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ANTITRUST IN THE COMMODITIES FIELD: AFTER GORDON

*Philip F. Johnson**

In the beginning, there was *Silver v. New York Stock Exchange*.¹ In the end, there was *Gordon v. New York Stock Exchange, Inc.*² Astride the twelve-year gap between these landmark Supreme Court rulings is section 15 of the Commodity Exchange Act,³ born in the *Silver* era but growing up in the *Gordon* generation. The courts are left with the task of deciding whether section 15 reflects *Silver's* past or *Gordon's* future. The conclusion reached could have profound implications for both the Commodity Futures Trading Commission (CFTC) and the commodity futures industry.

In 1963, the New York Stock Exchange (NYSE) was stunned to learn from the Supreme Court in *Silver* that its activities could be challenged effectively under the antitrust laws, even though many of these activities were pervasively regulated by the Securities and Exchange Commission (SEC). The Supreme Court held that, while NYSE actions subject to direct SEC oversight might be immune from antitrust attack, the antitrust laws definitely apply to NYSE actions that the SEC does not directly regulate.⁴ The activity challenged in *Silver*, ordering member firms to discontinue wire connections with a nonmember, was not subject to direct SEC review. Nevertheless, the Court discussed the circumstances in which immunity from antitrust attack would be granted. After noting the familiar rule that " 'repeals [of the antitrust laws] by implication are not favored,' "⁵ the Court stated two criteria for such immunity: "Repeal is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then

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1. 373 U.S. 341 (1963).
2. 422 U.S. 659 (1975).
3. 7 U.S.C. §§ 1-22 (1970 & Supp. V 1975). Section 15 is found at 7 U.S.C. § 19 (Supp. V 1975).
4. *Silver v. New York Stock Exch.*, 373 U.S. 341, 357-61 (1963).
5. *Id.* at 357 (quoting *United States v. Borden Co.*, 308 U.S. 188, 198 (1939)).

only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes.”⁶ Although this language suggests a single two-part test—(1) necessity to avoid statutory conflict and (2) minimum competitive impact—the Supreme Court dealt with the two criteria as though each was a distinct test.

The Court analyzed the Securities Exchange Act of 1934 to ascertain whether, in the factual context of the case, immunity from antitrust attack was necessary to make the Act work. The Court concluded that it was not required.⁷ The specific exchange action in question was not subject to direct SEC review under the Act and, therefore, “the Commission’s lack of jurisdiction over particular applications of exchange rules means that the question of antitrust exemption does not involve any problem of conflict or coextensiveness of coverage with the agency’s regulatory power.”⁸ The Court observed that, absent direct agency oversight, “[d]enial of [the antitrust laws’] applicability would defeat the congressional policy reflected in the antitrust laws without serving the policy of the Securities Exchange Act.”⁹ The Court noted, however, that direct SEC oversight could produce a different result regarding immunity: “Should review of exchange self-regulation be provided through a vehicle other than the antitrust laws, a different case as to antitrust exemption would be presented.”¹⁰ Thus, the Court strongly suggested that antitrust immunity might follow from direct agency oversight under the regulatory statute. The Court made no mention here of the “minimum extent necessary” test.

Having decided that antitrust immunity was unnecessary to the operation of the regulatory statute because of the absence of direct SEC oversight, the Court acknowledged that “self-regulation does create problems for the Exchange.”¹¹ In such situations, “the

6. *Id.*

7. *Id.* at 358.

8. *Id.* (citations omitted).

9. *Id.* at 360.

10. *Id.* (citation omitted). The Court further elucidated this proposition, stating: Were there Commission jurisdiction and ensuing judicial review for scrutiny of a particular exchange ruling, as there is under the 1938 Maloney Act amendments to the Exchange Act to examine disciplinary action by a registered securities association . . . a different case would arise concerning exemption from the operation of laws designed to prevent anticompetitive activity, an issue we do not decide today.

Id. at 358 n.12 (citations omitted).

