ROOM B-352 2125
RAYBURN HOUSE OFFICE BUILDING
PHONE (202) 225-7790

Congress of the United States

House of Representatives

COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE

SUBCOMMITTEE ON CONSUMER PROTECTION AND FINANCE

WASHINGTON, D.C. 20515

September 2, 1975

Denis T. Rice, Esq.
Howard, Prim, Rice, Nemerovski
Canady & Pollak
The Hartford Building
650 California Street
San Francisco, California 94108

Dear Denis:

I have read your most thoughtful letter of August 25, 1975, to George Blackstone concerning antitrust aspects before the Subcommittee on Securities Markets and Market Structure. Your analysis should prove most useful to the Subcommittee as it pursues its activities. I would add only the following comments.

You state that the Supreme Court did not address the question of the pervasiveness of the regulatory scheme as a factor tending toward antitrust immunity, but rather focused on the precise intent of discreet sections of the Investment Company Act of 1940. But in affirming the district court's dismissal of a count of the complaint charging a conspiracy between the NASD and its members to prevent the growth of a secondary dealer market and a brokerage market in the purchase and sale of mutual fund shares, the Supreme Court looked to the SEC's "pervasive" supervisory authority over the NASD contained in the Maloney Act. The Court pointed out that the Maloney Act required the NASD to submit to the Commission for approval any proposed rule or rule changes and found that "the investiture of such pervasive supervisory authority in the SEC suggests that Congress intended to lift the ban of the Sherman Act from association activities approved by the SEC." This statement becomes especially important because the Securities Acts Amendments of 1975, signed into law on June 4 of this year, extende this requirement of SEC approval to proposed rules and rule changes of national securities exchanges.

You quote from the Senate report on S. 249 to the effect that nothing in that bill was intended to change "existing law with

respect to the relationship between antitrust and securities laws... ." You conclude from this statement that the applied immunity arrived at in the Gordon case is reinforced by the Amendments Act. I do not believe that this was the intent of either the Senate or House Committees. In its Securities Industry Study Report, S. Doc. No. 93-13, 93d Cong., 1st Sess. (1973), the Senate Banking Committee made the following statement:

> "Anti-competitive conduct of self-regulatory bodies is immune from antitrust attack only if the conduct is necessary to make the statutory scheme of regulation work and then only to the minimum extent necessary. This immunity is not increased or broadened in the event that the action in question is subject to SEC review or even if it is in fact approved by the SEC. The SEC has no power to immunize anti-competitive self-regulatory conduct from the operation of the antitrust laws."

The House Committee made much the same statement. In its Securities Industry Study Report, H. Rept. No. 92-1519, 92d Cong., 2nd Sess. (1972), the Subcommittee on Commerce and Finance said:

> "The Subcommittee reads Silver and Thill as standing for the proposition that any rule of an exchange is immune from the antitrust laws only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary, even if the challenged rule has been submitted to the SEC pursuant to the Commission's rule 17a-8 or is subject to Commission action under section 19 of the Securities Exchange Act. The Subcommittee believes that this rule is clear and is correct, both as to what the law is an as to what the law should be."

And in the conference report accompanying the bill that became the Amendments Act, H. Rept. No. 94-229, 94th Cong., 1st Sess. (1975), the conferees said:

> "In expanding the scope of direct judicial review of SEC decisions, the conferees are cognizant of the potential conflict with collateral antitrust attacks on actions by self-regulatory organizations. For example, a self-regulatory organizations' rule, after approval by the SEC, is

> reviewable in a court of appeals under the standard of the Exchange Act, i.e., whether it imposes a burden on competition which is neither necessary nor appropriate in furtherance of the purposes of the Exchange Act. ... The same self-regulatory rule, however, could also be challenged in a Federal district court under the antitrust laws where a somewhat different standard might be applied."

The Gordon and NASD cases, therefore, represent a departure from what the House and Senate Committees considered the law to be. There is some unhappiness with the broad sweep of the language in those two cases, and I anticipate that legislation will be introduced on the subject. I do not give such legislation much chance for passage, however, since I would expect the regulator (SEC) and the regulated (the securities industry) to combine in opposition to it.

Sincerely,

Harvey

Harvey A. Rowen
Counsel

HAR:jaq
cc: Members of the Subcommittee on
Securities Markets and Market Structure