court held that this rule was immune from the antitrust laws.<sup>62</sup> The Court relied on three factors. First, the Court examined the long history of commission rate self-regulation by securities exchanges<sup>63</sup> and noted that Congress provided for SEC review over exchange commission rates in the Securities Exchange Act.<sup>64</sup> Second, it concluded that the SEC's comprehensive exercise of its supervisory authority over exchange commission rates supported a holding in favor of an implied repeal of the Sherman Act.<sup>65</sup> Third, the Court noted that the 1975 Amendments<sup>66</sup> to the Securities Exchange Act still provided for SEC review of commission rates, despite abolishing fixed commission rates, indicating Congressional approval of exclusive SEC review and oversight of exchange commission rates.<sup>67</sup> Consequently, the Court held that where the SEC actively and

58. *Id.* at 272-73.

59. *Id.* at 269-70. In *Thill*, the plaintiff, a nonmember broker-dealer, alleged that the NYSE's rule which prohibited members from giving nonmember dealers rebates for orders placed violated both the Sherman and Clayton Acts. Plaintiff asserted that such a rule constituted an unreasonable and unlawful combination and conspiracy in restraint of interstate commerce as well as an unreasonable manipulation of the securities market.

The Seventh Circuit Court of Appeals rejected the NYSE's argument that an implied repeal of the antitrust laws existed because the rule was subject to potential SEC review. Contrary to its earlier holding in *Kaplan*, the court held that the presence of an SEC review mechanism does not make repeal of the antitrust laws necessary:

In our view, *Silver* teaches that a reconciliation of the two statutory schemes is not foreclosed simply because the Securities Act and the review jurisdiction of the SEC may touch upon the activity challenged under the antitrust laws . . . . [The] general power to adopt rules relating to the relations of its members with non-members, however, does not in and of itself place the application of such rules outside the reach of antitrust laws . . . . In short, its exemption must be based on a showing of true necessity.

*Id.* at 269. Faced with this case again, the court of appeals found that an implied repeal of the antitrust laws was necessary in light of *Gordon v. New York Stock Exch.*, *infra* note 60. *Thill Securities Corp. v. New York Stock Exch.*, 633 F.2d 65 (7th Cir. 1980), *aff'g* 473 F. Supp. 1364 (N.D. Ill. 1979), *cert. denied*, 450 U.S. 998 (1980).

60. 422 U.S. 659 (1975).

61. *Id.* at 661.

62. *Id.* at 692.

63. *Id.* at 663-66.

64. *Id.* at 666-667. Section 19(b) provided that the SEC had the power to order the exchanges to "alter or supplement" their rules concerning "the fixing of reasonable rates of commission" if it finds that "such changes are necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange . . . ." 15 U.S.C. § 78s(b)(9) (1970). This provision has since been amended. Act of June 4, 1975, Pub. L. No. 94-29, 89 Stat. 97 (1975).

65. 422 U.S. at 682-91. The Court engaged itself in a lengthy discussion of SEC review and supervision of fixed commission rates. It emphasized the various SEC studies concerning commission rates and the SEC's adoption of rule 19b-3, which provided for the graduated abolition of fixed commission rates in the exchanges. *Id.* at 668-679.

According to the Court, a Senate subcommittee which studied commission rates shared its view that the SEC was actively supervising the exchanges as to commission rates. After lengthy study, the Senate Subcommittee on Securities concluded that competitive rates must be introduced at all transaction levels and that legislation was not required at that time in view of the progress made by the SEC.

66. Act of June 4, 1975, Pub. L. No. 94-29, 89 Stat. 97, *amending* 15 U.S.C. §§ 78-80b (1975).

67. The Court interpreted this legislation as a Congressional affirmation of SEC review of such rates: Significantly, in the new legislation enacted subsequent to the SEC's abolition of Commission rate fixing, the Congress has indicated its continued approval of the commission rate structure.

directly reviews an exchange rule or disciplinary action, the courts should imply an immunity from the antitrust laws for that particular rule or action.<sup>68</sup> The Court distinguished *Gordon* from *Silver* because, in *Gordon*, unlike *Silver*, the SEC had the power to and actually did directly oversee the challenged action.<sup>69</sup>