11. *Id.* at 360. For delineation of the basic self-regulatory duties of a registered national securities exchange, see § 6 of the Securities Exchange Act of 1934, 15 U.S.C. § 78f (Supp. V 1975).

Exchange is left without guidance and without warning as to what regulative action would be viewed as excessive by an antitrust court"¹² This was the point in the Court's analysis where the "minimum extent necessary" test emerged: where direct agency oversight is absent and the exchange must justify its action in an antitrust court. The Court stated that "under the aegis of the rule of reason,"¹³ the exchange would be afforded an opportunity at trial to prove that its action was not "excessive";¹⁴ that is, that its anticompetitive effect was the minimum necessary to achieve the self-regulatory objectives of the Securities Exchange Act.¹⁵

The *Silver* test,¹⁶ therefore, is not a single test but rather two alternatives. Immunity may be predicated upon either (1) a finding that the administration of the regulatory statute is incompatible with the maintenance of private antitrust suits (statutory incompatibility); or (2) the defense that the activity's competitive impact, in the absence of direct agency oversight, is the minimum necessary to fulfill self-regulatory duties under the regulatory statute ("rule of reason").

Commodity exchanges, as well as much of the regulated business community, assessed their vulnerability to antitrust suits in light of *Silver*, and became alarmed. The commodity exchanges were also regulated by a federal agency, the Commodity Exchange Authority (CEA) within the Department of Agriculture,¹⁷ but that regulation was far less pervasive than SEC supervision of the stock markets. For example, the rules governing the activities of the commodity exchanges did not require affirmative approval by the CEA, nor could the CEA require that those rules be changed. In addition, most important actions taken by a commodity exchange, such as disciplinary and membership proceedings, were not di-

12. *Silver v. New York Stock Exch.*, 373 U.S. 341, 360 (1963).

13. *Id.*

14. *Id.*

15. *Id.* at 360-61.

16. By the word "test," it is meant that certain principles of analysis were established in *Silver v. New York Stock Exch.*, 373 U.S. 341 (1963). The decision itself did not apply all of the tests. For example, the statutory incompatibility test was employed only to the extent that the Supreme Court found that the statutes were not incompatible. Thus, the question of antitrust immunity when federal statutes are in conflict was not reached in *Silver*.

17. The Commodity Exchange Act assigned to the Secretary of Agriculture the duty to administer the Act. A bureau within the Department of Agriculture, the Commodity Exchange Authority (CEA), was organized for that purpose. Although headquartered at the Department of Agriculture in Washington, the CEA maintained regional offices in cities where major commodity exchanges were located.

rectly reviewable by the CEA.¹⁸ Nearly all actions by a commodity exchange would thus remain vulnerable to costly and protracted antitrust litigation; the outcome of a controversy would depend upon varying judicial determinations of whether, under the *Silver* "rule of reason" test, the challenged activity was the least anticompetitive means available to achieve an objective of the Commodity Exchange Act.¹⁹ Despite that continued legal exposure, the Commodity Exchange Act required that the commodity exchanges restrictively regulate themselves with the same vigor and intensity as the NYSE and other stock markets. The CEA's weak authority, however, made *Silver's* intimated antitrust immunity for statutory incompatibility far more remote for commodities markets than for securities exchanges.²⁰

The risks confronting the commodity exchanges after *Silver* became manifest in 1971, when antitrust suits were filed against them by both the Department of Justice²¹ and private plaintiffs.²² These suits challenged the legality of the exchanges' 100-year-old rules prescribing minimum rates of commission for commodity futures transactions. The CEA claimed to have no authority to approve or to require changes in those rules. The cases were eventually settled in 1973 and 1974 under agreements to phase out gradually the minimum rate rules,²³ a continuing process. One factor leading to the settlements was the CEA's limited regulatory oversight of minimum commission rates in the commodity futures industry.

