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Erratum

Add as a new footnote 94a at the end of the last complete sentence on page 150 the following: 94a The Commission's role in regard to commission rates has been essentially passive. *Special Study*, pt.2 at 328-33, 342-46. Although the Commission intervened in 1958 to suggest that the exchange decrease certain proposed commission rate changes, *Id.*, at 331-32, it appears that the Commission was primarily concerned with the reasonableness of commission rates as a quantitative matter.

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INTRODUCTION

The process of balancing the separate demands of public concern contained in the antitrust laws[1] and the federal securities laws[2] is both complex and delicate. The antitrust laws serve the general objective of promoting competition in open markets.[3] Nevertheless, in certain areas of regulated activity, exceptions or limitations upon the impact of the antitrust laws have been imposed by Congress and the courts. Thus, in the fields of transportation, communications, and other regulated industries, limitations have been placed upon the application of the antitrust laws. The securities laws, designed to afford protection to public investors through disclosure and other requirements, in some respects encourage competition within and among securities markets. Although the scope of the application of the antitrust laws to the securities field remains imprecise, the existence of federal regulation has been pointed to as justifying the exemption of certain practices from the antitrust laws.

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The securities laws recognize the semi-monopolistic position of the securities exchanges. The concept of self-regulation in the securities field embodies certain inherently anticompetitive effects; philosophical limits upon unchecked self-regulation are suggested by consideration of anti-

* The Securities and Exchange Commission, as a matter of policy, disclaims responsibility for any private publication by any of its employees. The views expressed herein are those of the author and do not necessarily reflect the views of the Commission or its staff.

1. The antitrust laws consist of the Sherman Act of 1890, 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-7 (1958); the Federal Trade Commission Act, 38 Stat. 717 (1914), as amended, 15 U.S.C. §§ 41-58 (1958); and the Clayton Act, 38 Stat. 730 (1914), as amended, 15 U.S.C. §§ 12-27 (1958).

2. The federal securities laws include: the Securities Act of 1933, 48 Stat. 74 (1933), as amended, 15 U.S.C. §§ 77a-mm (1958), as amended, Pub. L. No. 88-467, 88th Cong., 2d Sess. (Aug. 20, 1964) [hereinafter cited as Securities Act]; the Securities Exchange Act of 1934, 48 Stat. 881 (1934), as amended, 15 U.S.C. §§ 78a-jj (1958), as amended, Pub. L. No. 88-467, 88th Cong., 2d Sess. (Aug. 20, 1964) [hereinafter cited as Securities Exchange Act]; the Investment Company Act of 1940, 54 Stat. 789 (1940), as amended, 15 U.S.C. §§ 80a-1 to -52 (1958), as amended, 15 U.S.C. §§ 80a-2 to -74 (Supp. V, 1963) [hereinafter cited as Investment Company Act].

3. ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 1 (1955) [hereinafter cited as ATT'Y GEN. REP.].

trust principles.[4] Current developments in each of these areas of the law, notably the decision of the Supreme Court of the United States in *Silver v. New York Stock Exchange*,[5] suggest new practical significance to the accommodation of the objectives of the antitrust laws within the fabric of federal securities regulation.

It is the purpose of this article to examine the general applicability of the antitrust laws to the securities field, to briefly describe the areas in which the antitrust laws and the federal securities laws may collide, and to suggest means of generally dealing with the problems. Excluded from the scope of comment are the antitrust and securities problems in connection with corporate mergers[6] and the antitrust implications of recent mergers of brokerage firms.[7]

General Applicability of the Antitrust Laws: The Impact of Self-regulation

There is nothing novel about applying the antitrust laws to an industry which is otherwise subject to governmental regulation or control.[8] In the absence of some clear basis for immunity, the securities field, like any other area of commerce, is subject to the restraints of the antitrust laws. Neither the history nor the general scheme of the federal securities laws suggest that Congress intended to confer upon the securities field any sweeping immunity from the coverage of the antitrust laws.[9]

> It must be borne in mind that this whole statutory scheme was worked out with the greatest care by members of the Congress thoroughly aware of the antitrust problems, often in close contact and cooperation with those who were later to administer the intricate phases of this well articulated and comprehensive plan of regulation of the securities business, and in possession of the fruits of many prolonged and

4. Cary, *Self Regulation in the Securities Industry*, 49 A.B.A.J. 244, 246 (1963).

5. 373 U.S. 341 (1963).

6. See Bloom, *Antitrust Aspects of Securities Regulation: Sherman Act § 1 and § 6 of the Act of 1934; Clayton Act § 7 and Rule 133 Under the Act of 1933*, 8 N.Y.L.F. 195 (1962).

7. Denniston, *Justice Silent*, Washington Evening Star, May 14, 1964, p. B-8, col. 6.

8. *E.g.*, ATT'Y GEN. REP. 261-93; Berle, *Banking Under the Anti-Trust Laws*, 49 COLUM. L. REV. 589 (1949); Hale & Hale, *Competition or Control I; The Chaos in the Cases*, 106 U. PA. L. REV. 641 (1958); Hale & Hale, *Competition or Control II; Radio & Television Broadcasting*, 107 U. PA. L. REV. 585 (1959); Hale & Hale, *Competition or Control III; Motor Carriers*, 108 U. PA. L. REV. 775 (1960); Hale & Hale, *Competition or Control IV; Air Carriers*, 109 U. PA. L. REV. 311 (1961); Hale & Hale, *Competition or Control V; Production & Distribution of Electrical Energy*, 110 U. PA. L. REV. 57 (1961); Hale & Hale, *Competition or Control VI; Application of the Antitrust Laws to Regulated Industries*, 111 U. PA. L. REV. 46 (1962); McGovern, *Antitrust Exemptions for Regulated Industries*, 20 FED. B.J. 10 (1960); Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 HARV. L. REV. 436 (1954).

9. In fact, the non-exclusivity of the rights and remedies under the securities laws, *i.e.*, § 16 of the Securities Act, 48 Stat. 84 (1933), 15 U.S.C. § 77p (1958), § 28(a) of the Securities Exchange Act, 48 Stat. 903 (1934), 15 U.S.C. § 78bb (1958), suggests that the continued applicability of the rights and remedies of the antitrust and other laws was intended.

> penetrating investigations. They intended no exemption to the Sherman Act; and it is hardly probable that they would inadvertently accomplish such a result.[10]

Hence, any exemption of the securities field from the antitrust laws must be implied, and any such exemption is limited to the extent necessary to give effect to the purposes of the securities laws.[11]

Federal regulation of the securities field was designed to curb existing abuses.[12] Although self-regulatory attempts by the nation's securities exchanges were proved inadequate,[13] Congress nevertheless chose to create a regulatory system which would continue, strengthen, and make more effective self-regulation of securities exchanges subject to vigorous Commission oversight. Self-regulation was originally advanced and included in the pattern of federal control of the securities field on grounds of practicality[14] and the potential ineffectiveness of direct governmental regulation on a wide scale.[15] "The purpose of the self-regulation provisions of the Securities Exchange Act was to delegate governmental power to working institutions which would undertake, at their own initiative, to enforce compliance with ethical as well as legal standards in a complex and changing industry."[16]

The analysis of the *Report of the Special Study of the Securities Markets*[17] discloses a threefold need for public supervision of self-regulation. First, the need to provide assurance that the self-regulatory agencies actually assume responsibility for and discharge the functions and duties assigned to them is apparent. Second, as stated in the *Special Study:*

> self-regulation by a member organization involves some degree of impairment of competition and public control is necessary not only to insure that such impairment is compensated for by effective regulation, but also to insure that the kinds and extent of impairment are only such and no greater than required by the exigencies of regulation. Inherent in self-regulation is the "private" formulation of restrictive standards of business conduct and their enforcement by, at the very least, exclusionary practices. It is essential that the standards and their application not be left to the unfettered discretion, or perhaps even lack of bona fide reg-

10. United States v. Morgan, 118 F. Supp. 621 (S.D.N.Y. 1953). See note 66 *infra* and accompanying text.

11. *E.g.*, Silver v. New York Stock Exch., 373 U.S. 341 (1963); Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945); United States v. Borden Co., 308 U.S. 188 (1939).

12. See Tracy & MacChesney, *The Securities Exchange Act of 1934*, 32 MICH. L. REV. 1025, 1027-36 (1934).

13. S. REP. NO. 792, 73d Cong., 2d Sess. 4-5 (1934).

14. Securities and Exchange Commission, *Report of the Special Study of the Securities Markets*, H.R. DOC. NO. 95, 88th Cong., 1st Sess., pt. 4, at 501 (1963) [hereinafter cited as *Special Study*].

15. *Hearings on H.R. 7852 and H.R. 8720 Before House Committee on Interstate & Foreign Commerce*, 73d Cong., 2d Sess. 514 (1934).

16. Silver v. New York Stock Exch., 373 U.S. 341, 371 (1963) (dissenting opinion).

17. *Special Study*, pt. 4, at 502.

> ulatory purpose, of the private regulators. The accommodation of various public policies inherent in the formulation of appropriate standards and their proper application cannot be abdicated by public authority.[18]

Third, in some respects, self-regulatory agencies operate as quasi-public utilities when viewed in relation to the general public, and in this capacity require public oversight for much the same reasons as other utilities.[19] Although the expertness and immediacy of self-regulation often provide the most expedient and practical means of regulation, the system of self-regulation provides its own problems of practicality and efficiency not unlike those of direct governmental regulation.[20] Certain fundamental concepts regarding the relationship between the self-regulatory bodies and the government are derived from the fact that in many respects the regulatory agencies are official delegates of governmental power.[21] The need for assuring the effectiveness of self-regulation applies to the entire regulatory process; the reserve of governmental authority assures that the regulatory needs are fully and effectively met.[22]

The problem is one of reconciling the built-in, anticompetitive effects of self-regulation with the conflicting policies of the antitrust laws within the framework of the regulatory scheme of the securities laws. Two conflicting sets of statutory policies are involved — the policies of the antitrust laws favoring the preservation and protection of competition, and the policies which underlie the statutory program of self-regulation in lieu of direct governmental control.

National Securities Exchanges

The conflict emerges in two contexts: (1) when an exchange rule on its face contravenes the statutory standard because of its anticompetitive consequences; and (2) when in carrying out their self-regulatory obligations, the exchanges and their members are required to take concerted action, which, if not protected by the Securities Exchange Act,[23] would result in a violation of the antitrust laws.