In *United States v. National Association of Securities Dealers*,<sup>70</sup> the Supreme Court went one step further than *Gordon* and found antitrust immunity where the SEC could, but did not, actively review the rules of the association. In *NASD*, the SEC<sup>71</sup> brought an action against the association, mutual funds, mutual-fund underwriters and broker-dealers, alleging that these defendants "combined and 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."<sup>72</sup> The government alleged that such horizontal and vertical restrictions in the secondary market violated section 1 of the Sherman Act.<sup>73</sup>

In finding the challenged NASD practices immune from the antitrust laws,<sup>74</sup> the Court discussed the purposes of both the Investment Company Act<sup>75</sup> and the NASD restrictions on the sale of mutual-fund shares in the secondary market. It found that section 22 of the Investment Company Act was implemented to curtail the "two-price system"<sup>76</sup> as well as to eliminate the "bootleg market,"<sup>77</sup> both of

Although legislatively enacting the SEC regulatory provision banning fixed rates, Congress has explicitly provided that the SEC, under certain circumstances and upon the making of specified findings, may allow reintroduction of fixed rates.

- 422 U.S. at 690-91.
68. *Id.* at 691. Since the Court found the need for an implied antitrust repeal, it did not reach the issue of whether the rule was nonetheless justified.
- Many of the lower courts since *Gordon* have readily found an implied repeal of the antitrust laws for securities exchange rules. *Thill Securities Corp. v. New York Stock Exch.*, 633 F.2d 65 (7th Cir. 1980), *aff'g* 473 F. Supp. 1364 (E.D. Wis. 1979), *cert. denied*, 450 U.S. 998 (1981); *Harding v. American Stock Exch.*, 527 F.2d 1366 (5th Cir. 1976); *Sloan v. Securities and Exch. Comm'n*, 535 F.2d 676 (2d Cir. 1976); *Shumate & Co. v. New York Stock Exch.*, 486 F. Supp. 1333 (N.D. Tex. 1980); *Abbott Securities Corp. v. New York Stock Exch.*, 1976-2 Trade Cos. (CCH) ¶ 61,017 (D.D.C. 1976). *Contra Jacobi v. Bache & Co.*, 520 F.2d 1231 (2d Cir. 1975) *cert. denied*, 432 U.S. 1053 (1976).
69. Hence, [in *Silver*] the regulatory agency could not prevent application of the rules that would have undesirable anticompetitive effects; there was no governmental oversight of the exchange's self-regulatory action, and no method of insuring that some attention at least was given to the public interest in competition . . . . In contrast to the circumstance of *Silver*, § 19(b) gave the SEC direct regulatory power over exchange rules and practices with respect to "the fixing of reasonable rates of commission."
- 422 U.S. at 684-85. See *supra* note 53 and accompanying text.
70. 422 U.S. 694 (1975).
71. At the district court level, the government's action was accompanied by a private action alleging similar antitrust violations. The private complaint was dismissed after the Supreme Court's decision in *NASD*. *Haddad v. Crosby Corp.*, 1977-1 Trade Cas. (CCH) ¶ 61,503 (D.D.C. 1977).
72. 422 U.S. at 700.
73. The government's first count alleged a "horizontal combination and conspiracy among the members of appellee NASD to prevent the growth of a secondary dealer market in the purchase and sale of mutual fund shares." 422 U.S. at 701-02. Seven other counts alleged various vertical restrictions on the secondary market for mutual fund shares. *Id.* at 702-03.
74. *Id.* at 729-30, 735.
75. Pub. L. No. 768, 54 Stat. 789 (1940) (codified as amended at 15 U.S.C. §§ 80a-1 to 80a-64 (1982)).
76. The two-price system was the method used to price the daily net asset value of the mutual fund shares. The price of the fund shares for a given day was set at the close of trading on the preceding day. Of this two-price system, the Court said:
- During [the period between the close of one day and the beginning of trading the next day] two prices were known: the present day's trading price based on the portfolio value established the previous day; and the following day's price, which was based on the net asset value computed at the close of the exchange trading on the present day. One aware of both prices could engage in "riskless trading" during this interim period . . . . The two-price system did not benefit the investing public generally.
- 422 U.S. at 707 (1975).
77. A bootleg system occurred where broker-dealers having no connection with the mutual fund would

which were considered abuses produced by an overly unrestricted secondary market.

