



SECURITIES AND EXCHANGE COMMISSION

Washington, D. C. 20549

(202) 755-4846



FOR IMMEDIATE RELEASE

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The Securities and Exchange Commission has asked a Federal District Court to dismiss the suit brought by the City of Philadelphia which sought to block the Commission from inquiring into the offer, sale and resale of securities by the City.

The Commission moved in U.S. District Court for the Eastern District of Pennsylvania for dismissal of the complaint filed by the City on July 29, 1976. The Commission's memorandum was filed with the Court last week, and became a matter of public record on Tuesday, October 12. A copy of the Memorandum is attached.

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

CITY OF PHILADELPHIA, et al.,

Plaintiffs,

v.

SECURITIES AND EXCHANGE COMMISSION,
et al.,

Defendants.

Civil Action No. 76-2396

DEFENDANTS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF THEIR MOTION TO
DISMISS THE COMPLAINT

PRELIMINARY STATEMENT

On July 29, 1976, the City of Philadelphia and Lennox L. Moak, the City of Philadelphia's Director of Finance, individually, and as purported representatives of a class of Pennsylvania municipalities and their financial officials, filed this action against the Securities and Exchange Commission, Roderick M. Hills, Philip A. Loomis, Jr., John R. Evans, Irving M. Pollack, Paul F. Leonard, and Thomas H. Monahan in their official capacities as

Commissioners and employees of the Securities and Exchange Commission. 1/

The action is brought by the City and its Director of Finance, individually, and on behalf of "all political subdivisions of the Commonwealth of Pennsylvania which are constitutionally and statutorily authorized to levy and collect taxes and to issue and sell evidences of indebtedness secured by their full faith, credit and taxing power * * *" and "all officials who are charged by [state] law with the responsibility for the financial affairs of said political subdivisions." (Complaint ¶18.)

Plaintiffs seek a declaratory judgment that the defendants have no power to request production of documents or testimony from the plaintiffs (Complaint, Prayer ¶ 1(a)); that the defendants have no right to conduct any form of investigation of the plaintiffs for any purpose whatsoever (id. ¶ 1(b)); that the conduct of a formal investigation by the Commission, including, pursuant thereto, the exercise of compulsory process upon the plaintiffs, would be unlawful (id. ¶ 1(c)); and that the provisions of the Securities Act of 1933, 15 U.S.C. 77a, et seq., and the provisions of the Securities Exchange Act of 1934, 15 U.S.C. 78a, et seq., as they may be applied to the plaintiffs are "unconstitutional and void" (id. ¶ 1(d)).

1/ Mr. Hills is the Chairman of the Commission. Messrs. Loomis, Evans and Pollack are Commissioners. Messrs. Leonard and Monahan are the Regional Administrator for the Washington Region (encompassing the middle Atlantic states) and Assistant Regional Administrator for the Commission's Philadelphia Branch Office, respectively.

For convenience, the defendant Securities and Exchange Commission, its Chairman and Commissioners will be referred to as "the Commission." Defendants Monahan and Leonard will generally be referred to as part of the Commission's "staff".

An amended complaint was filed on August 17, 1976. Citations in this memorandum to "Complaint ¶ " refer to the amended complaint.

The complaint also seeks temporary, preliminary and permanent injunctive relief against the Commission, prohibiting it from conducting any formal or informal investigation of the plaintiffs and restraining the enforcement and operation of the Securities Act and the Securities Exchange Act against the plaintiffs (id. ¶¶ 2, 3 & 4.) 2/

Since plaintiffs' prayer for relief includes a request for an injunction restraining the operation of federal statutes, a three judge district court has been convened pursuant to 28 U.S.C. 2282, 2284.

For the reasons set forth below, the Commission moves that this action be dismissed.

STATEMENT OF FACTS

In May of this year, the staff of the Commission's Philadelphia Branch Office commenced an informal inquiry concerning the offer, sale and resale during 1975 of securities of the City of Philadelphia.