Another significant legal development occurred in the same period. In 1973, the Supreme Court decided *Ricci v. Chicago Mercantile Exchange*.²⁴ This decision established the principle, citing *Silver*, that when an antitrust complaint challenges commodity exchange actions arguably protected or prohibited by the Commod-

18. For the text of the Act prior to the 1974 amendments, see 7 U.S.C. §§ 1-17b (1970).

19. See text accompanying notes 13-15 *supra*.

20. For an articulation of the commodity exchanges' duty to conduct comprehensive and effective self-regulation, as well as of the legal dilemmas then facing the exchanges, see HOUSE COMM. ON AGRICULTURE, REPORT ON H.R. 13113, H.R. REP. NO. 975, 93d Cong., 2d Sess. 44-48 (1974). See also *Case & Co. v. Board of Trade*, 523 F.2d 355, 362 (7th Cir. 1975); Johnson, *Self-Regulation: A Primer on the Perils*, 27 AD. L. REV. 387 (1975).

21. See *United States v. Board of Trade*, [1974-1] TRADE CASES (CCH) ¶ 75,071 (N.D. Ill. 1974).

22. See *Arenson v. Chicago Mercantile Exch.*, 372 F. Supp. 1349 (N.D. Ill. 1974).

23. See text accompanying notes 21 & 22 *supra*.

24. 409 U.S. 289 (1973).

ity Exchange Act, the proceeding should be suspended until the federal regulatory Agency²⁵ has had an opportunity to review the action for compliance with the Act's requirements.²⁶ It should be emphasized that the Chicago Mercantile Exchange (CME) action challenged in *Ricci*, like that in *Silver*, was not under direct Agency supervision, although the Agency could make an after-the-fact appraisal as to whether the Act had been violated. The Court referred the case to the Agency simply for the Agency's expert views. The Court could do no more because the Agency did not then have formal statutory approval powers over the conduct in question. Thus, the Supreme Court in *Ricci* did not abrogate the role of the antitrust court as final decisionmaker because the Agency, at that time, had neither the statutory responsibility to oversee the particular exchange activity, nor the duty to apply the "rule of reason" test of least anticompetitive means enunciated in *Silver*.

In the summer and fall of 1973, Congress undertook a thorough review of the Commodity Exchange Act.²⁷ In particular, Congress wished to strengthen and expand the regulation of commodity futures trading. Congress had realized, as had the industry itself, that the existing regulatory system was inadequate for the times. Dismantling the Commodity Exchange Authority was Congress' first order of business; the outcome was never in doubt. In its place came a new Commodity Futures Trading Commission with greatly expanded powers over the exchanges, paralleling, and sometimes surpassing, the authority possessed by the SEC.²⁸ The only serious debate over the CFTC was whether it would have ties to the Department of Agriculture (preferred by the House)²⁹ or whether it would be an independent agency (preferred by the Senate).³⁰ Ultimately, the CFTC emerged as an independent regula-

25. The relevant agency in *Ricci v. Chicago Mercantile Exch., id.*, was not the Commodity Exchange Authority, but rather the Commodity Exchange Commission (CEC), which was also created by the Commodity Exchange Act. The CEC performed limited quasi-judicial functions, including the suspension or revocation of exchange licenses for violations of the Act; the CEA administered most other sections of the Act.

26. *Id.* at 302.

27. For a summary of the principal legislative changes made in the Commodity Exchange Act in 1974, see Schroeder & Pollack, *Commodities Regulation*, 8 REV. SEC. REG. (No. 7) (1975).

28. See Johnson, *The Commodity Futures Trading Commission: Newest Member of Each Exchange's Management Team*, 34 FED. B.J. 173 (1975).

