NOTES

ANTITRUST LAW—PRESENCE OF SEC REVIEW POWER EXEMPTS STOCK EXCHANGE FIXED MINIMUM BROKERAGE COMMISSION RATE SYSTEM FROM THE OPERATION OF THE ANTITRUST LAWS—*Gordon v. New York Stock Exchange, Inc.*, 498 F.2d 1303 (2d Cir.), *cert. granted*, 95 S. Ct. 491 (1974).

In April 1971, Richard A. Gordon brought an action[1] on behalf of himself and a group of small investors[2] against the New York Stock Exchange (NYSE), the American Stock Exchange, and two representative firms,[3] claiming that the exchange practice of fixing minimum brokerage commission rates violated the federal antitrust laws.[4] Specifically, the complaint alleged that exchange rules which provided for volume discounts on trades of over 1,000 shares, negotiated rates for portions of orders in excess of $500,000, and a surcharge of $15 on transactions involving less than 1,000 shares[5] constituted a scheme of price discrimination in

[1] Gordon v. New York Stock Exch., Inc., 366 F. Supp. 1261 (S.D.N.Y. 1973), *aff'd*, 498 F.2d 1303 (2d Cir.), *cert. granted*, 95 S. Ct. 491 (1974).

[2] Although this suit was brought as a class action, the issue of whether a class action could be maintained was never reached by the district court because it granted defendants' motion for summary judgment. Gordon v. New York Stock Exch., Inc., 366 F. Supp. 1261, 1267 (S.D.N.Y. 1973), *aff'd*, 498 F.2d 1303 (2d Cir.), *cert. granted*, 95 S. Ct. 491 (1974). In a similar case, however, the same court held that an antitrust attack on the temporary $15 surcharge on the minimum commission rate for small orders could not be maintained as a class action because the class was conglomerate and consisted of more than twenty million persons. Reinisch v. New York Stock Exch., 52 F.R.D. 561, 563-64 (S.D.N.Y. 1971). If such an action were to be maintained, the plaintiffs would be required to notify all possible members of the class at their own expense. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974).

[3] Gordon v. New York Stock Exch., Inc., 498 F.2d 1303, 1304 & n.1 (2d Cir.), *cert. granted*, 95 S. Ct. 491 (1974).

[4] Gordon v. New York Stock Exch., Inc., 366 F. Supp. 1261, 1262 (S.D.N.Y. 1973), *aff'd*, 498 F.2d 1303 (2d Cir.), *cert. granted*, 95 S. Ct. 491 (1974).

[5] Gordon v. New York Stock Exch., Inc., 498 F.2d 1303, 1304 (2d Cir.), *cert. granted*, 95 S. Ct. 491 (1974). Although the minimum commission system has functioned with few substantial changes since the inception of the NYSE in 1792, it became apparent in the 1960's that the rate structure was not responsive to economic realities and was fostering elaborate avoidance activities by member firms. Members were required to charge the minimum rate which was based on "a sliding scale on money involved per round lot," multiplied by the number of round lots involved in the transaction. SEC, REPORT OF SPECIAL STUDY OF SECURITIES MARKETS, H.R. Doc. No. 95, 88th Cong., 1st Sess., pt. 2, at 295-96, 347-48 (1963) [hereinafter cited as SPECIAL STUDY].

To alleviate the rigidities of this rate structure, the NYSE instituted volume discounts on orders in excess of 1,000 shares in 1968. SEC Securities Exchange Act of 1934 Release No. 11093 (Nov. 8, 1974). This action was also spurred by pressures from the SEC and the

violation of the Sherman Antitrust and Robinson-Patman Acts.[6] The plaintiffs also charged that the fixed commission rate system, to the extent that non-negotiated rates were unavailable to small investors, established a system of price-fixing in violation of sections 1 and 2 of the Sherman Antitrust Act.[7]

Department of Justice. Ratner, *Regulation of the Compensation of Securities Dealers,* 55 CORNELL L. REV. 348, 357-58 (1970).

The $15 surcharge on orders involving less than 1,000 shares was instituted in 1970 in response to severe financial problems in the industry which had forced some member firms to limit the services available to small investors. SEC Securities Exchange Act Release No. 8860 (April 2, 1970). The surcharge has since been eliminated. SEC Securities Exchange Act of 1934 Release No. 9351 (Sept. 24, 1971).

In 1971, fixed rates on portions of orders above $500,000 were eliminated. SEC Securities Exchange Act of 1934 Release No. 9079 (Feb. 11, 1971). That "breakpoint" was lowered to $300,000 the following year. SEC Securities Exchange Act of 1934 Release No. 11093 (Nov. 8, 1974). It will remain at that level until May 1975, when fully competitive rates are scheduled to begin. SEC Securities Exchange Act of 1934 Release No. 10560 (Dec. 14, 1973). Rates on orders involving less than $2,000 are now subject to "limited price competition." SEC Securities Exchange Act of 1934 Release No. 10670 (March 7, 1974).

For a thorough discussion of the possible economic effects of the elimination of fixed rates see Friend & Blume, *The Consequences of Competitive Commissions on the New York Stock Exchange,* reprinted in *Hearings on S. 3169 Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs,* 92d Cong., 2d Sess., at 259 (1972).

[6] Gordon v. New York Stock Exch., Inc., 498 F.2d 1303, 1304 (2d Cir.), *cert. granted,* 95 S. Ct. 491 (1974).

Section 1 of the Sherman Act provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

15 U.S.C. § 1 (1970).

Section 2 reads in pertinent part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdeameanor [*sic*] . . . .

Id. § 2.

The Robinson-Patman Act provides in pertinent part:

> It shall be unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly . . . .

Id. § 13(a).

[7] Gordon v. New York Stock Exch., Inc., 498 F.2d 1303, 1304 (2d Cir.), *cert. granted,* 95 S. Ct. 491 (1974).

Absent congressional authorization, price-fixing combinations are illegal per se and "are not evaluated in terms of their purpose, aim or effect in the elimination" of competition. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 228 (1940). Thus, per se violations are not assessed in terms of the "rule of reason" enunciated in Board of Trade v. United States, 246 U.S. 231, 238 (1918). For a critique of the per se doctrine see Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division* (pt. 1), 74 YALE L.J. 775 (1965).

Significantly, the Supreme Court has determined that prescribing standard commissions by a real estate board is illegal per se. United States v. National Ass'n of Real Estate Bds., 339 U.S. 485, 487-89, 495-96 (1950). But that decision had no effect on the stock exchange

The district court granted the defendants' motion for summary judgment on the ground that it lacked jurisdiction to entertain an antitrust attack on the commission rate structure.[8] The court premised its conclusion on the fact that the Securities Exchange Act of 1934 (the 1934 Act) expressly provided for supervision by the Securities Exchange Commission (SEC) of the exchanges' " 'fixing of reasonable rates of commission.' "[9]

The Second Circuit, in *Gordon v. New York Stock Exchange, Inc.*,[10] affirmed, addressing itself exclusively to the allegation that the practice of fixing minimum brokerage commission rates violates the antitrust laws.[11] The court, speaking through Chief Judge Irving Kaufman, determined that the specific wording and legislative history of the 1934 Act, as well as the policies underlying "supervised exchange self-regulation" mandated a finding that Congress intended to exempt exchange rate-fixing from the purview of the antitrust laws.[12] Accordingly, the court found that jurisdiction to review the rate-fixing practices of the exchanges was vested exclusively in the SEC.[13]

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practice of fixing minimum rates of commission. 5 L. Loss, SECURITIES REGULATION 3157 (Supp. 1969).