The Commission is expressly authorized by statute to investigate "any facts, conditions, practices, or matters which it may deem necessary or proper to aid in the enforcement of [the] provisions of [the Securities Exchange Act], in the prescribing of rules and regulations [thereunder], or in securing information to serve as a basis for recommending further legislation concerning the matters to which [the Securities Exchange Act] relates."3/

2/ Pursuant to an agreement between counsel for the parties, plaintiffs are not presently pursuing their request for temporary relief, (see Complaint, Prayer ¶ 4), inasmuch as counsel for the Commission have agreed informally that the staff would not pursue its informal request for information from the plaintiffs, pending proceedings before this court. Copies of the exchange of correspondence constituting this agreement were forwarded to the Court under letter dated August 10, 1976, from Edwin P. Rome, Special Counsel to the City.

3/ Section 21(a) of the Securities Exchange Act, 15 U.S.C. 78u(a) (emphasis supplied).

To carry out such an investigation, the Commission can exercise its formal powers of compulsion, to "administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records which the Commission deems relevant or material to the inquiry." 4/ Alternatively, the Commission's staff may commence an informal inquiry to determine whether the invocation of more formal process is necessary. 5/

In the instant case, no subpoenae were issued, nor could they be issued, because the staff had undertaken nothing more than an informal inquiry; 6/ the staff could neither compel production of documents nor require any person's testimony.

4/ Section 21(b) of the Securities Exchange Act, 15 U.S.C. 78u(b). See also, Section 19(b) of the Securities Act, 15 U.S.C. 77s(b).

5/ An informal inquiry or preliminary investigation is a Commission staff procedure described at 17 CFR 202.5 in which, as was the case here, no formal order of investigation is entered authorizing the staff to use the Commission's subpoena power. The Commission's power to compel testimony and production of documents is set forth at 15 U.S.C. 77s(b) and 78u(b). A description is set forth at 17 CFR 203.4, et seq., of formal Commission investigative proceedings, undertaken under the authority granted by Section 20(a) of the Securities Act, 15 U.S.C. 77t(a), and Section 21(a) of the Securities Exchange Act, 15 U.S.C. 78u(a).

6/ See ¶ 27 of the Complaint which alleges that the letter, dated July 8, 1976, from defendant Thomas H. Monahan, Assistant Regional Administrator (in charge of the Commission's Philadelphia Branch Office), to plaintiff Lennox L. Moak, City Director of Finance, requesting the production of documents and materials, "was sent prior to the issuance of any SEC formal investigation order." The letter is attached to the Complaint as Exhibit A.

The inquiry was begun in the midst of extensive public discussion of the financial affairs of the City. 7/ For the purposes of this motion to dismiss, however, no discussion of the City's financial practices, as these appear from press accounts and City documents, and particularly as they may have affected the sale of the City's securities, is believed necessary.

Rather, it should suffice to note here that trading practices in municipal securities are within the express purview of Commission jurisdiction. That jurisdiction, which expressly excludes any regulatory authority over municipalities which issue municipal securities, 8/ extends the Commission's regulatory jurisdiction to brokers and dealers who, through the channels of interstate commerce, buy municipal securities from, or sell municipal securities to, the investing public. 9/ In addition, the Commission has broad antifraud powers to

7/ See, e.g., the following articles: Philadelphia Inquirer: November 23, 1975 ("City Hurt by Deficit Financing; Accounting, New York Caused [Bond] Rating Drop"); February 29, 1976 ("Rare view of city finances set in [State Legislative] hearings this week"); May 9, 1976 ("The Lennox Moak solution: Balancing budget, politics"). Philadelphia Evening Bulletin: November 11, 1975 ("[Budget] Deficit May Climb, Moak Says; Finance Chief Admits Deficiency Could Top \$50 Million"); November 20, 1975 ("Why Underwriters Said 'No'"). Business Week, December 1, 1975 ("The fading magic of Philly's 'Wizard'").

8/ See Section 3(d) of the Securities Exchange Act, 15 U.S.C. 78c(d):

"No issuer of municipal securities or officer or employee thereof acting in the course of his official duties as such shall be deemed to be a 'broker', 'dealer', or 'municipal securities dealer' solely by reason of buying, selling, or effecting transactions in the issuer's securities."