29. See HOUSE COMM. ON AGRICULTURE, REPORT ON H.R. 13113, H.R. REP. NO. 975, 93d Cong., 2d Sess. 2 (1974).

30. See SENATE COMM. ON AGRICULTURE AND FORESTRY, REPORT ON H.R.

tory commission with greatly strengthened authority over the commodities industry.³¹

In all candor, antitrust considerations played a relatively minor part in the initial motivation for congressional action in 1973. Nevertheless, they soon gained importance as the legislation began to progress through Congress.³² The far broader SEC-like authority that Congress proposed to bestow on the new CFTC could now, in and of itself, bring the statutory incompatibility test suggested in *Silver* within the reach of commodity exchanges in appropriate cases. But antitrust also became a specific issue in Congress.³³

Congressional consideration of the relationship between commodity exchanges and antitrust laws began with the earliest version of the bill (H.R. 11955) drafted by the House Committee on Agriculture. Section 106 of H.R. 11955³⁴ proposed to add a new section 17 to the Commodity Exchange Act, immunizing from antitrust attack any exchange action taken pursuant to a rule that was either approved or required by the CFTC:

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

(b) The Commission shall take into consideration the public interest to be protected by the antitrust laws as well as the policies and purposes of this Act in issuing any order or adopting any rule or regulation, or in requiring or approving any bylaw,

13113, S. REP. NO. 1131, 93d Cong., 2d Sess. 5, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 5843, 5844.

31. See COMM. OF CONFERENCE, CONFERENCE REPORT ON H.R. 13113, H.R. REP. NO. 1383, 93d Cong., 2d Sess. 33, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 5894.

32. For an historical discussion of the antitrust issue as it progressed through Congress in the development of the 1974 amendments to the Commodity Exchange Act, see Johnson, *Antitrust Under the CFTC Act: An Ounce of Prevention . . .*, 20 ANTI-TRUST BULL. 441 (1975).

33. See *id.*

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

rule or regulation of a contract market or registered futures association established pursuant to section 15 of this Act.³⁵

The thrust of section 106 in the form above was modified by the House Committee during a "markup" session on February 15, 1974, in which the express antitrust exemption in subsection (a) was narrowed to include only exchange rules that the CFTC actually *required* to be adopted.³⁶ This change seemed to suggest that exchanges might be barred from asserting an antitrust exemption on grounds of statutory incompatibility for rules that they initiated themselves, even when those rules had been subjected to close scrutiny and affirmative approval by the CFTC. Had this interpretation been adopted, the antitrust immunity intimated in *Silver* for exchange rules under direct agency oversight might not have been available to commodities markets. They might have been left able to assert only the "rule of reason" test. Thus, while acting under direct federal supervision, the commodities markets would have been placed in a far worse antitrust posture than the securities exchanges.

Ultimately, the House Committee deleted the restricted exemption in subsection (a) that had fostered that inference, but preserved subsection (b) of section 106, requiring the Commission to consider antitrust policy as well as the objectives of the Commodity Exchange Act in the appraisal of exchange rules. When the Committee reported its final bill to the full House of Representatives, it noted the "[c]onfusion in court decisions . . . with regard to antitrust consequences of self-regulatory activities of exchanges,"³⁷ and cited that confusion as an impetus to the development of the Committee's legislative proposals. The Committee explained that the deletion of express exemption language in subsection (a) was done in "great reliance" upon assurances from the Department of Justice that the legal principles announced in *Silver* would be available to commodity exchanges in appropriate cases.³⁸

35. *Id.*

36. STAFF OF HOUSE COMM. ON AGRICULTURE, 93D CONG., 2D SESS., MEMORANDUM OF COMM. ACTION FOR MEMBERS AND COMM. STAFF 1 (Comm. Print 1974).

37. HOUSE COMM. ON AGRICULTURE, REPORT ON H.R. 13113, H.R. REP. NO. 975, 93d Cong., 2d Sess. 48 (1974).

38. *Id.* at 27-28. Indeed, the Justice Department's communication to the House Committee on Agriculture stated that "present law provides an adequate antitrust exemption for those activities of contract markets necessary to achieve valid objectives of the Commodity Exchange Act" and that "existing law assures the exchanges that, where there is a conflict between the antitrust laws and the Commodity Exchange Act, the latter is paramount." *Id.* at 23.