The Supreme Court discussed extensively the legislative intent and history of sections 22(d)<sup>78</sup> and 22(f)<sup>79</sup> of the Investment Company Act. The Court found that although section 22(d) warranted no repeal of the Sherman Act,<sup>80</sup> the provisions in section 22(f) did warrant an implied repeal of the Sherman Act for the alleged vertical restrictions.<sup>81</sup> After finding that an implied antitrust repeal was supported by both the legislative history of section 22(f) of the Investment Company Act<sup>82</sup> and the views expressed by the SEC on this section after passage of the Act,<sup>83</sup> the Court concluded that the provisions of section 22(f) and application of the antitrust laws could not be reconciled.<sup>84</sup>

After determining that the SEC's supervisory authority under section 22(f) warranted an implied antitrust repeal for the vertical restrictions, the Court addressed the issue of whether the SEC regulatory scheme over the NASD provided by the Maloney Act<sup>85</sup> was so pervasive as to justify an implied repeal for the horizontal restrictions.<sup>86</sup> The Court concluded that "the investiture of such pervasive supervisory authority in the SEC suggests that Congress intended to lift the ban of the Sherman Act from association activities approved by the SEC."<sup>87</sup> The

purchase shares from selling shareholders either at a price slightly greater than the redemption price or at a discount from contract dealers. They would then sell the shares at a price slightly lower than the price of shares in the primary system. This caused a price war between those selling shares in the primary market and those selling in the secondary market. *Id.* at 709.

78. Section 22(d) provides in pertinent part:

No registered investment company shall sell any redeemable security issued by it to any person except either to or through a principal underwriter for distribution or at a current public offering price described in the prospectus, and, if such class of security is being currently offered in the public by or through an underwriter, no principal underwriter of such security, and no dealer shall sell any such security to any person except a dealer, a principal underwriter, or the issuer, except at a current public offering price described in the prospectus.

15 U.S.C. § 80a-22(d) (1982).

79. Section 22(f) provides:

No registered open end 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 interests of the holders of all of the outstanding securities of such investment company.

15 U.S.C. § 80a-22(f) (1982).

80. 422 U.S. at 720. The Court found that § 22(d) did not apply to "brokered transactions" but rather only applied when broker-dealers were acting in their capacities as dealers. *Id.* at 713-43. The Court's view of the provision was the same held by the SEC General Counsel in 1941 when he said that § 22(d) did not place restrictions on brokerage transactions. *Id.* at 717.

81. *Id.* at 720-29. The Court found that the congressional purpose of § 22(f) was to allow mutual funds to place transferability restrictions on their shares, unless otherwise disallowed by other SEC rules or regulations. These are the types of restrictions alleged to have violated the Sherman Act.

82. *Id.* at 721-24.

83. *Id.* at 725-27. The Court rejected the government's argument that insufficient exercise of the SEC's regulatory authority over restrictions on the transferability of mutual fund shares does not constitute review sufficient to warrant implied repeal. The Court stated that the SEC's power to review need only be invoked if a mutual fund places restrictions which are inconsistent with SEC rules or regulations. Thus, the restrictions are subject to SEC disapproval, not approval. *Id.* at 726.

84. *Id.* at 729. The Court recognized that the challenged restrictions, absent regulatory authority, would constitute per se violations of § 1 of the Sherman Act. "[H]owever, Congress has made a judgment that these restrictions on competition might be necessitated by the unique problems of the mutual fund industry, and has vested in the SEC final authority to determine whether and to what extent they should be tolerated . . . ." *Id.* at 729.

85. 15 U.S.C. § 78o-3 (1982).

86. *Id.* at 730.