18. *Ibid.*

19. *Ibid.* The *Special Study* suggests that the exchanges in operating a market place for public participants and by fixing minimum commission rates, and the National Association of Securities Dealers (NASD) in operating a retail quotation system are essentially conducting businesses affected with a public interest requiring public supervision and control; see also H.R. REP. NO. 1383, 73d Cong., 2d Sess. 15 (1934).

20. *Special Study*, pt. 4, at 722.

21. *Id.* at 723.

22. *Ibid.*

23. The following provisions of the Securities Exchange Act are directly concerned with national securities exchanges:

Section 5, 48 Stat. 885 (1934), 15 U.S.C. § 78e (1958), makes it unlawful to use the mails or any means or instrumentalities of interstate commerce for the purposes of using any facility of an exchange to effect any transaction in a security, or to report any such transaction, unless such exchange is registered pursuant to § 6, 48 Stat. 885 (1934), 15 U.S.C. § 78f

The Commission has had only one occasion to weigh the anticompetitive effects of an exchange rule. That was in connection with a proceeding, pursuant to section 19(b) of the Securities Exchange Act,[24] involving the "multiple trading rule" contained in the constitution of the New York Stock Exchange (NYSE), which subjected members to disciplinary action for acting as odd-lot dealers or specialists on other exchanges, or for otherwise dealing publicly outside the exchange in securities dealt in on the exchange. Because of the sweeping effect of that provision upon otherwise lawful dual membership on securities exchanges and the activities of such members in dually listed securites, the Commission determined that enforcement of the exchange rule would have impeded the functioning of the regional exchanges as instrumentalities of interstate commerce, and would have curtailed or impaired existing channels for the distribution in interstate commerce of dually traded securities. The Commission concluded, *inter alia,* "that the Rule would operate as an unreasonable and unjustified restraint upon interstate commerce and that enforcement of the Rule would violate one of the basic purposes of regulation under the [Securities Exchange] Act, a purpose which is closely related to the public policy regarding restraints and the maintenance of fair competition as disclosed by Congress in the Sherman Act, the Clayton Act and the Federal Trade Commission Act."[25] The Commission accordingly altered the exchange constitution to authorize members to con-

(1958), or is exempt by reason of the limited volume of transactions effected thereon. Section 6(a) provides that an exchange may be registered as a national securities exchange by filing a registration statement which contains, *inter alia,* an agreement to comply, and to enforce so far as it is within its powers compliance by its members, with the provisions of the act and the rules and regulations thereunder. Section 6(b) prohibits registration of an exchange unless its rules include provisions for expulsion, suspension or disciplining of members for conduct inconsistent with just and equitable principles of trade, and declare that willful violations of the act and the rules thereunder are considered conduct inconsistent with just and equitable principles of trade. Section 6(d) provides that in order to grant registration to an exchange, the Commission must find that it is so organized as to be able to comply with the provisions of the Act and rules thereunder and that its rules are just and adequate to insure fair dealing and to protect investors.

Section 19(a)(1), 47 Stat. 898 (1934), 15 U.S.C. § 78s (1958), as amended, 15 U.S.C. §§ 78s(c)-(d) (Supp. V, 1963), authorizes the Commission to take action which is necessary or appropriate for the protection of investors to suspend for a period not to exceed twelve months or to withdraw the registration of an exchange which it finds has violated the Act or rules thereunder, or has failed to enforce, so far as within its powers, compliance therewith by a member or the issuer of a security registered thereon. Section 19(a)(3) gives the Commission power to suspend from membership for up to twelve months or to expel from an exchange, a member who it finds has violated any provisions of the Act or rules thereunder. Section 19(b) authorizes the Commission, after written request to an exchange to make specified changes in its rules or practices, to alter or supplement the rules of an exchange by rule, regulation or order in respect of thirteen enumerated categories of matters, when necessary or appropriate for the protection of investors or to insure fair dealing upon and administration of the exchange.

24. Rules of the New York Stock Exchange, 10 S.E.C. 270 (1941) (the "multiple trading case"); see *Special Study,* pt. 2, at 923.

25. Rules of the New York Stock Exchange, 10 S.E.C. 270, 287 (1941).

tinue to engage in the activities which the exchange had sought to prohibit.

At the time of enactment of the Securities Exchange Act, it was generally established that the exchanges, in their capacity as self-regulatory agencies, were amenable to antitrust jurisdiction in a variety of circumstances.[26] Nevertheless, the exchanges were often successful in avoiding the impact of the antitrust laws, receiving considerable latitude from the courts in the management of their internal affairs.[27] It was recognized that the existence of every exchange or board of trade imposed some restraint upon the conduct of business by its members. The controlling principles were set forth in *Board of Trade of Chicago v. United States*,[28] which sustained a rule of the board of trade prohibiting transactions by members in certain commodities after the close of trading hours at prices other than the closing bid.

> [T]he legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, all are relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.[29]

The problems involved in assuring against misuse of the delegated power of self-regulation and in reconciling the anticompetitive consequences of self-regulatory action were focused in *Silver v. New York Stock Exchange*.[30] Silver, the principal of two over-the-counter brokerage firms, and not a member of the exchange, had private wire connections

26. See generally MEYER, THE LAW OF STOCKBROKERS AND STOCK EXCHANGES 60-64 (1931).

27. Thus, exchanges were permitted to withhold quotations, Moore v. New York Cotton Exch. 270 U.S. 593 (1926); Board of Trade of Chicago v. Christie Grain & Stock Co., 198 U.S. 236 (1905); to regulate prices for transactions between members after trading hours, Board of Trade of Chicago v. United States, 246 U.S. 231 (1917); to prescribe and enforce minimum commissions for brokerage services, Hopkins v. United States, 171 U.S. 578 (1898); Chamber of Commerce v. FTC, 13 F.2d 673 (8th Cir. 1926); to prohibit members from dealing with members of rival exchanges, Anderson v. United States, 171 U.S. 604 (1898); and to prohibit members from dealing with nonmembers, Anderson v. United States, *supra; but cf.* Chamber of Commerce v. FTC, *supra*. Some of the foregoing cases may be of doubtful authority today.

28. MEYER, *op. cit. supra* note 26.

29. Board of Trade of Chicago v. United States, 246 U.S. 231, 238 (1917).

30. Silver v. New York Stock Exch., 373 U.S. 341 (1963).

with various member firms and ticker service from the exchange, pursuant to temporary exchange approval.[31] Without notice to Silver or explanation to the member firms, the exchange ordered members to discontinue wire connections with Silver and halted ticker service to him.[32] Silver thereupon sued for an injunction and for damages under the Sherman Act.[33] The Supreme Court held that the exchange was liable to Silver for causing its members to terminate wire connections because of the unfairness of the procedures followed by the exchange in failing to give notice to Silver and for refusing to afford him the opportunity to meet the "charges" against him. The Court thus finessed the broader question of the general applicability of antitrust concepts to the securities field by grounding its decision upon the determination that

31. The rules of the New York Stock Exchange (NYSE) require approval of any such wire connections. Silver's approval was "temporary," pending completion of an investigation of his character and business reputation. Exchange rules further provide that members must discontinue wire connections with nonmembers upon instructions from the exchange.

32. In accordance with exchange policy of not giving reasons for disapproval or withdrawal of approval, Silver was not permitted to ascertain the reasons for the exchange's action, nor to answer any accusations upon which it might have been based.

33. The complaint stated a claim under the Clayton Act § 4, 38 Stat. 731 (1914), 15 U.S.C. § 15 (1958), and § 16, 38 Stat. 737 (1914), 15 U.S.C. § 26 (1958), alleging a conspiracy between the exchange and various member firms to deprive Silver of private wire connections and ticker service to Silver's competitive disadvantage in violation of Sherman Act § 1, 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1958). The other claims, sounding in tort, were not considered by the courts.

The district court determined that there was no exemption from the antitrust laws for the acts complained of. Without determining whether there was any exemption by reason of the Securities Exchange Act with respect to matters directly concerning the business in listed securities, the court saw the issue as confined to the over-the-counter market with respect to which the exchange was not entitled to regulate the conduct of its members. The court stated:

> Providing that its members do not indulge in conduct which is illegal or incompatible with just and equitable principles of trade, an exchange has neither the power nor the authority to determine with whom its members may or may not deal or to direct them to desist from dealing with nonmember broker/dealers engaged in transactions in over-the-counter securities and municipals. If it does so it does so at its peril and is subject to such appropriate action as may be taken under the anti-trust laws. Silver v. New York Stock Exch., 196 F. Supp. 209, 222 (S.D.N.Y. 1961).

The court of appeals held that the exchange's action was within its authority under the Securities Exchange Act and therefore beyond the coverage of the Sherman Act. No justification was found for the distinction between control by an exchange over members' dealings in listed or other securities. The court concluded that in exercising the powers required by the statute, the exchange must be immune or exempt from the restrictions and sanctions of other legislation, namely the Sherman Act. Silver v. New York Stock Exch., 302 F.2d 714 (2d Cir. 1962).

The early cases had established that quotation services could not be obtained without an exchange's consent. *E.g.*, Board of Trade of Chicago v. Christie Grain & Stock Co., 198 U.S. 236 (1905). It was also established that reasonable conditions could be imposed upon those receiving quotations. There was disagreement among the state courts as to whether an exchange might discriminate among those to whom it furnished quotation services. New York & Chicago Grain & Stock Exch. v. Board of Trade, 127 Ill. 153, 19 N.E. 855 (1889). *Contra*, In the Matter of Renville, 46 App. Div. 37, 61 N.Y. Supp. 549 (1899). In Moore v. New York Cotton Exch., 270 U.S. 593 (1926), the Supreme Court held that an exchange, in exercising the ordinary right of a private vendor of news or other property, was not required to furnish quotations on a non-discriminatory basis. See MEYER, *op. cit. supra* note 26, at 49-60.

while "the action here taken by the Exchange would clearly be in violation of the Sherman Act unless justified by reference to the purposes of the Securities Exchange Act . . . that statute affords no justification for anticompetitive collective action taken without according fair procedures."[34] The Court concluded that by acting without according procedural safeguards to Silver at his request, the exchange exceeded the scope of its authority under the Securities Exchange Act to engage in self-regulation. There was thus no occasion for the Court to pass upon the sufficiency of the reasons advanced by the exchange for its action; similarly, there was no need for the Court to further define the substantive standards by which to justify the exchange's action on the merits.