In addition, the Committee affirmed its intention to preserve the analytical procedures of *Silver* in cases where direct agency oversight is lacking: "Section 106 will assure that the public interest reflected in the antitrust laws will be weighed against the public interest protected through regulation of the futures trading industry."³⁹ Of course, section 106 delegated to the CFTC, rather than to the courts, the task of making this appraisal.

The House Committee went even further; it wove the philosophy of *Ricci* into its proposal. In *Ricci*⁴⁰ the Supreme Court had halted an antitrust suit pending a review of the Chicago Mercantile Exchange's conduct by the CFTC's predecessor Agency to determine whether the Chicago Mercantile Exchange had acted in conformity with its duties under the Commodity Exchange Act. At that time, the CEA's limited authority over the challenged activity rendered inapplicable the statutory incompatibility test suggested in *Silver*. Thus, the CME's actions were to be judged by *Silver*'s alternative "rule of reason" test; the trial court, therefore, was directed to retain jurisdiction ultimately to decide the antitrust issues after receiving the Agency's views. In reserving the trial court's jurisdiction, the Supreme Court observed that, under the Commodity Exchange Act at that time, "[t]he [CEA's] area of administrative authority does not appear to be particularly focused on competitive considerations; there is no express provision in the Act directing administrative officials to consider the policies of the antitrust laws in carrying out their duties"⁴¹ New section 106 radically changed the Act in this respect. It required the Commission to consider competitive effects in approving exchange rules, and to balance antitrust policy against the regulatory objectives of the Act. As such, the need seen in *Ricci* for a court to retain jurisdiction over antitrust claims where direct agency oversight was lacking became doubtful, since the CFTC would henceforth apply the *Silver* "rule of reason" test in its own review of exchange rules and actions upon referral from the antitrust court. Nothing would remain for an antitrust court to do after the CFTC had completed its work except, perhaps, to review the Agency's decision for an abuse of discretion.

When H.R. 13113 reached the Senate Committee on Agriculture and Forestry, only one change was made in section 106. The

39. *Id.* at 28.

40. *Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289 (1973).

41. *Id.* at 302 n.13.

Department of Justice had urged the Senate Committee to direct the CFTC to *insure* that it approve exchange rules only if they were the least anticompetitive means of achieving the objectives of the Act.⁴² The word “insure” was unacceptable to the Senate Committee, which decided merely to require the CFTC to “endeavor” to approve exchange rules which were the least anticompetitive means.⁴³ The Senate Committee balked at the more stringent formula because it “did not want to encourage excessive litigation to test the decisions of the Commission to determine whether they represented the least anticompetitive means of achieving the objectives of the Act.”⁴⁴ The practical effect of the Senate’s action was to modify the “rule of reason” test announced in *Silver* by no longer requiring that the least anticompetitive means necessarily be achieved in order to avoid antitrust liability in cases where direct agency oversight was lacking.

The Senate version emerged from Congress as section 15 of the upgraded Commodity Exchange Act.⁴⁵ The final text states:

The Commission shall take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the objectives of this [Act], as well as the policies and purposes of this [Act], in issuing any order or adopting any Commission rule or regulation, or in requiring or approving any bylaw, rule, or regulation of a contract market or registered futures association established pursuant to section [17] of this [Act].⁴⁶

When President Ford signed the new law in October 1974, commodity exchanges perceived several resultant benefits. First, based upon the legislative history of section 15, the legal principles announced in *Silver* were clearly intended to be embodied in the new Act. Second, the CFTC’s mandate to consider antitrust policy might mean that, in future *Ricci*-type litigation challenging exchange actions not subject to direct agency oversight, the CFTC’s assessment following a court referral would constitute a final disposition of the entire controversy, subject, perhaps, to the court’s

42. SENATE COMM. ON AGRICULTURE AND FORESTRY, REPORT ON H.R. 13113, S. REP. NO. 1131, 93d Cong., 2d Sess. 22-23, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 5843, 5863.