Section 15B(d)(1) of the Securities Exchange Act (as amended, 89 Stat. 131), 15 U.S.C. 78o-4(d)(1), which provides:

"Neither the Commission nor the [Municipal Securities Rulemaking] Board is authorized under this title, by rule or regulation, to require any issuer of municipal securities, directly or indirectly through a purchaser or prospective purchaser of securities from the issuer, to file with the Commission or the Board prior to the sale of such securities by the issuer any application, report, or document in connection with the issuance, sale, or distribution of such securities."

9 / See Sections 15 and 15B of the Securities Exchange Act of 1934 (as amended, 89 Stat. 121, 131), 15 U.S.C. 78o and 78o-4.

preclude "any person" 10/ from selling any type of securities--including municipal securities--by fraudulent means. 11/

The Commission's staff, accordingly, could undertake to inquire informally into Philadelphia's interstate, national sale of securities to public investors in order to determine:

- a) whether any violations of the federal securities laws by any person, might have occurred--or be about to occur;
- b) whether specific rulemaking was necessary to correct market practices in municipal securities by those persons subject to the Commission's jurisdiction; or
- c) whether any changes in legislation relating to municipal securities marketing might be appropriate.12/

10/ Section 2(2) of the Securities Act, 15 U.S.C. 77b(2), defines "person" to include "a government or political subdivision thereof." Section 3(a)(9) of the Securities Exchange Act (as amended, 89 Stat. 97), 15 U.S.C. 78c(a)(9), defines "person" to include a "government, or political subdivision, agency, or instrumentality of a government."

11/ See Section 17(a) of the Securities Act, 15 U.S.C. 77q(a); Section 10(b) of the Securities Exchange Act, 15 U.S.C. 78j(b); Sections 15(c)(1) and (2) of the Securities Exchange Act (as amended 89 Stat. 121), 15 U.S.C. 78o(c)(1) and (2); Rule 10b-5, 17 CFR 240.10b-5.

12/ Supra, Sections 15, 15B, 21(a) and 21(b), Securities Exchange Act.

In 1975, an extensive revision of the Securities Exchange Act was adopted by the Congress. A major aspect of that revision was the grant to the Commission of jurisdiction over the markets for, and professionals trading in, municipal securities. See nn. 9 and 10, supra. See also P.L. 94-29, 89 Stat. 121,131 (June 4, 1975). The primary reason for this grant of authority was the discovery of some sordid practices in municipal securities traded nationally which, prior to 1975, had been exempt from much meaningful Commission jurisdiction. See, S. Rep. No. 94-75, 94 Cong. 1st Sess. 43 (1975).

Additional revelations of troublesome practices after the 1975 legislation inspired the introduction of several bills to regulate disclosures affecting the issuance of municipal securities, see, e.g., S. 2574, 94th Cong., 2d Sess. (1976), including legislation prepared by the Commission at the Congress's request. S. 2969, 94th Cong., 2d Sess (1976).

In the course of its informal inquiry, the Commission's Branch Office staff conducted interviews with, and reviewed documents in the possession of, underwriters and broker-dealers involved in transactions in securities of the City of Philadelphia, as well as evaluated documents of the Office of the City Controller. 13/ This informal inquiry, or "evaluation," could proceed only with the cooperation of the City's various officials.

Consistent with the staff's lack of subpoena power and, thus, the need to obtain the cooperation of witnesses in the inquiry, on July 7, 1976, members of the Commission's Branch Office staff met with the Finance Director and requested information concerning the offer of the City's securities and the City's financial affairs. (Complaint ¶ 25.) This request was subsequently put in the form of a letter, dated July 8, 1976, asking the City's cooperation in the matter and specifying, inter alia, that information was sought relevant to the offer, sale, resale and distribution of City bonds issued July 22, 1975, November 19, 1975 (this bond issue was aborted as no bids were received) and November 26, 1975. (Complaint ¶ 26 and Exhibit A.) Similar letters were sent to Robert L. Greenberg, Acting City Treasurer, and William G. Klenk, II, City Controller. The letter to the Controller was dated July 14.