The Court's rationale dealing with the problem of reconciling the pursuit of eliminating restraints upon competition with the effective functioning of the statutory policy which encourages self-regulation (recognizing that it may have anticompetitive effects in general and specific application) deserves careful note. Removal of the wire connections by the collective action of the exchange and its members would, had it occurred in a context free of other federal regulation, have constituted a per se violation of section 1 of the Sherman Act as a group boycott.[35] In the absence of Commission jurisdiction to review particular instances of enforcement of exchange rules, the issue was reduced to a determination of the extent to which the character and objectives of self-regulation under the Securities Exchange Act were incompatible with the maintenance of an antitrust action. There is nothing in the regulatory scheme to perform the antitrust function of assuring that exchanges do not apply their rules in a manner injurious to competition and unjustified by legitimate self-regulatory ends. By providing no agency check on exchange behavior in particular cases, Congress left the regulatory scheme subject to the influences of improper collective action over which the Commission has no express authority. Unbridled self-regulation must not be

34. Silver v. New York Stock Exch., 373 U.S. 341, 364 (1963). The court believed that Congress could not have intended to sanction self-regulatory activity carried out in an unfair manner. The Court stated:

> The point is not that the antitrust laws impose the requirement of notice and a hearing here, but rather that, in acting without according petitioners these safeguards in response to their request, 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 364-65.

Justice Stewart's dissenting opinion, on the other hand, concluded that the existence of a violation of the antitrust laws is not dependent upon whether the defendant's conduct was arbitrary; he takes the position that the majority erred in using the antitrust laws to serve ends which they were not intended to serve, *i.e.*, "to enforce the court's concept of fair procedures under a totally unrelated statute." *Id.* at 370.

35. That concerted refusals by traders to deal with other traders is an unlawful restraint of trade see, *e.g.*, Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); Fashion Originators' Guild v. FTC, 312 U.S. 457 (1941); Barber, *Refusals to Deal Under the Federal Antitrust Laws*, 103 U. PA. L. REV. 847 (1955).

permitted to cause competitive injury to issuers or nonmembers if beyond the scope of the purposes of the Securities Exchange Act; some form of review of exchange self-policing — by the administrative agency or the courts — is not, in the Court's view, incompatible with the fulfillment of the aims of the Securities Exchange Act.

> Since the antitrust laws serve, among other things, to protect competitive freedom, *i.e.*, the freedom of individual business units to compete unhindered by the group action of others, it follows that the antitrust laws are peculiarly appropriate as a check upon anticompetitive acts of exchanges which conflict with their duty to keep their operations and those of their members honest and viable. Applicability of the antitrust laws, therefore, rests on the need for vindication of their positive aim of insuring competitive freedom. Denial of their applicability would defeat the congressional policy reflected in the antitrust laws without serving the policy of the Securities Exchange Act.[36]

The existence of review of exchange self-regulation through a vehicle other than the antitrust laws, *i.e.*, review by the Commission and ensuing judicial review of exchange disciplinary actions, as there is under the Maloney Act[37] with respect to registered securities associations, would have presented a different case. The absence of Commission power to review particular instances of self-regulatory action by exchanges creates problems for the exchanges.[38]

> The entire public policy of self-regulation, beginning with the idea that the Exchange may set up barriers to membership, contemplates that the Exchange will engage in restraints of trade which might well be unreasonable absent sanction by the Securities Exchange Act. Without the oversight of the Commission to elaborate from time to time on the propriety of various acts of self-regulation, the Exchange is left without guidance and without warning as to what regulative action would be viewed as excessive by an antitrust court possessing power to proceed based upon the considerations enumerated. . . . But, under the aegis of the rule of reason, traditional antitrust concepts are flexible enough to permit the Exchange sufficient breathing space within which to carry out the mandate of the Securities Exchange Act. . . . Although, as we have seen, the statutory scheme of that Act is not sufficiently pervasive to create a total exemption from the antitrust laws . . . it is also true that particular instances of exchange self-regulation which fall within the scope and purposes of the Securities Exchange Act may be regarded as justified in answer to the assertion of an antitrust claim.[39]

With respect to the broader question of the applicability of the antitrust laws to the securities field, the Court suggested that the proper approach to the case was an analysis which reconciled the operation of each

36. Silver v. New York Stock Exch., 373 U.S. 341, 359-60 (1963).

37. See note 43 *infra.*

38. The opinion thus intimated that certain self-regulatory activities of the exchange, because of the absence of Commission review, can still violate the antitrust laws. The court refused to specify what such activities were. Nor did it indicate whether the existence of Commission review would have obviated the question of whether the collective action in withdrawing the wire service was exempt from the operation of the antitrust laws.

39. Silver v. New York Stock Exch., 373 U.S. 341, 360-61 (1963).

statute with the other, rather than concluding that one completely ousted the other. Antitrust exemption is to be implied only if necessary to make the Securities Exchange Act work, and then only to the minimum extent necessary. Thus, the Court intimated that the exchange should remain subject to the antitrust laws in the exercise of its self-regulatory functions, at least until the intervention of antitrust policies impedes the discharge of such responsibilities or hampers the fulfillment of the goals of the Securities Exchange Act. No guidelines were offered to delineate the boundaries of susceptibility or immunity of exchange action under the antitrust laws. The only clear answer thus far is that self-regulatory action taken without affording fair procedures is not immune. Moreover, the Court remained aloof from the underlying question of legislative policy: whether it is more appropriate for government oversight in this area to be vested in the administrative agency or in the courts.[40]

Registered Securities Associations

The regulatory pattern of the federal securities laws was augmented in 1938 by the Maloney Act amendment to the Securities Exchange Act[41] which extended the self-policing concept to dealers in the over-the-counter securities market by providing for the registration of voluntary securities associations.[42] A more ambitious program of government oversight than that which prevails with respect to registered securities exchanges was introduced, particularly the extension of the Commission's jurisdiction to include review of association disciplinary actions.[43] Section 15A(n) provides that the provisions of section 15A are to prevail over any other conflicting federal laws. While not specifically conferring exemption from the antitrust laws, that section has nevertheless been interpreted as providing some degree of antitrust immunity.[44] It was

40. *Special Study*, pt. 4, at 707. As more fully considered below, the *Special Study* was of the view that primary jurisdiction of this area should be vested in the Commission.

41. See 2 LOSS, SECURITIES REGULATION 1359-91 (1961).

42. The National Association of Securities Dealers (NASD) is the only such registered national securities association. See generally 2 LOSS, *op. cit. supra* note 41; *Special Study*, pt. 4, ch. XII-G.

43. Section 15A of the Securities Exchange Act, 52 Stat. 1070 (1938), 15 U.S.C. § 78*o* (1958), provides for the registration as a national securities association of any association of brokers or dealers which it appears to the Commission satisfies the provisions of that section. In addition to making membership available to any broker or dealer not subject to statutory disqualification under § 15A(b), the rules of the association must, *inter alia*, afford due process type protection in any disciplinary proceedings. Commission review of disciplinary action is expressly provided in §§ 15A(g) and (h), and as a concomitant of the requirement of pre-filing of association rules (now extended by Commission Rule 17a-8, 17 C.F.R. § 240.17a-8 (1964), to exchanges) the Commission has authoriay to abrogate any association rule, to assure fair dealing, fair representation of members, and to protect investors. Securities Exchange Act §§ 15A(j), (k).

44. International Ass'n of Machinists v. Street, 367 U.S. 740, 809-10 n.16 (1961) (dissenting opinion, Frankfurter, J.); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 227 n.60 (1940); 2 LOSS, *op. cit. supra* note 41, at 1370.

intended to be limited to the operation of section 15A(i)(1), which permits the rules of an association to prohibit members from dealing with nonmembers, except at the same prices, commissions, and fees, and on the same terms and conditions as are accorded to the general public.[45] Without a provision like section 15A(n), there presumably would have been a serious question whether the preferred treatment of members sanctioned by section 15A(i)(1) could escape conflict with the antitrust laws.[46]

In return for such exemption the policies of the antitrust laws, at least, were made applicable to registered securities associations by reason of section 15A(b)(7), which requires that the rules of such an association be

> designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to provide safeguards against unreasonable profits or unreasonable rates of commissions or other charges, and, in general to protect investors and the public interest, and to remove impediments to and perfect the mechanism of a free and open market; and are not designed to permit unfair discrimination between customers or issuers, or brokers or dealers, to fix minimum profits, to impose any schedule of prices, or to impose any schedule or fix minimum rates of commissions, allowances, discounts, or other charges.

The extension of the self-regulatory concept to over-the-counter dealers' associations was designed to elevate that segment of the securities industry to a stature comparable to the registered exchanges.[47] Nevertheless, different treatment of such associations under the antitrust laws resulted; the broader jurisdiction of the Commission suggests the possibility of a limited antitrust exception under the doctrine of the *Silver* case.[48] The "regulatory gap," *i.e.*, the differences between the provisions of the Securities Exchange Act dealing with the powers of the Commission with respect to securities exchanges as distinguished from those respecting the National Association of Securities Dealers (NASD) has long been recognized. Its existence may lead to unwarranted differences in the application of the antitrust laws to each type of self-policing agency.

Specific Applications of the Antitrust Laws

Underwriting and Distribution of Securities

Until 1943, it was generally assumed that the practice of resale price maintenance,[49] a concomitant of the technique of fixed price underwriting

45. See In the Matter of NASD, 19 S.E.C. 424, 478 n.9 (1945) (dissenting opinion, Commissioner Healy). It is clear that nonmembership was intended to carry economic sanctions.

46. *Ibid.*; 2 Loss, *op. cit. supra* note 41, at 1370 n.41.

47. *Hearings Before Senate Committee on Banking and Currency on S. 3255*, 75th Cong., 3d Sess. 7-8, 11, 18-19 (1938).

48. The Commission at an earlier date appears to have rejected such a suggestion. See In the Matter of NASD, 19 S.E.C. 424 (1945).

49. The practice typically involves an agreement among the underwriters and selling group

of securities, was beyond challenge under the antitrust laws.[50] In that year, that assumption was shattered when, in the course of proceedings before the Commission to review a group of NASD disciplinary actions,[51] the fixed price method of distributing securities was attacked by the then Division of Trading and Exchanges of the Commission and the Antitrust Division of the Department of Justice[52] on the ground that price fixing agreements, regardless of their economic justification, were illegal per se under the Sherman Act.[53]

Reviewing the Supreme Court cases holding price fixing illegal per se under the Sherman Act,[54] and tracing the history of modern underwriting techniques, the majority of the Commission pointed out that the nature of securities markets renders price maintenance as to one security during a short period of distribution distinguishable from a scheme affecting long-term marketing of consumers' or other goods. Moreover, in view of the history of the development of underwriting techniques, price maintenance agreements and stabilization, which may be objectionable in principal, were deemed necessary under existing conditions.[55] Whether

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members not to sell the offered securities below a fixed public offering price, except for the usual reallowance to members of the NASD, and except for changes in price or removal of price restrictions by the syndicate manager after the initial offering by reason of changed market conditions. See 3 LOSS, SECURITIES REGULATION 1615 (1961).