87. *Id.* at 733. The Court reached this conclusion by finding that "the SEC, in its exercise of authority over association rules and practices, is charged with protection of the public interest as well as the interests of shareholders . . . and it repeatedly has indicated that it weighs competitive concerns in the exercise of its continued supervisory responsibility." *Id.*

Court stated that the "maintenance of an antitrust action for activities so directly related to the SEC's responsibilities poses a substantial danger that appellees would be subjected to duplicative and inconsistent standards. This is hardly a result that Congress would have mandated."<sup>88</sup> Moreover, the Court held that where the Act expressly authorizes anticompetitive conduct, the authorized conduct is immune from antitrust scrutiny.<sup>89</sup>

Thus, the courts will imply an antitrust immunity where the SEC has direct oversight of the exchange rule or action and where the rule is necessary to make the Securities Exchange Act effective or where Congress has expressly endorsed the subsequent anticompetitive practice. In light of *NASD*, it appears that the direct agency oversight need not be actively exercised, as was required by the Supreme Court in *Gordon*. Also, it is unclear to what extent the courts will apply the "pervasive regulatory scheme" language of *NASD* to future securities exchange cases.

### THE COMMODITY FUTURES TRADING COMMISSION

When Congress amended the Commodity Exchange Act by enacting the Commodity Futures Trading Commission Act of 1974,<sup>90</sup> it substantially altered the nature and extent of federal agency regulation of the commodity exchanges. Prior to the Act, the Commodity Exchange Authority had little oversight powers and narrow jurisdiction.<sup>91</sup> The 1974 amendments to the Commodity Exchange Act, however, created the Commodity Futures Trading Commission<sup>92</sup> and gave the CFTC direct oversight of commodity exchange rules and actions. In the Futures Trading Act of 1982,<sup>93</sup> Congress confirmed the CFTC's authority over the commodity exchanges by reauthorizing that Commission until September 30, 1986<sup>94</sup> and by altering its direct oversight of exchanges only slightly.<sup>95</sup>

Like the Securities Exchange Act,<sup>96</sup> the CFTC Act has a two-tiered regulatory scheme. On the first tier, the commodity exchanges regulate themselves.<sup>97</sup> On the second tier, the CFTC oversees exchange self-regulation in order to advance the Act's objectives<sup>98</sup> and avoid abuses by the exchanges or their members.<sup>99</sup>

Courts considering whether to imply immunity typically emphasize Congressional intent to displace antitrust laws in order to further the objectives of the regulatory schemes.<sup>100</sup> Because the courts emphasize both the nature of agency regulation and legislative intent, it is appropriate to review the nature of CFTC

88. *Id.* at 732. The Court actually found that the pervasive regulatory scheme provided in the Maloney Act warranted an implied repeal of the antitrust laws for both the horizontal and vertical restrictions. *Id.* at 733-34.

89. *Id.* at 711. *Id.* at 736 (White, J., dissenting).

90. Pub. L. No. 93-463, 88 Stat. 1389 (codified as amended at 7 U.S.C. § 1 (1982)).

91. The Commodity Exchange Authority had very little authority over the exchanges, especially since it had little power over futures trading, which had grown substantially prior to the enactment of the CFTC Act.

92. 88 Stat. 1389 (codified at 7 U.S.C. § 4a (1982)).

93. Pub. L. No. 97-444, 96 Stat. 2294 (1983).

94. 96 Stat. 2294 (1983). See also H.R. Rep. No. 97-565, 97th Cong., 2d Sess., reprinted in U.S. CODE CONG. & AD. NEWS 3871, 3875.

95. Pub. L. No. 97-444, 96 Stat. 2294 (1983).

96. See *infra* notes 111 to 125 and accompanying text.

97. See *supra* notes 5-6 and accompanying text.

98. Under the CFTC Act, the CFTC must oversee, approve or disapprove exchange rules and regulations to ensure that they do not conflict with the objectives (e.g. preventing manipulation, or excessive speculation by exchange members) of the Act. See *infra* notes 102 to 110 and accompanying text.

99. In the Commodity Exchange Act, Congress recognized the volatile nature of the commodity futures industry and the great potential for manipulative, speculative, and detrimental transactions in the commodity futures industry. 7 U.S.C. § 5 (1982).