[8] Gordon v. New York Stock Exch., Inc., 366 F. Supp. 1261, 1264, 1267 (S.D.N.Y. 1973), *aff'd*, 498 F.2d 1303 (2d Cir.), *cert. granted*, 95 S. Ct. 491 (1974).

[9] 366 F. Supp. at 1264 (quoting from Securities Exchange Act of 1934, § 19(b)). This section provides:

> (b) 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 regulations or by order to alter or supplement the rules of such exchange . . . in respect of such matters as . . . (9) the fixing of reasonable rates of commission . . . .

15 U.S.C. § 78s(b) (1970).

[10] 498 F.2d 1303 (2d Cir.), *cert. granted*, 95 S. Ct. 491 (1974).

[11] 498 F.2d at 1305. The plaintiffs not only attacked the fixed rates as being "unreasonably high," but also charged that volume discounts and negotiated rates were set at "unreasonably low levels," a system which allegedly discriminated against the small investor. 366 F. Supp. at 1262. This question of the reasonableness of the rates was not reached in either the district court or the circuit court because it was determined that the antitrust court lacked jurisdiction. 498 F.2d at 1304-05. However, the lower court rejected plaintiffs' claims of price-discrimination under the Robinson-Patman Act on the grounds that "stock trade executions . . . are not 'commodities.' " 366 F. Supp. at 1263 (citing Baum v. Investors Diversified Servs., Inc., 409 F.2d 872, 875-76 (7th Cir. 1969); C.B.S., Inc. v. Amana Refrigeration, Inc., 295 F.2d 375, 378 (7th Cir. 1961)).

Gordon also attacked the limited membership practice of the exchanges, but this attack was dismissed as "frivolous." 498 F.2d at 1304 n.5. *See also* Abbott Sec. Corp. v. New York Stock Exch., 384 F. Supp. 668, 670 (D.D.C. 1974).

[12] 498 F.2d at 1305-06.

[13] *Id.* at 1304-05. Judicial review of the SEC's determinations is thus limited to that

The presence of a statutory scheme which arguably regulates an activity being attacked as violative of the antitrust laws burdens the court with the troublesome task of reconciling the regulatory and antitrust statutes.[14] The difficulty of this task is compounded by the fact that the policy of open and free competition embodied in the antitrust laws may or may not be incorporated in the regulatory statute. Consequently, to determine which activities are subject to antitrust scrutiny, courts have engaged in a careful analysis of the regulatory statute, as well as the purposes behind the legislation, to ascertain if the activity involved is either expressly or impliedly exempted from the operation of the antitrust laws.[15] Absent an express provision in the statute,[16] courts have examined the statutory scheme to determine if the extent of control vested in the agency is so pervasive as to indicate congressional intent to immunize the activity involved.[17] Such intent has rarely been found and repeal of the antitrust laws is implied only if the court finds a "plain repugnancy between the antitrust and regulatory provisions."[18]

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provided for in the Administrative Procedure Act, 5 U.S.C. §§ 702, 704, 706 (1970), and the 1934 Act, 15 U.S.C. § 78y (1970). 498 F.2d at 1311. Commission determinations may only be disturbed if the reviewing court finds them to be unsupported by substantial evidence. 5 U.S.C. § 706 (1970); 15 U.S.C. § 78y (1970). For a discussion of the substantial evidence test see 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.02 (1958).

[14] For a discussion of the interrelationship between the antitrust laws and regulated industries see P. AREEDA, ANTITRUST ANALYSIS § 179 (1974); 5 H. TOULMIN, A TREATISE ON THE ANTI-TRUST LAWS OF THE UNITED STATES §§ 1.1-9.34 (1950).

[15] *See, e.g.*, FMC v. Seatrain Lines, Inc., 411 U.S. 726, 731-36 (1973).

[16] Express exemptions from the antitrust laws can be found in statutes governing other regulated industries. *See, e.g.*, Shipping Act, 46 U.S.C. § 814 (1970) (agreements among companies are exempt if approved by the Federal Maritime Commission); Federal Aviation Act, 49 U.S.C. §§ 1378(a), 1379(a), 1382, 1384 (1970) (approval by the Civil Aeronautics Board exempts certain activities). But these provisions have been narrowly construed. *See, e.g.*, Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 216-20, *modified*, 383 U.S. 932 (1966) (rate-making agreements which have not been specifically approved by the FMC are not exempt); Pan American World Airways, Inc. v. United States, 371 U.S. 296, 305 (1963) (activity of CAB immunized agreements among airlines only because one of "precise ingredients" of exempt regulatory function).

[17] *See, e.g.*, Otter Tail Power Co. v. United States, 410 U.S. 366, 372-74 (1973); California v. FPC, 369 U.S. 482, 485 (1962); United States v. R.C.A., 358 U.S. 334, 339-46 (1959).

For discussions of implied exemption see Comment, *An Approach for Reconciling Antitrust Law and Securities Law: The Antitrust Immunity of the Securities Industry Reconsidered*, 65 NW. U.L. REV. 260, 314-18 (1970); Note, *The New York Stock Exchange Minimum Commission Rate Structure: Antitrust on Wall Street*, 55 VA. L. REV. 661, 669-74 (1969).

The same factors considered in determining whether an activity is impliedly exempted from the operation of the antitrust laws are examined to determine whether the doctrine of primary jurisdiction should be invoked. For an expanded discussion of this doctrine see note 19 *infra*.

[18] United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 350-51 (1963) (footnote omitted). *See also* United States v. Borden Co., 308 U.S. 188, 198 (1939).

Antitrust scrutiny may also be circumvented if a regulatory agency is empowered to review the activity challenged. Such review power has allowed the courts, by invocation of the doctrine of primary jurisdiction,[19] to defer to the agency in varying degrees and on various issues.

Any antitrust attack on the stock exchange practice of fixing minimum commission rates requires an analysis of the regulatory scheme established by Congress in the Securities Exchange Act of 1934. The exchanges, as self-regulating bodies, have long required their members to charge fixed minimum rates of commission.[20]

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[19] The doctrine of primary jurisdiction has been defined

> as a judicial doctrine devised to allocate the decision-making responsibilities between the courts and the agencies and possibly to determine the sequence of the participation of both.

King, *The "Arguably Lawful" Test of Primary Jurisdiction in Antitrust Litigation Involving Regulated Industries,* 40 TENN. L. REV. 617, 622 (1973).