50. *Hearings Before House Committee on Interstate and Foreign Commerce on H.R. 4344, H.R. 5065, H.R. 5832*, 77th Cong., 2d Sess., pt. V, 1361 (1942).

51. In the Matter of NASD, 19 S.E.C. 424 (1945); Note, *Price Maintenance in the Distribution of New Securities*, 56 YALE L.J. 333 (1947). The proceedings involved disciplinary action by the NASD against numerous association members who violated resale price maintenance agreements in connection with a distribution in 1939 of bonds of Public Service Company of Indiana for engaging in conduct inconsistent with "high standards of commercial honor and just and equitable principles of trade," in contravention of the rules of the association. The issue had been offered to the public during a period of international unrest and the distribution process was exceptionally long in duration; as a result many of the participating underwriters and dealers engaged in transactions in disregard of the uniform selling price and concession terms. The majority of the Commission concluded that if it were faced with the question it would not prohibit price maintenance agreements. However, the NASD's interpretation of its rules requiring adherence to price maintenance agreements was found to be contrary to the provisions of § 15A(b)(7) and the Commission set aside the action of the NASD. In that posture of the proceedings, the Commission was not compelled to determine whether the price maintenance provisions violated the antitrust laws. Nevertheless, in view of the arguments advanced it felt constrained to express its views on that issue.

52. The Department of Justice was granted leave to intervene. In the Matter of NASD, 15 S.E.C. 577 (1944).

53. The question of the application of the Sherman Act was properly raised as a matter to be considered in the course of the Commission's functions under the Securities Exchange Act. Under the circumstances, there was no anomaly for an administrative tribunal to express its views on antitrust questions otherwise triable in the court. In the Matter of NASD, 19 S.E.C. 424, 436; *cf.* McLean Trucking Co. v. United States, 321 U.S. 67 (1944).

54. *E.g.*, Ethyl Gasoline Corp. v. United States, 309 U.S. 436 (1940); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

55. In view of the fixed price paid to the issuer and the relatively narrow spread, a successful distribution requires a sale price at or close to the offering price; it was felt that some price maintenance was justified to counteract selling pressure placed on the market by the distribution itself.

the policy of the Sherman Act required price competition among those engaged in a common economic undertaking under circumstances which made it necessary for the participants to act in combination was believed to be dependent upon the facts of the particular case,[56] the focus of attention being the extent to which the fixed price of the particular issue affects the price of other issues or exceeds the competitive limits set by the market affecting similar types of securities. In light of the provisions of the Securities Act which sanction fixed price offerings with allowances and discounts,[57] and the congressional policy which committed stabilization practices to the Commission's jurisdiction,[58] the opinion warned that the decisions dealing with price fixing and price maintenance in other commodities under the Sherman Act "must obviously be read with caution."[59] Although it was recognized as unnecessary to decide the point, the Commission was inclined to the position that the price maintenance agreements involved were not illegal under the Sherman Act. A caveat in the opinion emphasizes that the conclusion was not to be taken to mean that the Commission was of the view that the Sherman Act was not applicable to the underwriting business.[60] The Commission's views on the application of the antitrust laws to the securities field were summarized as follows:

> The mere making of agreements containing provisions for a fixed offering price, price maintenance and stabilization is not *per se* unlawful. But, like many other contracts, these may be entered into and performed under circumstances that amount to an unlawful suppression of competition. We have already noted certain factors by which the lawfulness of the syndicate may be judged.[61] Among these are: the size of the group in relation to the size of the issue, the suppression of competition in

56. Among the relevant factors suggested were: the size of the distribution group in relation to the size of the issue; the particular combination of powers reserved to those who dominate the distribution; the length of time provided in the contract for keeping the combination together; the type and quality of the security, and the size and nature of the class of investors to whom the distribution must be made. In the Matter of NASD, 19 S.E.C. 424, 458 (1945).

57. One author concludes that because sales below the offering price contained in the prospectus would make the prospectus false and misleading unless supplemented or amended, it is impossible to carry out a fixed price underwriting without some form of agreement. "If one reads the Securities Act of 1933, it is inconceivable that Congress thought that fixed-price distributions were illegal when it enacted that statute." JENNINGS & MARSH, SECURITIES REGULATION 668 (1963).

58. Because the regulation of stabilization was committed to the jurisdiction of the Commission by § 9 of the Securities Exchange Act, 48 Stat. 889 (1934), 15 U.S.C. § 78i (1958), it was believed that Congress thereby removed that matter from the scope of the Sherman Act. *But see* note 70 *infra.*

59. In the Matter of NASD, 19 S.E.C. 424, 452 (1945).

60. It was emphasized that the Commission was then much concerned about monopoly abuses in the securities business as discussed in its opinions and the Congressional investigations. That concern in part prompted the promulgation of Rule U-50 under the Public Utility Holding Company Act of 1935, 49 Stat. 803 (1935), 15 U.S.C. § 79 (1958), requiring competitive bidding in the sale of securities of registered holding companies.

61. See note 56 *supra.*

bidding or negotiating for the business, and the duration of a syndicate dictated by the manager and major underwriters.[62]

Before the proceedings were concluded, the so-called Reece bills[63] were introduced in the House, but were never reported out of committee. If enacted, these measures would have codified resale price maintenance provisions in the securities laws and would have exempted the practice from the antitrust laws.[64] Nevertheless, the bills were later severely criticized by one court as an ill-considered attempt to legalize certain aspects of fixed price underwriting generally, without reference to the circumstances of their use in particular cases.[65]

Further attempts to apply the antitrust laws to investment banking were made in 1947 when a civil action in equity under the Sherman Act was instituted against seventeen of the leading investment banking firms charging a conspiracy to monopolize the nation's securities business.[66]

62. In the Matter of NASD, 19 S.E.C. 424, 464 (1945). In a dissenting opinion, Commissioner Healy accepted the principle that price fixing was illegal per se and that the Miller-Tydings Act, 50 Stat. 693 (1937), 15 U.S.C. § 1 (1958), amending § 1 of the Sherman Act relating to resale price maintenance under state fair trade laws, did not apply to securities, or if it did, the securities involved were not brought within it, and agreed that underwriters may combine under some circumstances in violation of the Sherman Act. However, the existence and size of the syndicate was necessary to effect the distribution and was not in his opinion a combination to lessen competition. The agreement to observe a fixed offering price and not to cut that price for a reasonable period of distribution did not appear to Commissioner Healy to be price fixing or resale price maintenance within the Sherman Act cases.

> Under the Commission's rules, underwriters are permitted to stabilize, *obviously in combination*, to preserve a *market price* during a period of distribution, not merely to observe an offering price. Here this agreement is merely that during an appropriate period the underwriters and seller will not violate the terms of their common undertaking. Why swallow a camel like stabilization of a market price and strain as a gnat like a uniform offering price not to be broken during a period of primary distribution? The one excuse for stabilizing, which everyone agrees is a form of manipulation of market prices, is to protect a public offering during a period of public distribution, in order to facilitate that distribution. How futile it is to permit that and yet insist that those who have combined their capial and efforts in a common undertaking cannot agree to cut their own public offering price during a period reasonably needed for the distribution process! Is that price to be protected by stabilizing against all adverse outside influences and yet the price be breached by those on the inside who are distributing the security? Are the underwriters and distributors stabilizing against their own price cutting? Are they stabilizing against their violations of their own contracts? *Id.* at 488-89.

63. H.R. 5233, 78th Cong., 2d Sess. (1944); H.R. 1676, 79th Cong., 1st Sess. (1945) (introduced by Congressman Reece of Tennessee).

64. Resale price maintenance agreements would have been required to be included in Item 16 of Schedule A of the Securities Act, 48 Stat. 88 (1933), 15 U.S.C. § 77aa(16) (1958). The Securities Exchange Act would have been amended to prohibit price fixing and stabilization of a public offering of securities in contravention of Commission rules and unless delivery of the offered securities was accompanied by a summary of the fixed price and price maintenance agreements. These provisions were to have prevailed over any conflicting federal law.

65. United States v. Morgan, 118 F. Supp. 621, 697-98 (S.D.N.Y. 1953).

66. United States v. Morgan, *supra* note 65; Carson, *Some Abuses of Antitrust Prosecution: The Investment Bankers Case*, 54 MICH. L. REV. 363 (1956); Howell, *Competition in the Capital Markets*, Harv. Bus. Rev., p. 83, May-June 1953; Steffen, *The Investment Bankers' Case: Some Observations*, 64 YALE L.J. 169 (1954); Whitney, *The Investment Bankers' Case — Including A Reply to Professor Steffen*, 64 YALE L.J. 319 (1955); Steffen, *The Invest-*

During the course of the proceeding, the government sought to amend the complaint, contending that the provisions of syndicate agreements relating to the public offering price, resale price maintenance, stabilization and withholding commission clauses, uniform concessions and reallowances, and termination periods for the duration of the syndicate or the continuance of price restrictions, were all illegal per se under the Sherman Act.[67] Judge Medina refused to permit the introduction of these additional issues; however, because of the possibility that he might have been in error, he set forth his views by way of dictum on the validity of syndicate agreements generally.[68] That portion of his opinion in *United States v. Morgan*[69] first determined that there was nothing conspiratorial about the syndicate system in view of the history of its development and that because the situation was sui generis, no precedent required holding that syndicate agreements were illegal per se under the Sherman Act. Applying the rule of reason, the fixed type of public offering of new securities was believed to give no offense to the Sherman Act on the basis of the methods commonly used. This was not to be taken to mean that in connection with a specific issue of securities, by reason of the period of the continuation of the price restrictions, the number and underwriting strength of the syndicate members, or the existence of other factors, a finding that such agreements were illegal under the Sherman Act might not be justified. Moreover, the court continued, various provisions of the Securities Act recognize the syndicate technique of securities distribution and the fixed price offering; stabilization, sanctioned in connection with new issues, was viewed as having nothing to do with price fixing in the sense of the Sherman Act cases; and stabilization generally was not outlawed, but was committed to Commission jurisdiction.[70] Provisions in syndicate agreements respecting withholding of commissions, concessions, and discounts or reallowances were all found to be consistent with the registration requirements of the Securities Act, serving

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ment Bankers' Case: Observations in Rejoinder, 64 YALE L.J. 863 (1955); Whitney, *The Investment Bankers' Case: A Surejoinder*, 64 YALE L.J. 873 (1955); Note, *The Investment Bankers' Case: The Use of Semantics to Avoid the Per Se Illegality of Price Fixing*, 63 YALE L.J. 399 (1954).