13/ However, notwithstanding the Commission's preference for, and usual policy of, maintaining investigations non-public while such are in progress, 17 CFR 202.5 and 203.5, supra, during the first week of July, 1976, the Branch Office staff was informed that a news report disclosing the existence of a Commission investigation was imminent. Accordingly, a limited public statement was issued on July 6, 1976, to forestall inaccurate public comment and to indicate the limited nature of the staff's initial concerns. It stated that the Commission was "evaluating" information that had appeared in the press regarding the sale of securities of the City, and pointed out that no formal order of investigation had been issued and that no inference of wrongdoing was appropriate from the mere existence of the staff's informal inquiry. The release also stressed the confidential nature of such an inquiry. On the same day, by letter, the Branch Office advised the City's Finance Director of this inquiry. (Complaint ¶ 23).

The specifications in the attachment to the July 8 letter from the Commission's Branch Office to the plaintiff Moak (Exhibit A to the Complaint) reveal that the inquiry was broadly focused and addressed to information in the City's possession relevant to the sale, resale and other activities of underwriters and others, as well as material more directly related to the City's financial affairs. See, e.g., the attachment to the July 8 letter at ¶3, (records related to meetings with, among others, underwriters in connection with material made available to the public), ¶ 4 (records related to discussions with, among others, underwriters or representatives of rating services relative to the ratings of these securities), ¶ 7 (records relating to meetings or discussions with underwriters regarding the underwriting and retailing of City securities) and ¶ 8 (various records including all closing memoranda in connection with each offering).

On July 15, 1976, the Commission's staff advised the City that the staff would probably request testimony from City officials once review was made of the documentary material requested earlier. (Complaint ¶ 28.) On July 29, 1976 (the date this action was commenced), the City advised the staff of the Commission's Branch Office that it would not agree to the request for access to City documents. (Complaint ¶ 29.)

As noted above, supra, page 3, note 2, pursuant to an agreement between counsel for the parties, all Commission investigative activity in this matter has temporarily been halted, pending further proceedings in this action. 14/

14/ As indicated infra, at p. 29, et seq, the Commission believes that its investigatory authority, which is couched in the broadest discretionary terms, is not seriously open to challenge by the plaintiffs. See Section 21(a) of the Securities Exchange Act, and Section 20(a) of the Securities Act. Accordingly, the agreement to forebear further investigation does not, in the Commission's view, foreclose reopening of the inquiry or even issuance of a formal order of investigation, if facts coming to the Commission's attention warrant such action. In that event, however, plaintiffs will be advised in advance.

SUMMARY OF ARGUMENT

There are many difficult and intriguing unresolved issues involving a broad spectrum of the realm of federal securities regulation which the Commission and its counsel desire to see resolved judicially. There are other issues that our counterparts in the private securities bar would like similarly resolved. But a desire to see an issue resolved—no matter how important or significant in the Constitutional sense that issue may be—cannot create either

--standing to prosecute the issue; or

--a justiciable case or controversy,

and that is the situation with which this Court and counsel are faced here.

The issues the plaintiffs seek to adjudicate are doubtless important. And the Commission's views on the pure legal issues are diametrically opposed to those of the plaintiffs. But, unless this Court may render an advisory opinion, an act the founders wisely sought to prevent, 15/ the Commission believes there is no jurisdiction to resolve the issues plaintiffs seek to raise; for, the plaintiffs urge on this Court a constitutional confrontation between the federal commerce power and state sovereignty in terms, and at a time, inappropriate for judicial resolution.

Plaintiffs seek a broad order declaring the provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 unconstitutional, as they may be applicable to them. But no one has, as yet, sought to apply any of those provisions to the plaintiffs. They have been asked to provide information to the Commission's staff--a request they can refuse without penalty or sanction

15/ See 2 M. Farrand, The Records of the Federal Convention of 1787 340-341 (rev. ed. 1937) (tabling of suggestion that Supreme Court render advisory opinions upon request of the President or Congress).

of any kind. Indeed, plaintiffs have, at this juncture, no legally-cognizable relationship with the Commission qua Commission. The Commission has exercised no authority against the plaintiffs, and judicial protection from the Commission is neither necessary nor appropriate.

Of course, if the plaintiffs wish to preclude the Commission's staff from conducting its informal inquiry expeditiously, the Commission will be required to consider, at some point, whether it wishes to compel the plaintiffs to furnish the information thus far only informally requested. Whether or not the Commission would seek recourse to formal compulsion is, however, problematical at this juncture, depending (as it necessarily must) on how important the information is to its staff's inquiry, whether the information can be obtained from other sources, and similar considerations. In these circumstances, traditional doctrines of standing and ripeness militate decidedly against judicial intervention.

"Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function."

International Longshoremen's Union v. Boyd, 347 U.S. 222, 224 (1954).

But, even if it be assumed that a formal order of investigation would be employed by the Commission, application of the federal securities laws, in that fashion, to these plaintiffs, does not, ipso facto, raise the spectre of Constitutional confrontation. No person or entity may withhold testimony if relevant to the conduct of others. Cf. United States v. Nixon, 418 U.S. 683 (1974). Whether or not the Commission could or would ever seek to prosecute the City of Philadelphia and its officials for securities fraud, if such fraud occurred—and the Commission resolutely believes that it has such authority—it cannot be gainsaid that the activities of others who can claim no Constitutional privilege are within the purview of the federal securities laws. Plaintiffs

do not assert otherwise. Accordingly, even a formal investigation by the Commission in which the plaintiffs' testimony was sought could not raise the broad issues these plaintiffs seek to raise now. Those are issues, in short, for another time and another day, if they are issues at all.

I. PLAINTIFFS HAVE NOT ALLEGED NOR SUSTAINED ANY COGNIZABLE INJURY. THEY NEITHER NEED NOR SHOULD BE PERMITTED TO INVOKE THE INTERCESSION OF THIS COURT.

A. This action does not involve the exercise of any power by the Securities and Exchange Commission.

"[W]hen a plaintiff's standing is brought into issue the relevant inquiry is whether . . . [he] has shown an injury to himself that is likely to be redressed by a favorable decision. Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III limitation."

Simon v. Eastern Ky. Welfare Rights Org., 96 S. Ct. 1917, 1924 (1976) (emphasis supplied).

This action does not involve the issuance of compulsory process on the City of Philadelphia, the Finance Director of the City of Philadelphia, or any member of the purported class. Nor does it involve any attempt by the Commission pursuant to Section 22(b) of the Securities Act, U.S.C. 77v(b), or Section 21(c) of the Securities Exchange Act, 15 U.S.C. 78u(c), to require compliance with Commission subpoenae by application to a district court. It does not involve an attempt to bring an action to enforce the antifraud provisions of the federal securities laws with respect to the named plaintiffs or any members of the class pursuant to Section 20(b) of the Securities Act, 15 U.S.C. 77t(b), or Section 21(d) of the Securities Exchange Act, 15 U.S.C. 78u(d). In sum, this action does not involve any Commission action to enforce any provision of the federal securities laws against the plaintiffs. Moreover,

this action does not question the Commission's power to act against third party underwriters or broker-dealers in connection with their role in the offer or sale of Philadelphia's securities.

Rather, plaintiffs' complaint conjures up numerous and complex harms alleged to arise exclusively from the mere existence of any preliminary inquiry into the sale of the securities of the City of Philadelphia or any member of the plaintiff class. Consequently, as we understand plaintiffs' Complaint, the constitutionality of substantive provisions of the federal securities laws is challenged not because these statutes, standing alone, impose duties upon the plaintiffs which conflict with their notions of sovereignty, but rather because a request for information from, or possible future investigation of, the defendants could cause certain unidentified and unspecified third parties to take highly speculative and hypothetical action. In reality, therefore, plaintiffs challenge a basic investigatory technique--an informal inquiry undertaken to assist a federal official in determining whether the agency he represents should consider whether to invoke its compulsory investigatory powers. But that informal inquiry has not harmed the plaintiffs; at most, even if the plaintiffs could demonstrate real harm, which they cannot, that harm derives not from any direct effect on the plaintiffs caused by the Commission, but from the independent actions of third parties.

- B. If the plaintiffs fear any harm flowing directly from informal requests to them for information, they can refuse to cooperate without sanction.

As noted above, a preliminary investigation involves only requests for cooperation in producing information bearing upon (1) possible violations of law;

(2) the need for Commission rulemaking; or (3) the desirability of recommending new legislation (including Constitutional amendments) to the Congress. If such requests are objected to by plaintiffs as overly intrusive or burdensome, they may decline to cooperate. Indeed, they have done so. No form of compulsion or coercion is involved.