The doctrine of primary jurisdiction was initially invoked to promote uniformity throughout a regulated industry. *See, e.g.,* Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 447-48 (1907). The doctrine was later invoked in deference to administrative expertise in a particular area. Far E. Conference v. United States, 342 U.S. 570, 574-75 (1952). The present trend is to invoke the doctrine only if an agency is granted express statutory power to immunize an activity from the antitrust laws or a pervasive regulatory scheme exists. Note, *Primary Jurisdiction in Antitrust Action Against the New York Stock Exchange: Immunization and Expertise,* 1970 U. ILL. L.F. 544, 552-53 & n.57.

The courts have considered various factors in reaching the determination of whether to apply the doctrine. *See, e.g.,* Chicago Mercantile Exch. v. Deaktor, 414 U.S. 113, 115 (1973) (the relative ability of the agency to make a specific determination); Federal Maritime Bd. v. Isbrandtsen Co., 356 U.S. 481, 491-93 (1958) (the presence or absence of express power to immunize); S.S.W., Inc. v. Air Transp. Ass'n of America, 191 F.2d 658, 661-62 (D.C. Cir. 1951) (the extent to which the agency is compelled to consider antitrust factors).

If the court chooses to invoke primary jurisdiction it must then determine whether or not it will review the agency's determinations and what standards of review will be applied. Note, *Fixed Brokerage Commissions: An Antitrust Analysis After the Introduction of Competitive Rates on Trades Exceeding $500,000,* 85 HARV. L. REV. 794, 818 (1972). Invocation of the doctrine may effectuate dismissal of the case with subsequent judicial review limited to review of an administrative determination. *See, e.g.,* Far E. Conference v. United States, *supra* at 577. The court may alternatively order a stay of the case in the antitrust court pending administrative action. General Am. Tank Car Corp. v. El Dorado Terminal Co., 308 U.S. 422, 433 (1940). *But see* California v. FPC, 369 U.S. 482, 487 (1962).

The consequences of invoking the doctrine of primary jurisdiction have been recognized by the Supreme Court:

> We recognize that the practical effect of applying the doctrine of primary jurisdiction has sometimes been to channel judicial enforcement of antitrust policy into appellate review of the agency's decision . . . or even to preclude such enforcement entirely if the agency has the power to approve the challenged activities . . . .

United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 353-54 (1963) (citations omitted).

For further discussion of the doctrine see 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 19 (1958); Jaffe, *Primary Jurisdiction,* 77 HARV. L. REV. 1037 (1964).

[20] SPECIAL STUDY, *supra* note 5, at 295. Article XV, section 1 of the NYSE Constitution provides in pertinent part:

> Commissions shall be charged and collected upon the execution of all orders

The scheme of self-regulation was retained in the 1934 Act,[21] but the SEC was empowered, pursuant to section 19(b),

> to alter or supplement the rules of such exchange . . . in respect of such matters as . . . the fixing of reasonable rates of commission . . . .[22]

The SEC may make such changes if it finds that they are "necessary or appropriate for the protection of investors or to insure fair dealing in securities."[23] While the SEC has rarely invoked its powers under section 19(b),[24] it has held hearings on the fixed minimum commission structure intermittently over the past six years.[25] As a result of those hearings, the SEC has announced its intention to enforce the implementation of fully negotiated rates by May 1975.[26]

> for the purchase or sale for the account of members or allied members . . . of securities admitted to dealings upon the Exchange and these commissions shall be at rates not less than the rates in this Article prescribed . . . .

2 CCH NYSE GUIDE ¶ 1701 (1972).

[21] William O. Douglas, while serving as Chairman of the SEC, described the "proper relationship" between the stock exchanges and the SEC as

> "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 (J. Allen ed. 1968).

Although the exchanges have remained predominantly self-regulating, the 1934 Act requires registration with the SEC to attain the status of a national securities exchange. 15 U.S.C. §§ 78e-f(a) (1970). The Commission may permit registration if it finds the rules to be "just and adequate to insure fair dealing and to protect investors." *Id.* § 78f(d). If at any time subsequent to registration the SEC determines that the exchange rules do not meet this standard, the SEC is authorized to suspend or withdraw the registration of a national securities exchange, after appropriate notice is given and hearings are held. The SEC may take such action if, in its opinion, it "is necessary or appropriate for the protection of investors." *Id.* § 78s(a).

[22] 15 U.S.C. § 78s(b) (1970). Before such action is taken, the Commission must provide adequate notice and opportunity for public hearing. *Id.*

[23] *Id.*

[24] Ratner, *supra* note 5, at 361-62.

[25] For a critique of SEC activity with respect to the fixed minimum commission rate structure see SENATE COMM. ON BANKING, HOUSING AND URBAN AFFAIRS, 92D CONG., 2D SESS., SECURITIES INDUSTRY STUDY 53-60 (Comm. Print 1972).

Congressional interest in fixed minimum rates has been intense. *See, e.g., Hearings on H.R. 5050 and H.R. 340 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce,* 93d Cong., 1st Sess. (1974); *Hearings on S. 470 and S. 488 Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs,* 93d Cong., 1st Sess. (1973).

[26] SEC Securities Exchange Act of 1934 Release No. 10383 (Sept. 11, 1973). The SEC recently reaffirmed its position:

> [T]he Commission's constant review and analysis of the market structure and functioning, particularly since the 1960's, has contributed to a conclusion by . . . the Commission . . . that the fixed rate system, even as modified over the last decade, has heightened conflicts of interest and distorted trading patterns, has seriously

Although the fixing of commission rates, as well as other exchange practices, is clearly anticompetitive to some extent, the first antitrust attack on an exchange practice did not arise until almost thirty years after passage of the 1934 Act.[27] The United States Supreme Court, in its only discussion to date of the problem of reconciling federal antitrust laws with exchange self-regulation, saw the issue raised in *Silver v. New York Stock Exchange*[28] as

> whether the Securities Exchange Act has created a duty of exchange self-regulation so pervasive as to constitute an implied repealer of our antitrust laws, thereby exempting the Exchange from liability in this and similar cases.[29]

Silver, a broker-dealer in over-the-counter corporate securities, who was not a member of the NYSE, brought an antitrust action against the Exchange, claiming that it had violated the antitrust laws when it ordered the removal of private wire connections between Silver and several member firms.[30] The NYSE, acting pursuant to an Exchange rule, had effectuated the removal without affording Silver any notice or opportunity for a hearing.[31] The Supreme Court concluded that the Exchange had not afforded Silver proper procedural safeguards and that the Securities Exchange Act "affords no justification for anticompetitive collective action taken without according fair procedures."[32]

The significance of *Silver,* however, rests not in its holding, but rather in the approach taken by the Court to reconcile antitrust laws with exchange self-regulation. Underlying the Court's discus-

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disadvantaged various classes of public investors and has tended to work against the development of a meaningful central market system for listed securities.

SEC Securities Exchange Act of 1934 Release No. 11093 (Nov. 8, 1974).