67. United States v. Morgan, 118 F. Supp. 621, 685 (S.D.N.Y. 1953).

68. The legal questions under discussion "form an area of head-on collision between the SEC on the one hand and the Antitrust Division of the Department of Justice on the other." United States v. Morgan, *supra* note 67, at 694. The court suggested, quite appropriately, that the satisfactory way to arrive at any definitive factual and legal conclusions which could be tested by appeal to serve as precedent, would be to bring before a court the question of the legality under the Sherman Act of a single group of agreements relating to a single securities issue. This has never been done.

69. United States v. Morgan, 118 F. Supp. 621 (S.D.N.Y. 1953).

70. Judge Medina was in general agreement with the Commission's conclusions on the antitrust question. He did not, however, agree with the Commission's position that the statutory provisions concerning stabilization operated to remove that problem from the antitrust laws.

the purpose of contributing to orderly distributions. Thus, while the provisions of securities laws did not amount to an implied exemption from the provisions of the Sherman Act, "all those who worked together on the formulation of [the federal securities] . . . legislation went about their task of integrating into the statutory pattern the current modes of bringing out new securities issues then in common use by investment bankers generally, with complete assurance that no violation of the Sherman Act was even remotely involved."[71]

Neither the *Morgan* opinion nor the Commission's earlier opinion offers complete justification for the accommodation of such agreements and practices under the antitrust laws.[72] Each opinion declares that there is no general exemption from the antitrust laws for the securities business, but intimates that the provisions of the securities laws exhibit the intention by Congress to permit the existence of activities which in a different context would violate the antitrust laws. Nevertheless, under appropriate circumstances — apparently taking into account quantitative differences — each opinion warns that fixed price underwriting arrangements could violate the antitrust laws. Logical consistency in applying the antitrust thesis advanced in the *Morgan* case and in the Commission's opinion, would lead to the conclusion that the same antitrust treatment might not be extended to the underwriting and distribution of securities exempt from the registration provisions of the Securities Act which recognize the fixed price offering technique and resale price maintenance.[73] The exemp-

71. United States v. Morgan, 118 F. Supp. 621, 697 (S.D.N.Y. 1953). Congressional recognition of the existing underwriting practices does not alone justify the conclusion that all of such practices were authorized for antitrust purposes.

72. The Commission was of the view that application of § 15A(b)(7), 52 Stat. 1070 (1938), 15 U.S.C. § 78*o*-3 (1958), as amended, Pub. L. No. 88-467, 88th Cong., 2d Sess. (Aug. 20, 1964), involves concepts different from those under the antitrust laws and was therefore able to conclude that economic and business realities justified application of the rule of reason.

73. For example, the fixed price distribution of an intrastate offering or other exempt offering of securities, and the attendant price maintenance and other arrangements, free of the registration provisions of the Securities Act, would be stripped of the ostensible protections afforded by those provisions. With respect to the intrastate exemption, local restraints of sufficient importance to have interstate effects may be subject to antitrust action. United States v. Employing Lathers Ass'n, 347 U.S. 198 (1954); Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948). On the other hand, an offering made pursuant to Regulation A under the Securities Act, which provides exemption for offerings up to $300,000, would be protected under the theory of *Morgan* and the Commission's opinion. The provisions of Regulation A recognize the attributes of the fixed price offering. Moreover, failure to adhere to the fixed price resulting in sales at a higher price would result in loss of the exemption.

One writer has suggested that certain aspects of the private placement market which developed under the private offering exemption of the Securities Act § 4(1), 48 Stat. 77 (1933), as amended, 15 U.S.C. § 77d (1958), as amended, Pub. L. No. 88-467, 88th Cong., 2d Sess. (Aug. 20, 1964), namely, that issuers seeking to place their securities privately may not offer them freely or the exemption will be lost; that business practice favors negotiated rather than free, competitive offering; that issuers are forced to accept terms different from those which would be available in a free market; and that small institutional lenders are tive provisions of the securities laws justify no such difference in antitrust application. Legislative treatment along the lines of the abortive Reece bills may have been appropriate. Not only would the antitrust question have been obviated, but the Commission would have had direct control over the matter through the registration process and rule making authority.

Stock Exchange Commission Rate Structure

The avowed objectives of organizing the NYSE in 1792 were the setting of minimum commission rates and the establishment of a preference for members of the exchange in their dealings *inter se.*[74] The level and structure of commission rates are established by the rules of the various exchanges, subject to the Commission's authority under section 19(b) of the Securities Exchange Act. The structure of the NYSE commission rate schedule, the antirebate rule and concomitant attempts to avoid it, as well as certain reciprocal business and special service arrangements, each involves practices which, unless otherwise sheltered by the securities laws, suggest questions in the application of the antitrust laws.

The NYSE commission rate schedule and the rules which govern it establish a mandatory system of minimum commission rates for dealings between members *inter se* and between members and nonmembers,[75] and prohibit any rebate, return, discount or allowance.[76] The rates of commission contained in the member schedule are not only lower than those contained in the single nonmember schedule, but also contain separate schedules of charges for executing or clearing transactions or for both.[77] Nonmembers, on the other hand, including nonmember broker-dealers, are subject to a higher all-inclusive commission schedule based upon a fixed round lot rate, regardless of the number of round lots involved in a transaction.

> Under the public commission schedule of the NYSE, a nonmember broker must pay a member the same commission that his customer would

excluded from and cannot compete for the business of the large issuers — impose restraints inconsistent with the policies of the antitrust laws. Such limited access to a market in any other commodity would not be tolerated under the antitrust laws. See Steffen, *The Private Placement Exemption: What to Do About A Fortuitous Combination in Restraint of Trade,* 30 U. CHI. L. REV. 211 (1963). Professor Steffen suggests that the antitrust policy might be satisfied by according special treatment to a recognized private placement market. *Id.* at 239-40.

74. *Special Study,* pt. 2, at 295.

75. NYSE Constitution Art. XV, in *Special Study,* pt. 2, at 295-96. The Commission rate structure of the NYSE is not only the most important in the country, but serves as the pattern for the other national securities exchanges. *Id.* at 299.

76. On the other hand, three regional exchanges grant discounts to nonmembers. *Ibid.*

77. *Id.* at 297.

pay if he were to place the order directly with a member. Yet the nonmember incurs, in addition to the commission cost, overhead and other expenses incident to securing and transacting the business. Since competition normally prevents the nonmember from charging his customer any more than the rate charged by a member, his gross income from the transaction generally equals the commission he pays to the member, notwithstanding his other costs. Yet unless he accepts such NYSE business placed with him by his customer, he runs the danger of losing both customer and business altogether.[78]

As a result of the prohibition against rebates of commissions to nonmembers, there have been established a variety of *ad hoc* practices directed at special treatment of nonmember professionals.[79] Although the return of cash to nonmembers violates the antirebate rule, the return of a cash equivalent in the form of commission business or services is permissible.[80] The *Special Study* describes several methods by which a member of the NYSE desiring to reciprocate for commission business given to him by a nonmember professional can return commission business to the nonmember.[81] Such business is usually placed under arrangements involving proportions favoring the member firm. Alternatively, a member may, with certain limitations, reward a nonmember for commission business by furnishing him with special services, such as installation and maintenance of wire arrangements, clearance of non-exchange transactions, office space, special research, promotional materials and displays — either free of charge or at reduced cost.[82] Because the public schedules require charging the same rates of commission based on the value of a round lot regardless of the size of the transaction, special services varying in content, scope, and depth from those provided to ordinary public customers are also used as a reward or an inducement for commission business of large block or volume customers. These practices are generally geared to circumvent the prohibition of certain special service arrangements by NYSE rules.[83] The permissive splitting of dollar commissions among members has given rise to additional reciprocal arrangements characterized as give-ups, generally availed of by mutual funds, whereby a portion of the commission on a transaction is paid over at the direction of the customer to another member firm to satisfy the customer's purposes.[84] Lastly,

78. *Id.* at 301.

79. *Id.* at 346-47.

80. *Id.* at 304.

81. *Id.* at 302-07. These arrangements include placing such business on a regional exchange through the nonmember even though the member may also be a dual member, or the security dealt in is dually listed; and placing orders in over-the-counter securities with the nonmember even if the member is capable of effecting the transactions directly.

82. *Id.* at 307-09.

83. NYSE Rule 369, in *Special Study*, pt. 2, 313-16.

84. Another variation of the reciprocal give-up involves payment of a portion of the cash commission to another member as a conduit who renders services for a nonmember with whom the customer wishes to reciprocate. Still another method involves business transacted

the absence of direct price competition has resulted in competition among exchange members in ancillary services such as furnishing research, investment advice and quotations, safekeeping of securities, and collecting dividends. However, as indicated, while more costly special services are offered to large customers, the average customer is, in effect, compelled to pay for services which he may not want under circumstances where he cannot take his business elsewhere to avoid such services or charges for them.[85]

Within the framework of the commission rate structure, there is some question whether the existence of these practices and activities is compatible with the antitrust laws.[86] For example, the commission rate schedule, particularly the system establishing minimum rates of charge, may constitute an illegal price fixing scheme — per se an unreasonable restraint of trade under the Sherman Act.[87] A schedule of maximum commission rates or a minimum-maximum range may, strictly as a matter of antitrust law, be viewed more favorably.[88] Similarly, because of limited access to exchange membership, and depending upon circumstances, the antirebate rule and reciprocal dealing arrangements may be capable of construction as a form of group boycott, *i.e.*, a concerted refusal to deal.[89]

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on regional exchanges through a dual member who gives up a portion of the commission to a regional-only member, or on some regional exchanges even to a nonmember. See *id.* at 316-18.

85. *Id.* at 321.

86. There appears to be no question of whether the activities involved concern trade or commerce within the jurisdiction of the antitrust laws. United States v. National Ass'n of Real Estate Bds., 339 U.S. 485 (1950).

87. United States v. National Ass'n of Real Estate Bds., *supra* note 86 and cases cited therein. Note that the early cases of Hopkins v. United States, 171 U.S. 578 (1898) and Anderson v. United States, 171 U.S. 604 (1898), are not applicable.