100. See *Gordon v. New York Stock Exch.*, 422 U.S. 659 (1975).

oversight of the commodity exchanges and the legislative history of the CFTC Act regarding the application of the antitrust laws.

### Nature of CFTC and SEC Regulation of Exchanges

Under the present regulatory scheme, the CFTC directly oversees most commodity exchange rules, regulations and disciplinary actions. Just as the SEC oversees securities exchanges,<sup>101</sup> the CFTC must affirmatively approve or disapprove rules, regulations, bylaws and resolutions adopted by a commodity exchange.<sup>102</sup> If the CFTC disapproves an exchange rule, it can order the exchange to alter or supplement the rule.<sup>103</sup> Furthermore, if the Commission determines that an exchange has failed to sufficiently alter or supplement the disapproved rule, it can alter or supplement the rule on its own accord.<sup>104</sup> The CFTC also has the power to reverse, modify or remand commodity exchange disciplinary actions and membership decisions.<sup>105</sup> If an exchange fails to take disciplinary action against one or more of its members, the Commission itself has the authority to intervene and take appropriate action.<sup>106</sup>

Under the CFTC Act, each commodity exchange must enforce all bylaws, rules, regulations, and resolutions which the CFTC has approved.<sup>107</sup> The exchanges must revoke and refuse to enforce any bylaw, rule, regulation or resolution disapproved by the Commission.<sup>108</sup> A commodity exchange's failure to comply with the Act or with CFTC rules or regulations is cause for suspension or revocation of that exchange's designation as a "contract market."<sup>109</sup> The Act makes the trading of futures unlawful except when traded in a "contract market" as defined by the Act.<sup>110</sup> The CFTC, therefore, has substantial, direct supervisory authority over commodity exchange rules and actions.

The SEC has substantial authority to oversee the rules,<sup>111</sup> proposed rules and rule changes,<sup>112</sup> and disciplinary actions<sup>113</sup> of the securities exchanges. Before granting registration to an exchange, the SEC must review the registrant ex-

101. See *infra* notes 111 to 125 and accompanying text.

102. 7 U.S.C. § 7a(12) (1982). This provision also requires the CFTC to publish notice and afford interested persons an opportunity to present their views prior to CFTC approval or disapproval of the exchange rule or action. *Id.* The CFTC may approve of rule changes or additions to rules of a registered futures association. However, if the association requests review of the rule change or rule addition or the CFTC notifies the association of its intention to review the changes or additions, it becomes effective 10 days after submission. Otherwise, the CFTC must approve or disapprove such rules within 180 days of receipt, or else the rules become effective after that time. 7 U.S.C. § 21(j)(1982).

103. 7 U.S.C. § 12a(7) (1982). The CFTC may request a registered futures association to alter or supplement certain association rules. 7 U.S.C. § 21(k)(2)(1982).

104. *Id.* With respect to registered futures associations, the CFTC may alter or supplement rules regarding membership, methods for rule changes or additions, and methods for choosing officers and directors, if the association has failed to do so within a reasonable time after the CFTC has requested such action. 7 U.S.C. § 21(k)(2) (1982).

Also, the CFTC may, if necessary and appropriate to assure fair dealing by association members and after notice and opportunity for a hearing, abrogate any association rule. 7 U.S.C. § 21(k)(1) (1982).

105. 7 U.S.C. § 12c (1982). The CFTC has similar powers with regard to disciplinary actions of a registered futures association. 7 U.S.C. §§ 21(i) (1982).

106. *Id.*

107. 7 U.S.C. § 7a(8) (1982). A registered futures association must also enforce compliance with its rules. 7 U.S.C. § 21(l) (1982).

108. *Id.*

109. 7 U.S.C. § 7b (1982). The CFTC has similar power over registered futures associations. 7 U.S.C. § 21(l) (1982).

110. 7 U.S.C. § 6 (1982).

111. 15 U.S.C. §§ 78s(b),(c) (1982).