A test of SEC muscle pursuant to section 19(b) may have been averted by the NYSE's decision not to sue to block the May 1 deadline set by the SEC for implementation of fully negotiated rates. Wall St. Journal, Feb. 7, 1975, at 2, col. 3. The NYSE, as well as several other exchanges, had initially refused to comply with the SEC's mandate. SEC Securities Exchange Act of 1934 Release No. 11093 (Nov. 8, 1974).

[27] *See* 5 L. Loss, SECURITIES REGULATION 3156-57 (1969) (citing Silver v. New York Stock Exch., 373 U.S. 341 (1963)). The exchanges appeared to be free from antitrust attack "as long as they stayed within reasonable business limits." Bloom, *Securities and Commodity Exchanges,* 33 A.B.A. ANTITRUST L.J. 88, 90 (1967) (footnote omitted).

For a comprehensive discussion of the antitrust laws and the securities industry see Baxter, *NYSE Fixed Commission Rates: A Private Cartel Goes Public,* 22 STAN. L. REV. 675 (1970); Comment, *supra* note 17; Note, *Fixed Brokerage Commissions: An Antitrust Analysis After the Introduction of Competitive Rates on Trades Exceeding $500,000,* 85 HARV. L. REV. 794 (1972).

[28] 373 U.S. 341 (1963).

[29] *Id.* at 347.

[30] *Id.* at 345.

[31] *Id.* at 344.

[32] *Id.* at 364 (footnote omitted).

sion was the recognition that the alleged violations constituted a group boycott and would be a per se violation of the Sherman Act in the absence of a statutory scheme that may justify the activities charged.[33]

In determining the extent to which the 1934 Act might justify the Exchange's action, the Court examined the Act to ascertain whether it effectuated a repeal of the antitrust laws.[34] The Court, concluding that the 1934 Act contained no express exemption from the antitrust laws,[35] reasoned that any exemption must therefore arise by implication.[36] Emphasizing that repeal of the antitrust laws is not favored, the Court articulated the "guiding principle" 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.[37]

The Court saw the purpose of this standard as a reconciliation of the national policy of free and open competition with the policy of exchange self-regulation which includes some anticompetitive aspects.[38] To implement the policies of both statutory schemes, the Court found that only those exchange activities which do the minimum harm to antitrust concepts while furthering the purposes of the 1934 Act are exempt from antitrust review.[39]

However, the Court did not need to apply its own analysis with respect to repeal of the antitrust laws because, while the 1934 Act grants the authority to the SEC to approve or disapprove an individual exchange rule, a particular application by an exchange

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[33] *Id.* at 347. For a discussion of per se illegality see note 7 *supra*. The Court recognized that the activity was "a group boycott depriving petitioners of a valuable business service." 373 U.S. at 347.

[34] 373 U.S. at 348-49. The court of appeals had held that the challenged exchange activity was "within the general scope of the authority of the Exchange as defined by the 1934 Act," and was thus exempt from antitrust attack. Silver v. New York Stock Exch., 302 F.2d 714, 716 (2d Cir. 1962).

[35] 373 U.S. at 357. It has been theorized that Congress may have considered such a provision unnecessary because case law in 1934 "suggested that stock exchanges were not in interstate commerce" and were thus not subject to the antitrust laws. W. MARTIN, THE SECURITIES MARKETS 19 (1971). To protect the exchanges from antitrust attack, one commentator has recommended that the exchanges request Congress to grant them antitrust immunity coexistent with SEC review jurisdiction. *Id.* at 20.

[36] 373 U.S. at 357. For a discussion of implied and express exemptions see notes 16-17 *supra* and accompanying text.

[37] 373 U.S. at 357.

[38] *Id.* at 349.

[39] *Id.* at 358-62.

of an approved rule is not reviewable by the SEC.[40] The SEC, then, lacking jurisdiction to review specific applications of exchange rules, was powerless to insure that exchanges would not engage in activities inimical to antitrust provisions and not "justified as furthering legitimate self-regulative ends."[41] Consequently, to effectuate the policies of the antitrust laws it was essential to entrust review of the exchange's activities to an antitrust court.[42] The Court observed, however, that a "different case" would present itself if review of exchange self-regulation were possible by a forum other than an antitrust court.[43]

Although the Supreme Court in *Silver* attempted to offer a viable standard by which to reconcile antitrust and securities legislation, a number of critical questions were left unanswered. Paramount among these are the standards to be applied in determining the " 'minimum repeal necessary' " of the antitrust laws to make the 1934 Act work,[44] and the consequence of concurrent jurisdiction in the SEC. Nevertheless, one proposition that clearly emerges from *Silver* is that the 1934 Act does not entirely exempt exchange self-regulation from the antitrust laws.[45]

The different case which *Silver* said would arise if concurrent jurisdiction existed in the SEC to review exchange activities was

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[40] *Id.* at 357. *See also* Note, *Stock-Exchange Immunity from the Antitrust Laws,* 51 B.U.L. REV. 32, 42 (1971); Note, *supra* note 27, at 802. The Court noted that although the SEC could request exchanges to change their rules, the Commission did not have the power "to review particular instances of enforcement of exchange rules." 373 U.S. at 357. This limitation has been attacked as artificial because "rules are, after all, defined in the process of their employment." Note, *supra* note 27, at 801. It has been suggested that the Court employed this reasoning in order to "[slither] past the difficult issue of primary jurisdiction." Baxter, *supra* note 27, at 687.

[41] 373 U.S. at 358. Because the Exchange had not provided plaintiffs with the minimum procedural safeguards, the Court determined that

> the Exchange has plainly exceeded the scope of its authority under the Securities Exchange Act to engage in self-regulation and therefore has not even reached the threshold of justification under that statute for what would otherwise be an antitrust violation.

Id. at 365.

[42] *Id.* at 359-60. Absent scrutiny by the antitrust court, there would be no protection afforded the investor against anticompetitive action taken by the Exchange outside the scope of its authority. *Id.* at 359.

[43] *Id.* at 358 n.12, 360.

[44] Note, *supra* note 27, at 802. Justice Goldberg suggested that some exchange activities might be protected from antitrust scrutiny "under the aegis of the rule of reason." 373 U.S. at 360. This " 'rule of reason' " approach involves an analysis of the congressional design as evidenced by the regulatory statute and differs from the traditional rule of reason analysis applied in antitrust cases which involves judicial inquiry into the economic justifications offered for anticompetitive activities. Note, *supra* note 27, at 802.