88. "Obviously so drastic a step could not be taken, or even proposed, without much more exhaustive examination of its potential advantages and disadvantages than could possibly have been undertaken by the Special Study, and the reference to it [there] is not intended as a suggestion for action but only as a course of study. Yet it is appropriate to point out that many of the knottiest problems of rate structure and establishment of 'reasonable' rates . . . might be enormously simplified if 'reasonable' rates were not necessarily conceived of as minimum ones." *Special Study*, pt. 2, at 323. Note too that a maximum rate structure may not be entirely beyond the pale of the antitrust laws. Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951).

Section 3(a)(3) of the Securities Exchange Act, 48 Stat. 882 (1934), as amended, 15 U.S.C. § 78c (1958), as amended, Pub. L. No. 88-467, 88th Cong., 2d Sess. (Aug. 20, 1964), defines the term "member" to include any person who may make use of the facilities of an exchange upon payment of a commission or fee which is less than that charged the general public. If commission splitting between members and nonmembers were permitted, arguably, such nonmembers would fall within that definition, and under § 6, 58 Stat. 885 (1934), 15 U.S.C. § 78q (1958), and § 19(a)(1), 48 Stat. 898 (1934), 15 U.S.C. § 78s (1958), as amended, 15 U.S.C. § 78s (Supp. V, 1963), the exchange would be responsible for their conduct. Although it appears that Congress may thus have recognized the existence of the antirebate practice, its status under the antitrust laws was not clarified.

89. *E.g.*, Silver v. New York Stock Exch., 373 U.S. 341 (1963); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959). Compelling all customers to pay for ancillary ser-

Assuming for present purposes that each of the foregoing activities and practices does in fact contravene the antitrust laws, it does not appear that they are fully protected or given immunity under the securities laws within the guidelines of the *Silver* case. Notwithstanding that the criticized practices existed in some form prior to the enactment of the Securities Exchange Act, Congress gave no clue as to whether it intended merely to recognize the existence of the fixed commission schedules and attendant practices, or whether it authorized such schedules for antitrust purposes.[90] Indeed, Congress and the drafters of the bills were concerned with monopolistic abuses in the investment banking business and acknowledged the monopoly position of exchanges and their membership.[91] Yet, there is nothing which discloses the manner in which it was intended that particular practices were to be dealt with under the antitrust laws. Early drafts of the bill would have empowered the Commission to fix rates of commission directly.[92] However, under the Securities Exchange Act, the Commission's authority is confined to section 19(b)(9), which permits the Commission to alter or supplement rules of exchanges in respect to the fixing of *reasonable* rates of commission, interest, listings and other charges, and similar matters. Early drafts of the bill referred to uniform rates of commission,[93] but the language was changed without explanation to introduce the sole standard of reasonable rates. That term is undefined and must be viewed through the criteria of "protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange."[94] Thus, to whatever extent section 19(b) obviates the fixing of reasonable rates as a quantitative matter, it does not otherwise purport to protect a minimum schedule as such; however, a broad reading of that section would also permit the Commission to deal with the structure of commission rates. There are no provisions applicable to ex-

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vices whether wanted by the customer or not, also appears to be a form of unreasonable restraint of trade.

In Thill Securities Corp. v. New York Stock Exch., Civil No. 63-C-264, E.D. Wis., October, 1962, a nonmember broker-dealer filed an action on behalf of himself and all other nonmember broker-dealers, alleging a conspiracy to restrain trade by the exchange and its members in refusing to share or negotiate for sharing of commissions. If prosecuted to completion, that case may operate to put the antitrust question squarely before the Commission and the courts.

90. In either event, the practice of furnishing special services to nonmember professionals and large customers, and the practice of customer directed give-ups in cash or services, appear analogous to the type of exclusive dealing and other discriminatory arrangements variously prohibited by the antitrust laws.

91. *Hearings Before Senate Committee on Banking & Currency on S. 3255*, 75th Cong., 3d Sess. 7 (1938).

92. S. 2683, 73d Cong., 2d Sess. § 18(c) (1934); see *Special Study*, pt. 2, at 301.

93. See *Hearings on Stock Exchange Practices Before Senate Committee on Banking and Currency*, 73d Cong., 2d Sess. 7705 (1934).

94. 48 Stat. 898 (1934), 15 U.S.C. § 78s(b) (1958).

changes similar to those contained in section 15A, which prohibit fixing minimum profits or imposing schedules of prices or minimum rates of commissions, allowances, discounts, or other changes.[95] No comparable provision expressly prohibits discrimination among customers, issuers, or broker-dealers; but nothing authorizes and protects from the antitrust laws dealings by members with nonmember professionals except on the same conditions as are accorded to the general public.[96]

Strictly as a matter of antitrust law, the existence of so important and pervasive a structure of commission rates ought to rest on a sounder legal foundation. If there is sufficient economic justification to insist upon a minimum rate structure, then clarification by way of a limited antitrust exemption by statute would be appropriate. Otherwise, in the absence of further regulatory control by the Commission, it would appear that the present rate structure may be susceptible to antitrust enforcement.

Restrictions Upon Members' Off-Board Trading in Listed Securities

One of the more striking recent developments in the securities field is the growth of a market away from the stock exchanges for securities traded in upon exchanges — the so-called "third market."[97] Although the volume of such trading in NYSE listed securities is only a small percentage of exchange volume, it nevertheless involves millions of dollars annually.[98] The most important segment of such trading is carried on by broker-dealers who make off-board markets in listed stocks on a continuous basis.[99] This market is generally viewed as a professional market, *i.e.*, composed of institutional customers attracted by the promise of volume discounts and negotiated commissions, and nonmember dealers who seek to utilize the third market to avoid the fixed exchange commission schedule. From the point of view of the exchange market, the third market is considered a form of multiple trading;[100] NYSE Rule 394 prohibits members from dealing in the third market in listed securities without the consent of the exchange.[101]

It has been suggested[102] that with the prospective listing of bank stocks

95. Securities Act § 15A(b)(7), 52 Stat. 1070 (1938), 15 U.S.C. § 78o-3(b)(7) (1958).

96. Sections 15A(b)(7), (i)(1), 52 Stat. 1070 (1958), 15 U.S.C. § 78o-3 (1958), as amended, Pub. L. No. 88-467, 88th Cong., 2d Sess. (Aug. 20, 1964).

97. *Special Study*, pt. 2, at 870-911.

98. *Id.* at 873.

99. *Id.* at 870-71.

100. *I.e.*, a competitive market, and to the extent that it involves trading that would otherwise take place in the primary market, it may affect the depth of the latter. *Id.* at 901-03.

101. The prohibition against over-the-counter dealings in listed securities by members is followed in varying degrees by other exchanges. *Special Study*, pt. 2, at 900.

102. M. A. Schapiro & Co., *To List or Not to List Part II*, Bank Stock Q., September 1964, p. 15.

on the NYSE,[103] the attendant removal of members from dealings in what will become the third market in such stocks may constitute a form of concerted refusal to deal, prohibited by the antitrust laws, unless such action can be justified by the Securities Exchange Act.[104] Such a refusal to deal by exchange members, except in the primary exchange market, may be defended as a reasonable means of preventing "erosion of the primary market."[105] Such action may be justified as a concomitant of the unique monopoly position of the exchange which is recognized by the Securities Exchange Act. Although the success and quality of an auction market may depend upon a concentration of orders in that market, on balance the factor of competition that may be provided by multiple markets must also be considered.[106]

One of the aims of the scheme of regulation embodied in the Securities Exchange Act was to "endeavor to create a fair field of competition among exchanges and between exchanges as a group and the over-the-counter markets and to allow each type of market to develop in accordance with its natural genius consistently with the public interest."[107] Thus, it may be appropriate in the public interest to extend the theory of the multiple trading case[108] to include dual participation by members in the third market. Moreover, the duty of a broker-dealer to obtain the best price for his customer[109] may outweigh any asserted justification for continued restrictions upon members' dealings off-board.

The nature of the public interest in the maintenance of competition within and among markets was summarized by the *Special Study* in pertinent parts, as follows:

> The extent of needed regulation of markets in the public interest surely depends, at least in part, on the effectiveness of competition among markets — not merely competition for the handling of trans-

103. The incentive to banks and other issuers of publicly held securities to list was created by the Securities Act Amendments of 1964, Pub. L. No. 88-467, 88th Cong., 2d Sess. (August 20, 1964), which extends the reporting and other provisions of the Securities Exchange Act, heretofore applicable to listed companies, to publicly held corporations meeting the asset and shareholder criteria.

104. M. A. Schapiro & Co., *supra* note 102, at 19. The problem suggested is not peculiar to bank stocks alone and would logically involve any listed security traded in upon the third market. The crux of the problem is the exchange commission rate schedule. If rebates of commission commensurate with prevailing discounts were permitted, it is possible that the volume of the third market would dissipate.

105. *Special Study*, pt. 2, at 956. Exchange members are of course concerned about the loss of commission business to the third market. *Id.* at 954-56; Silberman, *Critical Examination of SEC Proposals*, Harv. Bus. Rev., Nov.-Dec. 1964, pp. 121, 125-26. Moreover, the restrictive rule is justified by the difficulties imposed on the exchange in policing the activities of its members in listed securities off-board.

106. *Special Study*, pt. 2, at 956.

107. S. REP. NO. 1739, 74th Cong., 2d Sess. 3 (1936).

108. Rules of the New York Stock Exchange, 10 S.E.C. 270 (1941).

109. Edison Elec. Illuminating Co., 1 S.E.C. 909, 913 (1936); see *Special Study*, pt. 2, at 958.

actions in multiple traded securities but competition to become the primary market for particular securities — in maintaining high standards of performance. Indeed, in the absence of effective competition among markets in both senses, the sheer size and power of any one or two markets might enlarge the scope and degree of needed governmental intervention to the point where the adequacy of present regulatory concepts would be open to question. . . .

The factor of depth in the primary market thus must be looked at, not in isolation, but in relation to the factor of competition. . . . [I]t has been concluded, not that impairment of depth in the primary market is irrelevant or inconsequential . . . but that . . . the public benefits of competitive markets (including added depth in the total market which they may provide) by and large outweigh any detriment in the form of impairment of depth in the primary market.[110] This conclusion does not preclude the possibility that the balance would be otherwise in particular instances. But, based on the study's analysis, the basic policy would still be 'to create a fair field of competition' among markets and generally to foster free and open competition, rather than restrict competition.[111]

Whether affected private interests or the government should intervene to vindicate their respective interests with respect to existing restraints upon member access to the third or other dual markets remains to be seen. Nevertheless, the promotion of free and open competitive markets and prevention of unfair competition involve a delicate balance of competitive factors which, unless the protection of the investing public requires otherwise, would appear to favor free access to primary and secondary markets.