112. *Id.*

113. 15 U.S.C. § 78s(d) (1982).

change's rules to ensure that the rules conform to the provisions of the Securities Exchange Act.<sup>114</sup> The SEC's review authority also allows it to approve or disapprove of any exchange's proposed rule or rule change.<sup>115</sup> If an aggrieved party files for review of an exchange disciplinary sanction imposed against one or more of its members, the SEC may review the disciplinary sanction.<sup>116</sup> Furthermore, under certain circumstances the SEC can amend or abrogate the rules of an exchange.<sup>117</sup> The SEC may suspend or revoke the registration of a securities exchange<sup>118</sup> or censure or impose limitations upon its activities<sup>119</sup> if it determines such action is necessary or appropriate.<sup>120</sup>

Although the SEC has substantial supervisory authority, the Securities Exchange Act requires procedural fairness in the review of exchange rules and disciplinary actions.<sup>121</sup> When reviewing, amending or abrogating proposed rules or proposed rule amendments, the SEC must provide adequate notice of its intentions<sup>122</sup> and must afford interested persons an opportunity to present their views on the proposed SEC action.<sup>123</sup> Moreover, the SEC must use a formal order<sup>124</sup> to approve or disapprove a proposed exchange rule or rule change.<sup>125</sup>

### Legislative History of the CFTC Act

The legislative history of the Commodity Futures Trading Commission Act also supports extension of the *Silver*,<sup>126</sup> *Gordon*,<sup>127</sup> and *NASD*<sup>128</sup> holdings to the commodity exchanges. Section 15 of the Act provides:

The Commission shall take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the objectives of this chapter, as well as the policies and purposes of this chapter, in issuing any order or adopting any Commission rule or regulation of a contract market or registered futures association established pursuant to section 21 of this title.<sup>129</sup>

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114. 15 U.S.C. § 78(a)(1982). When reviewing an application for registration, the SEC must publish notice and afford interested persons an opportunity to present their views. *Id.*

115. 15 U.S.C. § 78s(b) (1982). This subsection provides that "no proposed rule change shall take effect unless approved by the Commission or otherwise permitted in accordance with the provision of this subsection." *Id.*

116. 15 U.S.C. § 78s(d) (1982).

117. 15 U.S.C. § 78s(c) (1982). This section provides in part:

The Commission, by rule, may abrogate, add to, and delete from (hereinafter in this subsection collectively referred to as "amend") the rules of a self-regulatory organization (other than a registered clearing agency) as the Commission deems necessary or appropriate to insure the fair administration of the self-regulatory organization, to conform its rules to requirements of this chapter and the rules and regulations thereunder applicable to such organization, or otherwise in furtherance of the purposes of this chapter. . . .

*Id.*

118. 15 U.S.C. § 78s(h) (1982).

119. *Id.*

120. *Id.*

121. 15 U.S.C. §§ 78s(b),(d) (1982).

122. 15 U.S.C. §§ 78s(a)-(c) (1982). Prior to the 1975 Amendments, the Securities Exchange Act did not provide for notice and hearing. The Supreme Court in *Silver v. New York Stock Exch.*, 373 U.S. 341 (1963), cited the lack of appropriate procedures as one reason why the challenged NYSE disciplinary action was not immune from the antitrust laws. See *supra* note 31.

123. 15 U.S.C. §§ 78s(a)-(c) (1982). 15 U.S.C. § 78s(e) (1982) provides an aggrieved party with an opportunity for a hearing regarding an exchange's final disciplinary sanction.

124. 15 U.S.C. §§ 78s(a)(1),(b),(e)(1), (f),(h) (1982).

125. *Id.* These subsections provide for the promulgation of a formal order within various specified time periods.

126. *Supra* note 25.

127. *Supra* note 60.

128. *Supra* note 70.

129. 7 U.S.C. § 19 (1982).