In our view, therefore, plaintiffs need not, and should not be permitted to, invoke the protection of a federal court; they are clearly capable of protecting whatever rights they perceive to be threatened by such an informal inquiry. As the Supreme Court suggested in denying review of an agency action, an agency investigation creates no injury:

"The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, any thing; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation. * * * It is the exercise solely of the function of investigation. Moreover, the investigation made was not a step in a pending proceeding in which an order of the character of those held to be judicially reviewable could be entered later. It was merely preparation for possible action in some proceeding which may be instituted in the future--preparation deemed by the Congress necessary to enable the Commission to perform adequately its duties, if and when occasion for action shall arise.

United States v. Los Angeles & Salt Lake Railroad Co., 273 U.S. 299, 309-310

(1927) (citation omitted). See also, Rochester Telephone Corp. v. United States, 307 U.S. 125, 129-131 (1939). Cf., Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 151-156 (1951) (Frankfurter, J. concurring). A fortiori, an agency staff inquiry without compulsion also creates no cognizable injury to plaintiffs.

- C. Any harm alleged to flow indirectly from the cloud argued to have been created by the "mere fact" of the informal inquiry could not be remedied by a decree of this Court.

The City urges that the mere existence of an informal inquiry by the Commission might create a cloud over its attempts for future financing (Complaint ¶ 49). In so urging, however, the plaintiffs confuse cause and effect. The problems of Philadelphia's financial image were not caused by the Commission, nor by the undertaking of a preliminary inquiry by its staff. The cloud, if any, in this case preceded the Commission's staff's inquiry and, in an abstract sense, may be viewed as having caused the inquiry. Where any person who issues securities nationally has its finances called into question, the Commission would be remiss in fulfilling its duties were it not to inquire, 16/ particularly here, where the Congress has been relying upon the Commission to help fashion appropriate legislation to cope with the growing concern about the fairness, honesty and integrity of the markets for municipal securities (see note 12, supra). Nor is this defect cured by the plaintiffs' attempt to invoke a "guilt by association" phenomenon, by arguing that all securities issued by any entity not directly involved in the Commission's inquiry, but remotely related to the City of Philadelphia, will not be capable of being marketed. (Complaint ¶54). That assertion--and that is all it is--is surely speculative. No such result has occurred, nor is it even threatened. And, whatever difficulties the City of New York situation (to which plaintiffs analogize this case) may have engendered, if any, those difficulties arose

16/ See, e.g., United States v. Parrott, 315 F. Supp. 1012, 1015 (S.D.N.Y. 1969), affirmed, 425 F. 2d 972 (C.A. 2), certiorari denied, 400 U.S. 824 (1970).

not from any "cloud" of investigation over the City of New York, but from the City's publicly-announced and anticipated actual or imminent default on outstanding obligations. 17/

Nevertheless, the substance of plaintiff's allegations of injury appear to revolve around a supposed cloud over the City alleged to have been created by the fact that the Commission's staff is informally inquiring into matters relating to interstate transactions in the City's securities. (Complaint ¶ 49). But, even if such a cloud were to have arisen in that fashion, an injunction against further inquiry could only exacerbate the problem perceived, not relieve the plaintiffs of its burden. If potential underwriters or investors perceive concern on the part of the Commission as indicating some infirmity in the City's securities, restraint of the inquiry could not alleviate that situation. If anything, the supposition that the Commission was seeking to determine whether transactions in municipal securities created any problems for investors presumably would increase investor confidence in the City's securities, not decrease it. As one analyst remarked to the financial press when asked about a similar suit by the City of New York against this Commission: 18/

"'[I]f the Court actually found in favor of the city, who'd buy their securities? * * * People would think they had a license to commit fraud.'" 19/

17/ Indeed, the City of New York, in contrast to plaintiffs here, has attempted to cooperate fully with the Commission, furnishing documents and producing the City's elected officials for questioning, while preserving all constitutional objections. Wall Street Journal, July 30, 1976, 6:5.

18/ City of New York v. Securities and Exchange Commission, et al., No. 76-Civ-3307 (S.D.N.Y.) (filed July 27, 1976).

19/ Wall Street Journal, July 28, 1976, 16:4, quoting an unidentified securities analyst.