Odd-Lot System

Nearly ten per cent of the share volume on the NYSE, and a higher proportion of transactions, consists of odd-lots.[112] The conduct of the

110. The existence of the third market apparently does not seriously impair the depth of the exchange market. It provides volume in listed securities not otherwise available, and offers a medium for handling transactions too large to be efficiently handled by exchange capacity. *Special Study*, pt. 2, at 902-03. The competive advantages brought about by the third market include price competition which exists through volume discounts, and avoidance by institutional customers with their own advisory and other facilities of fixed commission rates for unnecessary services. The *Special Study* noted in this regard that, "it might be said that in this respect the market makers [*i.e.*, dealers in the third market] who incur none of the costs involved in performing these services compete with the exchange by *not* performing the services and by *not* charging for them." *Id.* at 905. Moreover, competition permits the nonmember professional to do business in listed stocks without paying public commission rates; although this may be moderated by reciprocal arrangements. *Ibid.* Nevertheless, the third market allows nonmembers to offer listed securities to customers which would not otherwise be possible, thereby encouraging sharper competition among brokers to the ultimate benefit of the public. Competition also exists in the form of faster executions and by allowing institutional customers tighter control over their market activities. *Id.* at 905-06.

111. *Id.* at 957.

112. *Special Study*, pt. 2, at 172, 199. Odd-lots consist of transactions in fewer shares than the minimum round lot trading unit. A round lot usually consists of 100 shares. *Id.* at 171. This discussion is confined to the NYSE. On most other exchanges, odd-lots are handled by specialists in their respective stocks. *Id.* at 172-73.

odd-lot business is significant to the public investor, particularly the small investor. Nevertheless, two firms dominate the odd-lot business, handling almost ninety-nine per cent of the volume of NYSE odd-lots.[113] These two firms, together with the floor brokers who work exclusively for them, comprise about ten per cent of the exchange membership.[114] The odd-lot differential or fee, over and above the minimum commission charges, is fixed by the odd-lot dealers and is not regulated directly by the exchange.[115] Until recently, exchange policy consisted of a virtual prohibition of price competition by members in odd-lot differentials and enabled the present duopoly to flourish.[116] Unlike the odd-lot differential which has been determined cooperatively, a form of competition does exist in the services offered by the odd-lot firms.[117]

The Commission's rule-making power under section 11(b) and its authority under section 19(b) with respect to odd-lot dealers has never been exercised. The exchange has now adopted rules governing activities of odd-lot dealers.[118] However, pending the completion of an odd-lot cost study and a determination by the exchange of what constitutes a reasonable differential, the odd-lot differential continues to be that imposed by the odd-lot dealers.[119] Thus, there has persisted a monopoly within a monopoly with the power to fix prices with respect to odd-lots. The impact of current self-regulatory measures cannot yet be fully appraised; it is possible that the antitrust question respecting odd-lots may thereby be clarified.[120]

Open-end Investment Companies

Open-end investment companies, commonly known as mutual funds, have in recent years experienced extraordinary growth and popularity.[121] The *Special Study* attributes these phenomena in part to two unique aspects of mutual funds — the continuous public offering of mutual fund shares and the redeemability of such shares[122] — which are circum-

113. *Id.* at 173.

114. *Id.* at 174.

115. *Id.* at 181.

116. *Id.* at 179.

117. *Id.* at 186.

118. The exchange had adopted few rules respecting odd-lots. *Id.* at 177-78. The addition of NYSE Rules 99, 100 and 124, effective June 1, 1964, introduced controls with respect to transactions in odd-lots.

119. NYSE Rule 125.

120. In view of the suggestion and the possibility of automating the handling of odd-lots, the problem concerning odd-lot dealers may be completely obviated. See *Special Study*, pt. 2, at 202; Wall Street Journal, Sept. 24, 1964, p. 1, col. 1.

121. Concerning mutual funds generally, see *Special Study*, pt. 4, ch. XI; Securities and Exchange Commission, *A Study of Mutual Funds*, H.R. REP. NO. 2274, 87th Cong., 2d Sess. (1962) [hereinafter cited as Wharton School Report].

122. *Special Study*, pt. 4, at 95-96.

scribed by the provisions of the Investment Company Act. Certain activities and practices carried on in connection with the distributon of mutual fund shares appear to be insulated from the operation of the antitrust laws. Mutual fund shares, not generally traded on an exchange or over-the-counter, are sold as part of a continuing and unlimited offering of new shares by the fund through a principal underwriter and are redeemed by the fund, as required by the Investment Company Act, both at prices related to "net asset value."[123] The process of distribution of mutual fund shares frequently takes place through independent broker-dealers serviced by the fund's principal underwriter.[124] The principal underwriter is often affiliated with the fund's investment adviser, broker-dealers, or affiliates of one or the other.[125]

The sales pressure in connection with the distribution of mutual fund shares which concerned the *Special Study* was noted to have resulted, at least in part, from the protection afforded by resale price maintenance, or "fair trading" of mutual fund shares under the Investment Company Act, NASD rules, and private sales agreements. To prevent price discrimination among buyers and to assure the orderly distribution of mutual fund shares, the Investment Company Act requires the maintenance of the announced public offering price.[126] That act prohibits sale of the fund's shares to the public by either the fund or the principal underwriter or dealer, except at the current offering price as described in the prospectus.[127] The NASD is authorized to prohibit members from purchasing mutual fund shares from a mutual fund or its principal underwriter, except at the public offering price less the prescribed discount.[128] An NASD rule prohibits sales by the principal underwriter at a discount to anyone other than an NASD member, and then only when a sales agreement which specifies the dealer's concession is in effect.[129]

123. *Id.* at 96-97. Net asset value is computed twice daily and consists of the fund's net assets per share. To minimize abuses such as dilution of the equity of existing shareholders, § 22(a) of the Investment Company Act empowers the NASD to adopt rules to prescribe methods for computing prices at which members may buy, sell or redeem mutual fund shares and the minimum time which must elapse between purchases and redemptions. The NASD is also authorized to adopt rules limiting and prescribing methods of computing commissions on mutual fund transactions. Investment Company Act § 22(b). See 1 LOSS, SECURITIES REGULATION 403 (1961).

124. *Special Study*, pt. 4, at 105-07. Other funds are distributed through integrated selling organizations. *Id.* at 102-04.

125. *Id.* at 97.

126. 1 LOSS, *op. cit. supra* note 123, at 404-05.

127. Investment Company Act, § 22(d), 54 Stat. 789 (1940), 15 U.S.C. § 80a-22(d) (1958). See Greene, *The Uniform Offering Price of Mutual Fund Shares Under the Investment Company Act of 1940*, 37 U. DET. L.J. 369 (1960).

128. Investment Company Act, § 22(b), 54 Stat. 789 (1940), 15 U.S.C. § 80a-22(b) (1958).

129. NASD Rules of Fair Practice art. III, § 26(c). Sales agreements under the Investment Company Act and NASD rules provide for a retail price of net asset value plus a specified sales charge.

> In theory, without these fair trade arrangements, a trading market for mutual fund shares could exist, with purchasers buying at prices below the prices stated in the prospectus (net asset value plus, say, 8.5 per cent) and sellers selling at prices above the contractual redemption price (net asset value). Prior to the passage of the Investment Company Act, indeed, there was such a market. The fair trade arrangements established by the act, the NASD rules and the private sale agreements now make it extremely difficult for a trading market in mutual fund shares to exist and to provide competition for the large mutual fund selling organizations in the sale of fund shares. While the overall economic desirability of such fair trade arrangements from the point of view of the public may well merit further consideration by the Commission, the Special Study has been able to do no more than note that in the protection they grant to large sales organizations, they contribute to the pressure for sales of mutual fund shares.[130]

The scheme of the Investment Company Act, regarding the distribution of mutual fund shares and price maintenance, would appear to offer an implied exemption from the operation of the antitrust laws to the extent necessary to carry out the purposes of the Investment Company Act.[131] Moreover, under the doctrine of the *Silver* case, added protection for these activities and practices is found in the self-regulatory participation of the NASD through its rules and regulations subject to Commission, and ultimately judicial, control. As the *Special Study* indicated, another equally important contributor to the pressure for sales of mutual fund shares is the NYSE minimum commission schedule which makes possible the reciprocal business arrangements developed to avoid the antirebate provision. Give-ups and other reciprocal business arrangements, more fully described above, are most frequently employed by mutual funds.[132] Unrestrained, these practices appear to be susceptible to anticompetitive abuses and, under appropriate circumstances, may operate to the competitive disadvantage of nonparticipating dealers.

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130. *Special Study*, pt. 4, at 98.

131. Although § 10 of the Investment Company Act, 54 Stat. 806 (1940), 15 U.S.C. § 80a-10 (1958), imposes certain limitations upon the complexion of the board of directors of registered investment companies, including the requirement that 40% of the board of directors be independent of the investment adviser, there is no limitation upon affiliations and interlocks between investment companies. (The Wharton School Report, at 69-73 describes affiliation and control of multi-firm groups). If the same person representing an investment adviser were to occupy a place upon each board of directors of two competing investment companies, there would appear to be a possible violation of § 8 of the Clayton Act unless such conduct is insulated therefrom by reason of the provisions of the Investment Company Act. Section 8 of the Clayton Act generally prohibits the same person from being a director of two or more competing corporations with capital in excess of $1,000,000 if elimination of competition between them would violate the antitrust laws. See United States v. W. T. Grant Co., 345 U.S. 629 (1953); Schectman v. Wolfson, 244 F.2d 537 (2d Cir. 1957); United States v. Sears, Roebuck & Co., 111 F. Supp. 614 (S.D.N.Y. 1953); Kramer, *Interlocking Directorships and the Clayton Act After 35 Years*, 59 YALE L.J. 1266 (1950). There is some question as to the effect of different persons representing the same firm on different boards of directors, a practice common among the investment banking community. See Kramer, *supra* at 1272.

132. *Special Study*, pt. 4, at 213. See note 84 *infra* and accompanying text.