43. *Id.*

44. *Id.* at 23, [1974] U.S. CODE CONG. & AD. NEWS at 5863.

45. Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, § 15, 88 Stat. 1389 (codified at 7 U.S.C. § 19 (Supp. V 1975)).

46. 7 U.S.C. § 19 (Supp. V 1975).

review of the decision under an abuse of discretion standard. Third, in a pronouncement that would echo into the future, the Senate said that it “did not want to make the antitrust laws more restrictive in the commodities industry than they are in the securities industry.”⁴⁷

The Supreme Court had not yet decided *Gordon v. New York Stock Exchange, Inc.*⁴⁸ In *Gordon* the Court faced a controversy which, unlike that in *Silver* or *Ricci*, involved exchange rules that had been overseen directly by the SEC, namely, the NYSE rules governing minimum commission rates. The Court expressly found the antitrust immunity based upon statutory incompatibility that had lurked in the shadows of the *Silver* case. It was now official: Antitrust actions will not lie against exchange rules that an Agency, acting diligently, has affirmatively approved and supervised pursuant to authority granted in the regulatory statute.⁴⁹

Indeed, the Supreme Court refused even to consider “rule of reason” issues such as the “wisdom of fixed rates”⁵⁰ or the necessity of fixed rates to the operation of exchanges as contemplated under the Securities Exchange Act:

We believe that the United States, as *amicus*, has confused two questions. On the one hand, there is a factual question as to whether fixed commission rates are actually necessary to the operation of the exchanges as contemplated under the Securities Exchange Act. On the other hand, there is the legal question as to whether allowance of an antitrust suit would conflict with the operation of the regulatory scheme which specifically authorizes the SEC to oversee the fixing of commission rates. The factual question is not before us in this case. Rather, we are concerned with whether antitrust immunity, as a matter of law, must be implied in order to permit the Exchange Act to function as envisioned by the Congress. The issue of the wisdom of fixed rates becomes relevant only when it is determined that there is no antitrust immunity.⁵¹

Thus, the Supreme Court confirmed in no uncertain terms that the *Silver* test actually consists of two distinct tests: statutory incompatibility and, only if incompatibility does not exist, reasonableness

47. SENATE COMM. ON AGRICULTURE AND FORESTRY, REPORT ON H.R. 13113, S. REP. NO. 1131, 93d Cong., 2d Sess. 23, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 5843, 5863.

48. 422 U.S. 659 (1975).

49. *Id.* at 685-91.

50. *Id.* at 688.

51. *Id.*

of restraint in that the restraint is the minimum necessary to make the regulatory scheme work.

In *Gordon* the Supreme Court also cited policy reasons for refusing to permit the antitrust claims:

[T]o deny antitrust immunity with respect to commission rates would be to subject the exchanges and their members to conflicting standards. . . . If antitrust courts were to impose different standards or requirements, the exchanges might find themselves unable to proceed without violation of the mandate of the courts or of the SEC. Such different standards are likely to result because the sole aim of antitrust legislation is to protect competition, whereas the SEC must consider, in addition, the economic health of the investors, the exchanges, and the securities industry.⁵²

Thus, the Supreme Court concluded that “permitting courts throughout the country to conduct their own antitrust proceedings would conflict with the regulatory scheme authorized by Congress rather than supplement that scheme.”⁵³

The practical effect of *Gordon* upon the NYSE was minimal, since the SEC had already ordered the elimination of fixed minimum rates for securities transactions.⁵⁴ Nevertheless, the long-awaited application in *Gordon* of *Silver*’s statutory incompatibility test was universally welcomed in the exchange community.

Gordon also triggered debate over its effect upon the commodity exchanges. Section 15, the antitrust provision in the Commodity Exchange Act, evolved in the pre-*Gordon* era and embodied certain concepts indigenous to the facts in *Silver*. For example, the “least anticompetitive means” language of section 15 reflects the test of reasonableness to be applied under *Silver* when exchange actions are *not* directly overseen by the regulatory agency. *Gordon*, however, held that exemption from the antitrust laws necessarily follows from a finding that the challenged conduct was directly and diligently regulated by a federal agency charged with that task by Congress, without making an independent assessment of the wisdom or necessity of the conduct. Does section 15, with its built-in “least anticompetitive means” language, preclude the immediate exemption of CFTC-monitored conduct and require a “rule of reason” analysis in each case?