[45] 373 U.S. at 359. *See also* Note, *supra* note 27, at 802.

arguably presented in *Kaplan v. Lehman Brothers.*[46] The plaintiff brought an action on behalf of the shareholders of five mutual funds against the NYSE and four member firms charging that the fixed minimum commission rate system was a violation of the Sherman Act and that the rates were unreasonable.[47] The district court granted the defendants' motion for summary judgment, relying on its interpretation of *Silver* "that action taken by the Exchange and its members, pursuant to its statutory authority to make rules, is not illegal per se under the Sherman Act."[48] Thus, because the plaintiffs had relied entirely on the allegation that the fixing of minimum commission rates by the Exchange was a per se violation of the Sherman Act, their action was barred by the holding in *Silver.*[49]

The court buttressed its conclusion that minimum commission rates were immune from antitrust attack by noting the presence of review power in the SEC over rate-fixing, which according to its reading of *Silver,* precluded any antitrust review.[50] Judge Hoffman also noted the inevitable disruption of the congressional plan enunciated in the 1934 Act which would result from conflicting court and Commission decisions on the reasonableness of commission rates.[51]

The Seventh Circuit, affirming in a brief opinion,[52] ignored the pleading aspect of the case and based its opinion on the conclusion that nothing in the Sherman Act or the 1934 Act indicated congressional intent to allow an antitrust attack on exchange action in fixing commission rates.[53] Accordingly, the court perceived the

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[46] 250 F. Supp. 562, 566 (N.D. Ill. 1966), *aff'd,* 371 F.2d 409 (7th Cir.), *cert. denied,* 389 U.S. 954 (1967).

[47] 250 F. Supp. at 562-63.

[48] *Id.* at 564. *See also* Cowen v. New York Stock Exch., 371 F.2d 661, 664 (2d Cir. 1967); Baum v. Investors Diversified Servs., Inc., 286 F. Supp. 914, 925 (N.D. Ill. 1968), *aff'd,* 409 F.2d 872 (7th Cir. 1969).

[49] 250 F. Supp. at 565. In reaching this conclusion, the court rejected the plaintiffs' claim that "[p]rescribed . . . rates . . . can never be 'reasonable.' " The court found that "[t]he argument . . . ignores the provision [in the 1934 Act] that the 'reasonable' rates shall also be 'fixed' rates." *Id.* It has been suggested that Judge Hoffman should have entertained the argument that a minimum rate schedule is "*not* 'reasonable' " and is therefore not within the scope of the 1934 Act. Note, *supra* note 27, at 805 n.62 (emphasis in original).

[50] 250 F. Supp. at 566.

[51] *Id.* Even if the plaintiffs had complained that the rates were too high, jurisdiction would be retained by the SEC because "[r]atemaking is a matter for which the courts are ill-equipped, and accordingly a matter traditionally committed to an administrative agency." *Id.*

[52] 371 F.2d 409, 411 (7th Cir. 1967).

[53] *Id.* One commentator has criticized the Seventh Circuit for "default[ing] on its

district court's opinion "as holding that the antitrust laws are inapplicable to the New York Stock Exchange insofar as its prescribing of minimum commission rates is concerned."[54] In support of this view, the court indicated that the Exchange had exercised its self-regulatory function pursuant to section 19(b) of the 1934 Act and that "fixing of minimum commissions is one method of regulating commission rates."[55]

The United States Supreme Court denied certiorari,[56] but in a strong dissenting opinion, Chief Justice Warren attacked the "blunderbuss approach" of the lower court which fell "far short of the close analysis and delicate weighing process mandated by this Court's opinion in *Silver*."[57]

The analysis called for in *Silver* was employed by the Seventh Circuit in *Thill Securities Corp. v. New York Stock Exchange*.[58] Noting Chief Justice Warren's attack on its approach in *Kaplan*,[59] the Seventh Circuit in *Thill* reversed a grant of summary judgment which had been premised on the concept, enunciated in *Kaplan*, that the Exchange's antirebate rule was immune from antitrust scrutiny because it fell within the scope of SEC review.[60] In *Thill*, the plaintiffs had attacked the Exchange practice which prohibited the sharing of brokerage commissions by members with nonmembers, as violative of the Sherman and Clayton Acts.[61] The Exchange admitted that absent an applicable statute, the antirebate practice would constitute a per se violation. However, it contended that *Kaplan* mandated a finding of immunity because the antirebate rule was within the scope of exchange self-regulation and SEC supervision.[62] The district court had concurred with this view,[63] but the Seventh Circuit reversed, holding that the presence of

judicial obligations when it treated statutory language, at best ambiguous, as resolving an issue of great importance." Baxter, *supra* note 27, at 691.

[54] 371 F.2d at 411.

[55] *Id.*

[56] 389 U.S. 954 (1967).

[57] *Id.* at 957. The Chief Justice recognized the importance of the petitioners' argument that the presence of SEC review power did not necessarily argue strongly for implied repeal because any action taken by the Commission is discretionary and it is not required to consider the effects of exchange activities on competition. *Id.* at 956-57.

[58] 433 F.2d 264 (7th Cir. 1970). For an extended discussion of *Thill* see Note, *Antitrust Laws and the Securities Exchanges*, 66 Nw. U.L. REV. 100 (1971).

[59] 433 F.2d at 271.

[60] *Id.* at 268, 275.

[61] *Id.* at 266.

[62] *Id.* at 267.

[63] *Id.* at 267-68.

general rulemaking power does not exempt rules established pursuant to that authority from antitrust scrutiny.[64]

In arriving at this conclusion, the Seventh Circuit substantially diminished the significance of its own holding in *Kaplan*.[65] The court recognized that the approach mandated by *Silver* was

> an *analysis* which reconciles the operation of both statutory schemes (the antitrust laws and the Securities Exchange Act) with one another rather than holding one completely ousted.[66]

Employing this analysis, the court determined that the antitrust court may not abdicate its jurisdiction unless the defendants sustain the burden of showing that the antitrust laws would frustrate the purposes of the 1934 Act and that their anticompetitive conduct is necessary to the workings of that Act.[67] The court indicated that the factors to be considered in determining whether exemption is merited by the evidence are the anticompetitive effects of the challenged activity, the nature of actual review by the SEC, the extent to which the regulatory scheme provides for the protection of antitrust principles, as well as an analysis of why the particular activity is necessary.[68] The court had no evidence before it with which to make the foregoing analysis and, in remanding the case, noted that the expert testimony required to establish whether the antirebate rule was necessary to make the Securities Exchange Act work could be provided by the SEC and the Department of Justice.[69] However, the court did indicate that the case against implied exemption was strong inasmuch as the SEC is not required to consider the effect of exchange rules upon competition.[70] Further, the SEC had not taken an active role in supervising the

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[64] *Id.* at 269. The court noted that the presence of review power in the SEC did not preclude antitrust scrutiny; "[r]ather it is at this point that the analysis of reconciliation really begins." *Id. See also* Zuckerman v. Yount, 362 F. Supp. 858, 861-63 (N.D. Ill. 1973).

[65] Note, *supra* note 58, at 106. The court, recognizing that its opinion in *Kaplan* might be misleading, lessened its import by stressing that *Kaplan* was decided on the pleadings. 433 F.2d at 270-71.

[66] 433 F.2d at 268 (emphasis by the court).

[67] *Id.* at 273.

[68] *Id.* at 270.

[69] *Id.* at 273.

[70] *Id.* at 272. The 1934 Act does not incorporate competitive standards in the factors to be considered by the SEC in its analysis of exchange rules. However, it has been concluded from the language of the Act that although there is no statutory duty to consider the effects of a rule on competition, the SEC may consider such factors. Comment, *supra* note 17, at 285.