The original version of the House bill 11955,<sup>130</sup> included an express exemption from the antitrust laws for any commodity exchange rule that the CFTC required or specifically approved under the Act.<sup>131</sup> Relying upon the Justice Department's statement that the commodity exchanges enjoyed an implied antitrust immunity under *Silver*,<sup>132</sup> the House Committee on Agriculture deleted the express exemption.<sup>133</sup>

Although the express exemption provision was deleted, the final bill included section 15, which requires the CFTC to "endeavor to take the least anticompetitive means of achieving the objectives and policies of the CFTC Act."<sup>134</sup> When

130. H.R. 11955, 93d Cong. 2d Sess. § 106 (1974).

131. This section provided:

Sec.17 (a) Notwithstanding any other provision of law, a contract market, registered futures association established pursuant to Section 15 of this Act, or person registered under the provisions of this Act who is acting pursuant to and in accordance with any order, rule, or regulation of the Commission or any bylaw, rule, or regulation of a contract market which has been required or specifically approved by the Commission as provided in this Act, shall be exempt from the antitrust laws of the United States as defined in Section 12 of Title 15 of the United States Code, and amendments and Acts supplementary thereto.

(b) The Commission shall take into consideration the public interest to be protected by the antitrust laws as well as the policies and purposes of this Act in issuing any order or adopting any rule regulation, or in requiring or approving any bylaw, rule or regulation of a contract market or registered futures association established pursuant to Section 15 of this Act.

*Id.* See *Hearings on H.R. 11955 Before the House Comm. on Agriculture*, 93d Cong., 2d Sess. 347-48 (1974).

132. The Department of Justice did not endorse this express exemption provision because it asserted that "this exemption is unwise from the standpoint of public policy and unnecessary because present law provides an adequate antitrust exemption for those activities of contract markets necessary to achieve valid objectives of the Commodity Exchange Act." House Report, *supra* note 5, at 23-24.

The Department of Justice letter further stated:

Under existing law, activities of regulated exchanges approved, as distinguished from mandated, by a regulatory agency, are also exempt from the antitrust laws if they are "necessary to make the . . . [regulatory act] work" and no more restrictive than necessary. Thus existing law assures the exchanges that, where there is a conflict between the antitrust laws and the Commodity Exchange Act, the latter is paramount, but, where there is no conflict, the antitrust laws are fully applicable. . . . The 'necessity' test of *Silver* applies where the regulatory agency reviews the rules of a self-regulatory organization. . . . and it also applies to commodity as well as securities exchanges.

*Id.* at 24-25 (citations omitted). In the report the Committee cited this opinion as their basis for eliminating the express antitrust exemption. *Id.* at 27-28.

133. House Report, *supra* note 5, at 28.

134. 7 U.S.C. § 19 (1982). The original version of this provision required only that the CFTC consider the public interest behind the antitrust laws in approving commodity exchange rules. See *supra* note 131.

It has been argued that the courts should not be able to apply the antitrust laws where the CFTC has met its section 15 duty. Special Committee on Commodities Regulation, *supra* note 29.

Where the Commission has considered the antitrust issues and endeavored to take the least anticompetitive means in achieving the objectives of the Act, a court should not be able, on antitrust grounds, to overturn its decision. Of course, if in taking its action, the Commission has acted arbitrarily or capriciously or has abused its discretion, a court may, on those grounds, overturn the Commission's determination in an appropriate proceeding.

*Id.* at 254.

A leading commentator believes that "it is extremely doubtful that the CFTC's compliance with section 15 could be challenged by an original civil antitrust suit against the exchange, since the actionable wrong results from the CFTC's breach of its section 15 duty." Johnson, *supra* note 12, at 126-27. See also 1 P. JOHNSON, *supra* note 5, at 418-21.

Section 15 has been appropriately viewed as more or less a codification of the rule of reason part of the test established in *Silver*. Johnson, *supra* note 12, at 123. See *supra* note 52 and accompanying text.