52. *Id.* at 689 (footnote omitted).

53. *Id.* at 690 (footnote omitted).

54. 17 C.F.R. § 240.19b-3 (1975).

There is no evidence to suggest that Congress intended such a result. Two congressional objectives are clear: First, section 15 was designed to codify the basic philosophy of *Silver*, which necessarily includes its intimated antitrust immunity for exchange actions taken under direct agency oversight. Second, Congress "did not want to make the antitrust laws more restrictive in the commodities industry than they are in the securities industry,"⁵⁵ to which *Gordon* clearly applies. In addition, Congress did not adopt *Silver's* strict "rule of reason" standard of "least anticompetitive means," but merely instructed the CFTC to "endeavor" to attain that objective. This modification of the *Silver* "rule of reason" test afforded the CFTC the same deference that the Supreme Court felt was necessary in *Gordon* to enable the SEC to administer the policies of the Securities Exchange Act. Moreover, the refusal of Congress to adopt an absolutist test was expressly intended to discourage "excessive litigation to test the decisions of the Commission."⁵⁶ Obviously, that objective would be defeated if each action of an exchange, under a rule sanctioned by a diligent CFTC, could be attacked as unreasonable under the antitrust laws.

The conclusion appears justified, therefore, that the *Gordon* precedent bars actions against commodity exchanges under the antitrust laws when direct CFTC oversight is involved. It does not necessarily follow, however, that antitrust issues are wholly insulated from judicial review in the commodities field. Section 15 of the Commodity Exchange Act places an affirmative duty upon the CFTC to consider antitrust policy in its decisions, including the approval of exchange rules, and to endeavor to adopt the least anticompetitive means of accomplishing the Act's purposes. A breach of that duty by the CFTC should be actionable by aggrieved parties under the Administrative Procedure Act⁵⁷ or the Declaratory Judgment Act.⁵⁸ Or, in cases of *Ricci*-type referral when direct CFTC oversight of the challenged action is absent, the antitrust court might retain jurisdiction to entertain claims that the CFTC's appraisal under section 15 upon referral was an abuse of agency discretion. But it is extremely doubtful that the CFTC's com-

55. See note 28 *supra*.

56. See text accompanying note 44 *supra*.

57. 5 U.S.C. §§ 702, 704 (1970). It is significant that the Supreme Court in *Gordon v. New York Stock Exch., Inc.*, 422 U.S. 659 (1975), noted the availability of this remedy in cases where immunity from antitrust suit has been granted. *Id.* at 690 n.15.

58. 28 U.S.C. §§ 2201-2202 (1970).

pliance with section 15 could be challenged by an original civil antitrust suit against the exchange, since the actionable wrong results from the CFTC's breach of its section 15 duty.

Antitrust suits against the exchanges for CFTC-condoned conduct would appear to be barred not only by *Gordon*, but by common sense as well. The *Ricci* principle of referring regulatory issues to the CFTC when antitrust actions are filed is still very much alive in cases where direct agency oversight is absent.⁵⁹ Its application to cases where there has been direct CFTC oversight would amount simply to a referral to the CFTC to take a second look at its earlier decision. Even if the CFTC were to reverse itself, there would appear to be little merit or justice in assessing antitrust damages against an exchange that has operated confidently under a previously approved rule. The more efficacious procedure would seem to be a direct challenge to the CFTC under section 15, leaving the exchange to be governed in the future by the eventual outcome of the litigation.

59. As recently as May 4, 1976, the CFTC announced publicly that it will entertain *Ricci*-type referrals in antitrust cases. [1975-1977 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,155 (1976).