The SEC did consider the anticompetitive effects of an exchange rule in *In re* Rules of the New York Stock Exch., 10 S.E.C. 270, 286-87 (1941).

exchanges, and the antirebate rule had been abolished by the regional exchanges and routinely ignored by NYSE members.[71]

The crucial question of the consequence of concurrent jurisdiction in the antitrust courts and the SEC, avoided in *Silver* and totally ignored in *Kaplan*,[72] was raised for the first time in *Thill* in the concurring opinion of Judge Swygert.[73] He perceived the question for the district court on remand as "whether the doctrine of primary jurisdiction requires that the anticompetitive aspects of an exchange rule be considered in the first instance by the SEC."[74] In Judge Swygert's view, the SEC supervision provided for in section 19 of the 1934 Act is not sufficient to place exclusive jurisdiction over exchange rules in the SEC because the review power provided does not require consideration of anticompetitive effects of the rules.[75] However, the existence of this review power was viewed by Judge Swygert as relevant to any determination by the court as to whether primary jurisdiction lay with the SEC to consider the anticompetitive aspects of exchange rules.[76]

The district court on remand refused to invoke the doctrine of primary jurisdiction and refer to the SEC the issue of the applicability of the antitrust laws to the antirebate rule.[77] Thus, the doctrine which has been applied in antitrust attacks on other regulated industries has never been successfully invoked in challenges to securities exchange practices.[78]

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[71] 433 F.2d at 273-74.

[72] Note, *supra* note 27, at 808-09.

[73] 433 F.2d at 277 (Swygert, J., concurring).

[74] *Id.* at 275.

[75] *Id.* at 276.

[76] *Id.* at 276-77. Judge Swygert indicated that the cases concerning other administrative agencies in which the doctrine of primary jurisdiction had been invoked did "not provide clear guidance for resolution of this question." *Id.* at 277. He suggested that on remand, the lower court consider the following criteria:

> (1) whether and to what extent the SEC is empowered to consider antitrust laws and policy in fulfilling its duty of review of exchange self-regulation; (2) whether an aggrieved party may initiate SEC review of exchange rules under the provisions of the Securities Exchange Act or the Administrative Procedure Act; (3) whether and to what extent SEC expertise would be useful in resolving, in the first instance, the question of whether a given rule is necessary to make the Securities Act work; and (4) whether the anticompetitive aims of the Sherman Act can be achieved without subjecting the exchanges to treble damage suits which necessarily result if the doctrine of primary jurisdiction is unavailable to the defendant in this case.

Id.

[77] Thill Sec. Corp. v. New York Stock Exch., 469 F.2d 14, 14 (7th Cir. 1972). In an opinion delivered by Judge Swygert, the Seventh Circuit refused to review the district court's unwillingness to refer the case to the SEC because such refusal was not an appealable order. *Id.* at 17.

[78] *See, e.g.*, Far E. Conference v. United States, 342 U.S. 570, 576-77 (1952); El Dorado Oil Works v. United States, 328 U.S. 12, 17 (1946).

Neither of the jurisdictional approaches advocated in *Thill*, one finding exclusive jurisdiction in the antitrust court absent a showing that the activity involved is immune, and the other suggesting the existence of primary jurisdiction in the SEC, was adopted in *Gordon v. New York Stock Exchange, Inc.*[79] Rather, the court found that the practice of fixing minimum commission rates was totally immune from antitrust scrutiny and thereby explicitly rejected invocation of the doctrine of primary jurisdiction:

> [W]e are of the view that Congress intended to exempt commission rate-fixing from the operation of the antitrust laws, and consequently deprived the courts of even "secondary" jurisdiction to entertain Sherman Act claims like that which Gordon asserts.[80]

The finding of total exemption in *Gordon* was premised on an interpretation of *Silver* that antitrust jurisdiction was displaced by the presence of SEC review power. In support of this interpretation, the court maintained that antitrust jurisdiction had been retained in *Silver* only because of the absence of review power in the SEC, as well as the absence of a "governmental body to perform the antitrust function."[81] Judge Kaufman determined that *Gordon* was "*toto caelo* different from *Silver*" because SEC review of the fixing of commission rates was expressly authorized pursuant to section 19(b) of the 1934 Act.[82] Furthermore, the court noted that power was vested in the SEC to determine if changes in the rate-

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Arguably, the question of primary jurisdiction would not have been properly raised in *Silver* or *Kaplan* because in the former there was no concurrent jurisdiction in the SEC, and in the latter the case was dismissed on the pleadings. However, the primary jurisdiction issue probably warranted a discussion by the Seventh Circuit in *Thill* because the SEC had some power to review the rule in question pursuant to section 19(b).

[79] 498 F.2d 1303 (2d Cir.), *cert. granted*, 95 S. Ct. 491 (1974).

[80] 498 F.2d at 1309-10 n.8. Judge Kaufman emphasized that the plaintiffs would ultimately have access to the courts pursuant to the Administrative Procedure Act and the 1934 Act. *Id.* at 1311. Review pursuant to the 1934 Act is limited to a party to the original proceeding who is aggrieved by an "order" of the Commission. Independent Broker-Dealers' Trade Ass'n v. SEC, 442 F.2d 132, 143 (D.C. Cir.), *cert. denied*, 404 U.S. 828 (1971). A reviewable order must be a formal agency determination complete with a formal record of the agency proceedings. 442 F.2d at 143. A rule promulgated by the SEC pursuant to section 19(b) is not an order within the meaning of 15 U.S.C. § 78y. PBW Stock Exch., Inc. v. SEC, 485 F.2d 718, 733 (3d Cir. 1973), *cert. denied*, 416 U.S. 969 (1974). The SEC has suggested that its letter of comment announcing its determination not to object to the NYSE's establishment of the $500,000 breakpoint was neither an "order" as required by 15 U.S.C. § 78y nor "final agency action" as mandated by 5 U.S.C. § 704. Summary of memorandum for SEC in Independent Investor Protective League v. SEC, in [1971-72 Transfer Binder] CCH FED. SEC. L. REP. ¶ 93,270 (2d Cir. 1971).

[81] 498 F.2d at 1305.

[82] *Id.*

fixing practice were " 'necessary' "[83] to accomplish " 'the aims of the Securities Exchange Act,' " a function which the court saw as tantamount to the analysis enunciated in *Silver*.[84]

However, the court did not rest its finding of exemption upon the presence of SEC review power alone, but concluded that the language and history of the 1934 Act, as well as the policy considerations underlying supervised exchange self-regulation, mandated a finding of implied repeal of the antitrust laws.[85] The court found evidence of congressional intent to immunize in the delegation to the SEC of the power to regulate price-fixing, an activity which the Supreme Court had declared to be a per se violation of the antitrust laws.[86] This grant of power was a "recognition of the Commission's competence to serve the necessary antitrust objective of preserving competition."[87]

In addition to finding a specific statutory provision which mandated a finding of immunity, the court maintained that the policies behind the scheme of supervisory self-regulation might be frustrated if the antitrust court were to intervene in an area in which the SEC had concurrent jurisdiction.[88] The court noted the hazards of repetition and conflict inherent in the exercise of overlapping jurisdiction, particularly when the SEC had developed a well-researched program for the gradual elimination of the challenged practice.[89] Noting the predictions of widespread broker failures if fixed rates were to be eliminated suddenly, the court concluded that

> when something as crucial to the survival of the securities industry as its very ancient rate structure is at stake, diagnoses and changes must come from an agency with the Commission's expertise.[90]

The jurisdictional approach advocated in *Gordon* marks a significant divergence from the declaration in *Thill* that

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[83] *Id.* at 1306 (quoting from 15 U.S.C. § 78s(b) (1970)).