In any event, since plaintiffs concede (Complaint ¶ 29) that they have declined to cooperate with the informal inquiry, any dispute concerning its propriety is now moot. However, should this Court treat the bare possibility of further action by the Commission or its staff, or the hypothesis that there remains a cloud of investigation, as sufficient to warrant further consideration, we show, infra, that the related doctrines of standing and ripeness compel the conclusion that plaintiffs' anxieties in this regard cannot be relieved in this forum, at this time.

II. PLAINTIFFS' ALLEGED INJURIES ARE SO SPECULATIVE AND INDIRECT THAT THEY LACK STANDING TO INVOKE THE POWER OF THIS COURT.

A. The allegations are not sufficient to establish that any harm alleged was caused by defendants' actions.

As noted, supra, despite the articulate hypotheticals in the complaint, no injuries have, in fact, resulted from defendants' actions. And, even if the plaintiffs' dire predictions were demonstrable as actual fact, their injuries would result not from the informal staff inquiry of which they complain, but rather, from the supposed reaction that unspecified third persons might have with regard to their transactions with the plaintiffs. The only relationship alleged between the defendants and the projected financial plight of the plaintiffs is that the staff inquiry might create a "climate" (Complaint ¶49) in which others will react adversely to plaintiffs' securities and thus precipitate the financial erosion of the City of Philadelphia. The nonexistent harm to plaintiffs, and the at most speculative correlation between the supposed injuries and the defendants here, serve to defeat plaintiffs' standing to litigate those allegations:

"[T]he 'case or controversy' limitation of Art. III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court."

Simon v. Eastern Ky. Welfare Rights Org., supra, 96 S. Ct. at 1926.

In ruling against the complainants on the issue of standing in that case, the Supreme Court held that:

"indirectness of injury, while not necessarily fatal to standing, 'may make it substantially more difficult to meet the minimum requirement of Art. III: to establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that the prospective relief will remove the harm.' Respondents have failed to carry this burden. Speculative inferences are necessary to connect their injury to the challenged actions of petitioners."

Id. at 1927 (footnote and citation omitted). Plaintiffs in this case cannot sustain their heavy preliminary burden. As noted, it would be quite difficult for plaintiffs to show that any adverse reaction to their bonds was the direct result of defendants' inquiry, rather than other causes discussed above. Any "proof" on that point could, at best, only be as speculative as the allegations in the complaint, and this is fatal to the plaintiffs' standing. 20/

In sum, a judgment by this Court under these circumstances could only amount to an opinion "in the nature of advice concerning legislative action, a function never conferred upon it by the Constitution * * *."

Muskraat v. United States, 219 U.S. 346, 362 (1911).

20/ Although the actions which, it is alleged, will cause the plaintiffs harm have, in fact, occurred (that is, the preliminary inquiry by the staff), plaintiffs make no allegation that in fact those actions have had any effect on them. Plaintiffs' allegations of harm are couched in terms of what may happen if the Commission investigates. We suggest, therefore, that since plaintiffs seem unable to allege (much less demonstrate) any injury resulting from the investigation that was being conducted, the imminence of any of the harm hypothesized in the complaint is doubtful and thus the wisdom of engaging this Court any further in this exercise in legal hypothesis is open to serious question.

B. The injuries alleged are conjectural and depend upon a tenuous chain of inference, hypothesis and speculation

Not only have the plaintiffs failed to show that the defendants have or will cause alleged harm to the plaintiffs, plaintiffs have not shown that they have or will suffer harm at all, and thus they do not show "injury in fact," necessary to maintain this action under Article III of the Constitution.

See Simon v. Eastern Ky. Welfare Rights Org., supra, 96 S. Ct. at 1924-1928; United States v. Richardson, 418 U.S. 166, 177-178 (1974); Linda R. S. v. Richard D., 410 U.S. 614, 617 (1973); Data Processing Service v. Camp, 397 U.S. 150, 152 (1970).

The Supreme Court observed in United States v. SCRAP, 412 U.S. 669, 688-689 (1973), in words prophetically applicable to the instant proceeding, that

"pleadings must be something more than an ingenious academic exercise in the conceivable. A plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action. And it is equally clear that the allegations must be true and capable of proof at trial."