CONCLUSION

The foregoing discussion emphasizes two of the problems involved in the process of balancing and accommodating the policies of the antitrust laws within the framework of federal securities regulation. First, strict application of the antitrust laws to at least certain areas of the securities field tends to produce anomalous results. For example, self-regulation is vulnerable to the per se theory of antitrust liability because of the many concerted activities which are carried on by the self-policing agencies and because of the intrinsic anticompetitive bias recognized in the concept of self-regulation. The possibility of antitrust liability in connection with the fixed price method of underwriting securities has not been entirely eliminated as a matter of law. Yet, in the proper economic setting, insistence upon literal application of classical concepts of competition and free markets may not be desirable in light of this and other industry practices. Second, there exists simultaneously an area within which the public interest, vis-à-vis the antitrust laws, may not be completely vindicated by the regulatory scheme of the federal securities laws. Thus, there is a demonstrated need to accommodate the goals of the antitrust laws to eliminate restraints upon competition, with the efficient functioning of the self-regulatory program envisaged by the federal securities laws. Although there are built-in anticompetitive effects in the self-regulatory concept, there is nothing built into the regulatory scheme which directly performs the antitrust function of guarding against the misuse of the delegated power of self-regulation. It is universally conceded that some form of government oversight and review of the self-policing efforts of the self-regulatory agencies is necessary to fulfill the purposes of the securities laws as well as the antitrust laws. "Whether the antitrust laws apply, some government oversight is warranted, indeed, necessary, to insure that action in the name of self-regulation is neither discriminatory nor capricious."[133]

It has been suggested that the self-initiating regulatory process can operate effectively only if it is free of the constant threat of antitrust liability, and that the securities laws remove from the sweep of the antitrust laws the activities of the self-regulatory bodies in the required exercise of their statutory responsibilities.[134] Recognizing that under some circumstances it may be in the public interest to substitute other values (*e.g.*, liquidity, continuity, stability) for free price competition, limited antitrust exemption, not unlike that contained in the Reece bills, may be appropriate.[135] Similarly, certain other activities may warrant special antitrust treat-

133. Cary, *Self-Regulation in the Securities Industry*, 49 A.B.A.J. 244, 246 (1963).

134. Silver v. New York Stock Exch., 373 U.S. 341, 371 (1963) (dissenting opinion).

135. Several federal regulatory statutes provide shelter from the antitrust laws with respect to particular matters vested in administrative jurisdiction, *e.g.*, Interstate Commerce Act, 24 Stat.

ment; however, total exemption seems inappropriate and unnecessary.[136] Surely, the proponents of complete antitrust exemption do not envisage total relief from the *policies* of the antitrust laws without an appropirate substitute. Unjustified anticompetitive conduct in the name of self-regulation under the securities laws should not be exempt from the sanctions of the antitrust laws. Misuse of the delegated power of self-regulation should be amenable to relief not otherwise available under the securities laws.[137] The corollary of such exemption must be the substitution of a scheme of government oversight more complete in scope than that presently conceived, but which will continue and strengthen the vitality of the concept of self-regulation.[138]

The difficulties involved in lengthy antitrust litigation mitigate against commending the use of that means of regulating anticompetitive conduct in the securities field. Further, the intervention of antitrust proceedings by private litigants or government agencies might tend to impair the efficient discharge by the Commission of its responsibilities, and would result in the diminution of the initiative and responsibility of the self-regulatory agencies. Effective functioning of self-regulation with due regard for all aspects of the public interest, as the *Special Study* pointed out, requires that the forum for review of self-regulatory action be the agency already established as the official, expert guardian of the public interest in the securities field — the Commission.

> With its broad responsibility and concern for the entire area, it is in the best position to comprehend and reconcile — in the first instance and subject to judicial and congressional oversight of its own activities — the diverse factors and considerations that may constitute or bear upon the total public interest in the manifold and complex circumstances where the question may arise. This is true of questions of competition and all other aspects of the public interest, as well as questions of reconcilement of private interests. For an orderly and coherent regulatory scheme, with self-regulation playing its intended role, needed governmental oversight ought to be fragmented as little as possible. This is,

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380 (1887), as amended, 49 U.S.C. § 5(11) (1958), 62 Stat. 472 (1948), 49 U.S.C. § 5b(9); Shipping Act, 39 Stat. 733 (1916), 46 U.S.C. § 814 (1958), as amended, 46 U.S.C. § 814 (Supp. V, 1963); Federal Communications Act, 57 Stat. 5 (1943), 47 U.S.C. § 222, as amended, 47 U.S.C. § 222 (Supp. V, 1963).

136. It has been suggested that absolute immunity would permit the existence, under some other guise, of conduct and activities designed to achieve anticompetitive results; and the obverse of such immunity would be unredressed injury to the victims thereof. Brief for the United States as Amicus Curiae, pp. 38-39, Silver v. New York Stock Exch., 373 U.S. 341 (1963). Moreover, a proliferation of exemptions from the antitrust laws may not be desirable from an antitrust standpoint. See ATT'Y GEN. REP. 288.

137. *Cf.* Baird v. Franklin, 141 F.2d 738 (2d Cir.), *cert. denied*, 323 U.S. 737 (1944); Pettit v. American Stock Exch., 217 F. Supp. 21 (S.D.N.Y. 1963) recognizing an implied right of action for negligent violation of § 6 of the Securities Exchange Act by an exchange for failure to take disciplinary action against its members.

138. See Jennings, *Self-Regulation in the Securities Industry: The Role of the Securities and Exchange Commission*, 29 LAW & CONTEMP. PROB. 663, 689 (1964).

> indeed, one of the basic roles of a specialized agency created to deal with a particular industry affected with a public interest.[139]

The majority opinion in the *Silver* case concluded that the Securities Exchange Act did not create a total antitrust exemption. Nevertheless, the Court intimated that particular instances of self-regulatory action falling within the scope and purposes of the act may be justified in answer to the assertion of an antitrust claim.[140] In that light, "governmental participation is necessary . . . to assure that action taken in the name of self-regulation fairly serves a valid public purpose and is not for a purpose inimical to antitrust or other public policies; and conversely, that bona fide self-regulatory action is not inhibited because of a risk of liability in the absence of Commission review."[141] In an endeavor to obviate the problems raised by the *Silver* decision, the *Special Study* suggested several measures designed to extend the scope of possible antitrust justification.

The Supreme Court took the position that the Commission's powers under section 19(b) of the Securities Exchange Act to request and direct changes in exchange rules impliedly carries with it the power to disapprove exchange rule proposals.[142] Accordingly, the *Special Study* recommended that all proposed rules be filed by exchanges sufficiently in advance of their effectiveness, similar to the requirements applicable to the NASD.[143] It was assumed in the *Silver* opinion that the Commission would have had the power under section 19(b) of the Securities Exchange Act to direct the exchange to adopt a rule providing a hearing and attendant procedures to nonmembers.[144] To be consonant with antitrust principles, such a rule would have to provide a minimum of procedural safeguards. The *Special Study* recommended that exchanges adopt rules designed to afford such procedures in all proceedings with respect to members, employees of members, issuers, and nonmembers.[145]

139. *Special Study*, pt. 4, at 707.

140. Silver v. New York Stock Exch., 373 U.S. 341 (1963); see note 39 *supra* and accompanying text. In the absence of concurrent agency and court jurisdiction, this conclusion involves more than an application of the doctrine of primary jurisdiction. Conduct necessary to carry out duties imposed by a regulatory statute cannot form the sole basis of antitrust claim. ATT'Y GEN. REP. 282-83.

141. *Special Study*, pt. 4, at 726.

142. Silver v. New York Stock Exch., 373 U.S. 341, 357 (1963). Whether this was intended to apply only within the context of § 19(b) or more broadly is not clear. *Special Study*, pt. 4, at 711 n.588.

143. *Id.* at 727. This recommendation was implemented by Rule 17a-8, Securities Exchange Act Release No. 7253, March 3, 1964, CCH FED. SEC. L. REP. § 76,973 (Transfer Binder 1961-64), which requires the pre-filing of exchange rule proposals not less than three weeks prior to effectiveness except under emergency circumstances.

144. Silver v. New York Stock Exch., 373 U.S. 341, 364 n.16 (1963). In the absence of any such rule, and in light of the utility of such a rule as an antitrust matter and its compatability with securities regulation principles, the Supreme Court saw no incompatability with the Commission's power inherent in the announcement by an antitrust court of the rule.

145. *Special Study*, pt. 4, at 727. The NYSE has apparently made efforts to make hearing

It further suggested that Commission review of at least certain types of exchange disciplinary matters, in the manner applicable to the NASD, be made available by means of a statutory amendment, if necessary.[146] The *Special Study* also suggested that the regulatory gap, *i.e.*, the differences between the statutory provisions defining the Commission's powers in respect of exchanges and of those applicable to the NASD, be re-examined within the framework of the principles of self-regulation and the *Silver* decision.[147]

In the past, when confronted with the opportunity, the Commission has attempted in the administration of the securities laws to give effect to the aims of the antitrust laws. There is an implicit recognition that the public interest under the securities laws includes the vindication of the policies of the antitrust laws in appropriate circumstances. More complete exercise by the Commission of all of its powers would be desirable and may be sufficient to implement the recommendations of the *Special Study.* Although the *Special Study* was not prepared to suggest further legislative changes, it was acknowledged that legislative changes would unquestionably contribute to a more complete and logical pattern of relationships between the Commission and the self-regulatory agencies, and would provide the most expeditious resolution of the issues raised by the *Silver* decision.[148] Elimination of the substantive differences in the provisions of the Securities Exchange Act governing the exchanges and registered securities associations will serve to obviate the difference in treatment of each type of self-regulatory agency under the antitrust laws. In addition, with a view to affording the maximum initiative to the self-regulatory institutions, the Commission's residual powers should be augmented to permit it when necessary to administer the policies of the antitrust laws within the regulatory framework of the securities laws.[149] So equipped, the Commission, with appropriate assistance from the self-regulatory agencies, will be able to cope effectively with the problems suggested by the *Silver* case.[150] Implementation of these measures will vindicate the public interest in a setting compatible with the objectives of the antitrust laws and of the federal securities laws.

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procedures more readily available than heretofore. Wall Street Journal, Sept. 29, 1964, p. 16, cols. 4 & 5.

146. *Special Study*, pt. 4, at 727-28.

147. *Id.* at 726-27.

148. *Id.* at xvi.

149. *Cf.* Hale & Hale, *Competition or Control VI: Application of Antitrust Laws to Regulated Industries*, 111 U. PA. L. REV. 46, 57-59 (1962).

150. This approach will permit a broader spectrum of Commission oversight and may require the Commission to define the substantive standards to govern the justification of exchange action in response to an antitrust claim on the merits. It was unnecessary for the Supreme Court to do so in *Silver.* At the same time, this approach gives effect to the antitrust laws in those areas not carved out from them by more specific regulation. *Accord*, S. S. W., Inc. v. Air Transport Ass'n, 191 F.2d 658, 662 (D.C. Cir. 1951); ATT'Y GEN. REP. 282.