[84] 498 F.2d at 1306 (quoting from Silver v. New York Stock Exch., 373 U.S. 341, 361 (1963)). It should be noted that it is difficult to find anything in *Silver* which indicates an intention on the part of the Court to abdicate the function of determining the extent of repeal, even if concurrent jurisdiction exists in the SEC.

[85] 498 F.2d at 1305-06.

[86] *Id.* at 1307. The Supreme Court had declared price-fixing to be per se illegal seven years before the passage of the 1934 Act. *See* United States v. Trenton Potteries Co., 273 U.S. 392, 397-98 (1927).

[87] 498 F.2d at 1307.

[88] *Id.* at 1308. *Cf.* Robert W. Stark, Jr., Inc. v. New York Stock Exch., Inc., 346 F. Supp. 217, 222 (S.D.N.Y.), *aff'd*, 466 F.2d 743 (2d Cir. 1972).

[89] 498 F.2d at 1308.

[90] *Id.* at 1309.

> before a court may abdicate its jurisdiction on the antitrust issue the defendant must establish its anticompetitive conduct as justified because it is necessary for the operation of the Securities Act.[91]

The presence of SEC jurisdiction was perceived by the court in *Gordon* as an indication of the necessity of the rule to be reviewed,[92] but the court never applied the *Silver* standard that repeal is to be found only to the minimum extent necessary.

The Second Circuit attempted to distinguish *Thill* from *Gordon* because the antirebate rule is not specified in section 19(b) of the 1934 Act as one of the exchange activities over which the SEC has the power of review.[93] However, noting the difficulty of maintaining such a distinction, the court determined that to the extent that the decisions were inconsistent, it disagreed with the holding in *Thill*.[94]

A significant factor in the disagreement between the two circuits is the interpretations afforded the meaning of the statement in *Silver* that a "different case" would arise if concurrent jurisdiction were to be found in the SEC.[95] The *Gordon* court inferred from that statement that the presence of SEC review power would displace antitrust jurisdiction.[96] The *Thill* court could find no such

[91] 433 F.2d at 273.

[92] 498 F.2d at 1306.

[93] *Id.* at 1310. The antirebate rule would fall, if anywhere, in the section 19(b) catchall, "similar matters." 498 F.2d at 1310 n.10. *See* 15 U.S.C. § 78s(b)(13) (1970).

[94] 498 F.2d at 1310. The Second Circuit criticized *Thill*'s reliance on United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963). 498 F.2d at 1310-11 n.11. *Philadelphia National Bank*, which held that the approval by the Comptroller of the Currency of a bank merger did not immunize the merger from antitrust scrutiny, was distinguished by Judge Kaufman on the ground that the legislative history of the Bank Act indicated "a congressional intent not to immunize bank mergers from at least Sherman Act attack." *Id.* (citing 374 U.S. at 352). However, it is interesting to note that the Court in *Philadelphia National Bank* found that no immunity from antitrust laws existed because the Comptroller was not given authority either to enforce the antitrust laws or to grant antitrust immunity. The Court reached this determination even though the Comptroller, in approving or disapproving any merger, was compelled to consider the effects of a merger on competition. 374 U.S. at 350-52, 372. For a discussion of the significance of the bank cases to the securities industry see Comment, *supra* note 17, at 326-36.

[95] 373 U.S. at 360. It should be noted that the Court in *Silver* referred to the review available under the Maloney Act, 15 U.S.C. §§ 78o-3(g)-(h), as the kind of review which would trigger "a different case." 373 U.S. at 358 n. 12. *Cf.* United States v. Morgan, 118 F. Supp. 621, 697 (S.D.N.Y. 1953). Although the review procedures provided in that statute for actions of broker-dealer associations may be comprehensive, total exemption from the operation of the antitrust laws has rarely been found. *See, e.g.*, Harwell v. Growth Programs, Inc., 451 F.2d 240, 246-47 (1971), *modified*, 459 F.2d 461 (5th Cir.), *cert. denied*, 409 U.S. 876 (1972). *But see In re* Mutual Fund Sales Antitrust Litigation, 374 F. Supp. 95, 114 (D.D.C. 1973), *prob. juris. noted sub nom.* United States v. National Ass'n of Sec. Dealers, Inc., 95 S. Ct. 37 (1974).

[96] 498 F.2d at 1305.

" 'intimation' " in the rationale presented in *Silver*[97] and concluded that the presence of review power was one factor to be considered by the antitrust court in its determination of whether or not the activity is " 'necessary' " to the working of the 1934 Act.[98]

Another aspect of *Gordon* which differs from the approach in *Thill* is the suggestion that Congress intended, by virtue of its grant of review power pursuant to section 19(b), that the SEC perform the antitrust function.[99] The court did not explore the standards the SEC must consider in performing that function, but instead implied that simply by allowing the SEC to regulate such a dangerous activity, Congress entrusted any antitrust analysis to the SEC.[100] In contrast, the *Thill* court would have required an examination of the kind of review entrusted to the SEC to determine if the SEC was, in fact, performing the antitrust function.[101] However, the Seventh Circuit noted that while the SEC may consider the anticompetitive effects of exchange rules in its review, this discretionary power

> does not vest the Commission with primary responsibility for the enforcement of competition as mandated by Congress in the antitrust laws.[102]

The difference in the approaches taken by the two circuits was further delineated in *Fredrickson v. Merrill Lynch, Pierce, Fenner & Smith.*[103] The district court for the northern district of Illinois declined to follow *Gordon* despite the fact that it had been presented with an identical antitrust attack on the fixed minimum commission rate structure.[104] In denying the defendants' motion to dismiss the complaint, the court in *Fredrickson* determined that, contrary to the holding in *Gordon,* the possibility of SEC review

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[97] 433 F.2d at 269.

[98] *Id.* at 270.

[99] 498 F.2d at 1307.

[100] *Id.*

[101] 433 F.2d at 270.

[102] *Id.* at 272.

[103] [Current Binder] CCH FED. SEC. L. REP. ¶ 94,792 (N.D. Ill. Sept. 9, 1974). *Gordon* has been cited with approval in J. R. Williston & Beane, Inc. v. Haack, [Current Binder] CCH FED. SEC. L. REP. ¶ 94,921, at 97,164-65 (S.D.N.Y. Dec. 23, 1974), and Abbott Sec. Corp. v. New York Stock Exch., 384 F. Supp. 668, 670 (D.D.C. 1974).