The few lower courts that have addressed the effect of § 15 on the CFTC's rule approval process, however, have not required the CFTC to implement the least anticompetitive means to further the objectives of the Act. For example, in *Rosenthal v. Bagley*, 450 F. Supp. 1120 (N.D. Ill. 1978), the plaintiff challenged enforcement of a regulation approved by the CFTC on the basis that the CFTC breached its duty under § 15 to "endeavor to take the least anticompetitive means." The court rejected this argument, saying that the CFTC fully meets its duty under § 15 when it fully considers the antitrust ramifications of a ruling it makes. "The CFTC more than fulfilled its responsibility to con-

amending this section to its final form, the Senate Committee on Agriculture and Forestry stated that "[i]t did not want to make the antitrust laws more restrictive in the commodities industry than in the securities industry."<sup>135</sup> This statement illustrates the legislative intent to provide for uniformity in the approaches to be taken by the courts in applying the antitrust laws to securities exchanges and commodity exchanges.<sup>136</sup>

The legislative history of section 15 demonstrates that Congress sought to effectuate two goals through this provision. First, Congress wanted the CFTC to weigh the antitrust laws' procompetitive objectives as a factor in approving or disapproving commodity exchange rules and actions. Second, Congress intended the courts to apply an implied antitrust immunity to commodity exchange rules and actions which the CFTC actively and directly oversees, those which are expressly required, and those which are necessary to effectuate the objectives of the Commodity Exchange Act.

### CONCLUSION

The Commodity Futures Trading Commission possesses extensive supervisory authority over the commodity exchanges so as to ensure that they regulate their members effectively and fairly. Congress implemented a two-tiered regulatory scheme in order to provide the utmost stability in an otherwise potentially volatile industry. This increased stability, however, results in a regulated industry possessing certain inherently anticompetitive characteristics.

Complete application of the antitrust laws in a commodities industry for exchange rules and actions would contravene some of the objectives Congress sought to achieve in the Commodity Exchange Act.<sup>137</sup> Since Congress failed to provide an express antitrust exemption, a judicially-implied immunity is necessary to prevent the frustration of CFTC regulation where it actively and directly supervises exchange rules and actions, or where the Act expressly endorses anticompetitive practices. The courts have implied such an immunity for the securities industry, although they generally disfavor an implied repeal of the antitrust laws.<sup>138</sup>

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sider the antitrust laws. Plaintiffs' assertion that the Commission was bound to adopt the least anti-competitive means is without merit." *Id.* at 1124-25. See also *Commodity Futures Trading Comm. v. American Bd. of Trade*, 473 F. Supp. 1177, 1182 n.14 (S.D.N.Y. 1979).

135. S. Rep. No. 1131, 93 Cong., 2d Sess. 23, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 5843, 5863.

136. Although both *Gordon v. New York Stock Exch.*, 422 U.S. 659 (1975) and *United States National Ass'n of Securities Dealers*, 422 U.S. 694 (1975) were both decided after enactment of the CFTC Act, the courts should apply to commodity exchanges the approach taken by the Court in these cases to implement the intent of Congress.

137. The commodity futures industry is a potentially volatile industry; without regulation of exchanges and their members, the possibility of manipulative and speculative practices would be greatly increased. The rules restricting exchange membership, for example, help prevent the use of such practices. If the courts applied the antitrust laws to all exchange rules and regulations, the exchange's ability to increase stability in this volatile industry would be lost. Although allowing free competition in the commodities industry might foster greater activity in the market, the potential for greater activity is outweighed by the abusive manipulative and speculative practices which would most likely result from the complete application of antitrust laws to commodity exchange rules and actions.

Congress has recognized the possibility of great abuses in a commodities industry without regulation:

The transactions and prices of commodities on such boards of trade are susceptible to excessive speculation and can be manipulated, controlled, cornered or squeezed, to the detriment of the producer or the consumer and the persons handling commodities and the products and byproducts thereof in interstate commerce, rendering regulation imperative for the protection of such commerce and the national public interest therein.

7 U.S.C. § 5 (1982).

138. *United States v. Borden Co.*, 308 U.S. 188, 198 (1939); *Silver v. New York Stock Exch.*, 373 U.S. 341, 357 (1963).

The legislative history of the CFTC Act supports the conclusion that the courts should imply an antitrust immunity for commodity exchange rules and actions. Moreover, the similarities in the nature of federal agency review in the securities and commodities industry, and the rationale for self-regulation and the anticompetitive nature of the schemes support an implied antitrust immunity for the commodities industry. For these reasons, the courts should, and probably will, apply to commodity exchanges the implied antitrust immunity approach that the Supreme Court established in *Silver*, *Gordon*, and *NASD*.

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