[104] [Current Binder] CCH FED. SEC. L. REP. ¶ 94,792, at 96,629. Plaintiffs, individually and as a class of non-members, brought suit against three stock exchanges and representative member firms attacking the fixed minimum commission rate structure as violative of the Sherman Act. *Id.* at 96,627. Plaintiffs argued that the "price fixing [was] not necessary to effectuating the purposes of the 1934 Securities Exchange Act" and "that the price fixing exceeded the minimum extent necessary." *Id.*

does not alone displace antitrust jurisdiction.[105] The court criticized the Second Circuit's interpretation of *Silver,* contending that "[t]he Supreme Court in *Silver* strongly hinted, if not held, that . . . antitrust court jurisdiction exists."[106] The court, speaking through Judge Parsons, also rejected *Gordon's* finding of congressional intent to immunize commission rate-fixing:

> I do not agree that exemption is mandated by statutory language which does not appear; there is no express exemption. Furthermore, I do not agree that a legislative history which shows the SEC was expected to play a "central role" mandates that the antitrust court plays absolutely no role.[107]

Having rejected a finding of exclusive jurisdiction in the SEC, the court concluded that the antitrust court alone must decide the question of implied repeal.[108] The court refused to invoke the doctrine of primary jurisdiction, noting the inadequacy of review by an agency which had apparently sanctioned the activity being attacked.[109] However, the court did indicate that the SEC's past findings concerning fixed minimum commission rates might be of some assistance to the court in determining whether the rates were "necessary to make the Securities Exchange Act of 1934 work" and whether they were "being applied to the minimum extent necessary."[110]

The significance of the jurisdictional approaches taken by the two circuits is the difference in the standard of review which will ultimately be applied to the fixed minimum commission rate structure. The effect of the decision in *Gordon* is to foreclose antitrust scrutiny and limit review of the rate structure to discretionary review by the SEC pursuant to section 19(b). The approach in *Fredrickson,* however, provides for antitrust review of the fixed

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[105] *Id.* at 96,629.

[106] *Id.*

[107] *Id.* at 96,630. The court noted that although agencies such as the Federal Power Commission and the Commodity Exchange Commission play central roles in other regulated industries, "the antitrust court does not lose all jurisdiction." *Id.* (citing Gulf States Utils. Co. v. FPC, 411 U.S. 747, 763 (1973); Ricci v. Chicago Mercantile Exch., 409 U.S. 289, 307 (1973)).

[108] [Current Binder] CCH FED. SEC. L. REP. ¶ 94,792, at 96,631.

[109] *Id.* This view echoes Justice Douglas' dissent in Ricci v. Chicago Mercantile Exch., 409 U.S. 289 (1973):

> [I]t would appear to be an anomaly to direct the plaintiff in a civil action to a federal supervising agency for a determination as to whether the regulations which it is charged to enforce have been violated, when the agency has, by its inaction, already shown every indication of sanctioning the alleged violation.

Id. at 308-09.

[110] [Current Binder] CCH FED. SEC. L. REP. ¶ 94,792, at 96,631.

minimum rates to determine the extent to which the rates are necessary to the working of the 1934 Act, and whether or not the anticompetitive effects of the rates are minimized. In effecting the careful analysis mandated by *Silver,* the *Fredrickson* approach is clearly preferable.

The difficulty inherent in the *Gordon* approach is the court's failure to recognize that the SEC is neither granted the power to immunize, nor compelled to consider anticompetitive factors in its discretionary review of exchange rules.[111] The effect of *Gordon* is thus to leave "no governmental body to perform the antitrust function."[112]

Also, by abdicating court jurisdiction, *Gordon* entrusts to the SEC the function of determining the necessity for fixed commission rates; however, implicit in the SEC's announced disapproval of such rates is a determination that the rates are not essential.[113] The better approach is to retain antitrust jurisdiction while according the SEC's findings considerable weight in determining the necessity of the rate structure.[114]

Although pending legislation may ultimately resolve the antitrust status of exchange practices,[115] it is still incumbent upon the

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[111] The Supreme Court has refused to find antitrust immunity for an interconnection of power ordered by the Federal Power Commission where

> [t]he standard which governs its decision is whether such action is "necessary or appropriate in the public interest." Although antitrust considerations may be relevant, they are not determinative.

Otter Tail Power Co. v. United States, 410 U.S. 366, 373-75 (1973) (quoting from Federal Power Act, 16 U.S.C. § 824a(b) (1970)). *But see* Gulf States Utils. Co. v. FPC, 411 U.S. 747, 757-60 (1973).

[112] 498 F.2d at 1305. *See* Silver v. New York Stock Exch., 373 U.S. 341, 358 (1963).

[113] Because the SEC has already reached its verdict on the necessity of the fixed rate system, the doctrine of primary jurisdiction should be inapplicable. *Cf.* United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 353 (1963).

It is also questionable whether invoking the primary jurisdiction of the SEC would be helpful. As Justice Marshall noted in his dissent in Ricci v. Chicago Mercantile Exch., 409 U.S. 289, 321 (1973):

> Where the plaintiff has no means of invoking agency jurisdiction, where the agency rules do not guarantee the plaintiff a means of participation in the administrative proceedings, and where the likelihood of a meaningful agency input into the judicial process is remote, I would strike a balance in favor of immediate court action.

[114] It is significant that in 1970 the SEC announced its determination that fixed rates on "that portion of an order in excess of $100,000" were "unreasonable." SEC Securities Exchange Act of 1934 Release No. 9007 (Oct. 22, 1970). Several months later, however, the SEC announced its "non-objection" to the NYSE's imposition of a $500,000 breakpoint. *See* SEC Securities Exchange Act of 1934 Release No. 9079 (Feb. 11, 1971); SEC Securities Exchange Act of 1934 Release No. 9148 (April 14, 1971). Arguably, the fixed rates on any orders in excess of $100,000 do not have the protection of an SEC finding of necessity.

[115] H.R. 5050, 93d Cong., 2d Sess. (1973). The bill provides that fixed minimum rates

Court to clarify the analysis enunciated in *Silver* and thereby leave future courts confronted with attacks on exchange practices meaningful guidelines for reconciling the antitrust laws with the 1934 Act.

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of commission must end on May 1, 1975 unless the SEC finds that a continuation is necessary for the public interest. After October 1, 1976, the SEC may by order permit an exchange to fix commission rates

> if the Commission determines that . . . such action is required . . . taking into consideration the competitive effects of permitting the continuance, establishment, or reestablishment of such schedule . . . weighed against the competitive effect of other lawful action which the Commission is authorized to take under this title.

Id. § 202.

The bill would also require the SEC, in determining whether an exchange rule is satisfactory, to consider whether the rule is designed "to remove impediments to and perfect the mechanism of a free and open market." *Id.*

This proposed amendment has met with strong opposition from the stock exchanges. N.Y. Times, Dec. 4, 1974, at 61, col. 7 (N.J. ed.).