Plaintiffs' alleged injuries are of this hypothetical nature. Plaintiffs baldly assert that the "climate created by the mere fact of an investigation" will lower their credit ratings and increase the rates of interest they must pay in selling securities. (Complaint ¶¶ 49, 50.) Based upon that unsupported assumption, the complaint builds speculation upon speculation to the point where plaintiffs maintain that the defendants' request for cooperation in providing documents during the conduct of an informal preliminary inquiry will necessarily cause employment to "suffer," impair the City's ability to

"attract and hold residents and enterprises," and "therefore erode the tax and employment bases of Plaintiffs, their fundamental lifelines." (Id. ¶ 58.)

But, "unadorned speculation will not suffice to invoke the federal judicial power." Simon v. Eastern Ky. Welfare Rights Org., supra, 96 S. Ct. at 1927.

See also United States v. SCRAP, supra, 412 U.S. at 688-689; Warth v. Seldin, 422 U.S. 490, 509 (1975).

As the Supreme Court just last Term noted in dismissing, for want of standing, the complaint in Warth v. Seldin, supra, and in terms applicable here:

"'pleadings must be something more than an ingenious academic exercise in the conceivable.' * * * We think the complaint * * * is little more than such an exercise. Apart from the conjectural nature of the asserted injury, the line of causation between [the defendant's] actions and such injury is not apparent from the complaint. Whatever may occur * * *, the injury complained of * * * results only from decisions made by * * * [persons] who are not parties to this case."

422 U.S. at 509 (citation omitted). 21/

21/ As noted above, the facts that

- (1) plaintiffs have neither alleged nor sustained any cognizable actual or threatened injury;
- (2) no governmental power has been exercised against the plaintiffs; and
- (3) at this juncture they can effect full relief by self-help -- that is, refusing to cooperate,

preclude the existence of an actual case or controversy as required by Article III of the Constitution. But even assuming, arguendo, that Article III did not preclude standing here, so-called "prudential rules of standing * * * serve to limit the role of the courts in resolving public disputes." Warth v. Seldin, 422 U.S. 490, 500 (1975). In such a case,

"[f]or purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party. * * * At the same time, it is within the trial court's power to allow or to require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing.

(footnote continued)

Even if plaintiffs' speculation is to be credited, however, the complaint herein fails dramatically to persuade that a favorable decision would either improve plaintiffs' ability to market their securities or minimize the likelihood that the economic forces governing the municipal bond market will dictate increased interest rates on such obligations. As the Supreme Court specifically noted in dismissing Simon, "the complaint suggests no substantial likelihood that victory in this suit would result in respondents' receiving the * * * treatment they desire." 96 S. Ct. at 1927-1928.

C. Allegations of injury to plaintiffs' "ability to make judgments and structure policies" are equally speculative and cannot be saved by being couched in terms of "chilling effects."

Finally, plaintiffs seek to create standing by alleging that the staff inquiry will have "chilling effects" on their ability to govern. (Complaint ¶ 61.) But, even discounting the inherently incredible nature of such an allegation, the Supreme Court rather forcefully has concluded that, in response to a challenge to standing, such allegations "of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific

21/ (footnote continued)

If, after this opportunity, the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed." Id. at 501-502 (citation omitted)(emphasis supplied).

Even following this lenient approach to standing, the plaintiffs' complaint must be dismissed for lack of standing. The thrust of defendants' argument herein--that plaintiffs have failed to allege "injury in fact"--is that their allegations of harm are inherently so speculative as to the cause of the harm that this Court may, indeed must, doubt that the alleged injury will occur. In this regard, the fact that plaintiffs allege only future harm and make no reference to the actual occurrence of any harmful event subsequent to the initiation of the informal inquiry by the Commission, supports the Commission's assertion that their cause is defectively speculative.

future harm * * * ." Laird v. Tatum , 408 U.S. 1, 13-14 (1972) (emphasis supplied). 22/ And, in any event, allegations of "chilling effects" are not relevant to these plaintiffs, who pursue only alleged Fifth and Tenth Amendment claims, and not First Amendment claims. As the Supreme Court reminded the complainant in Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 168 (1972),

"While the doctrine of 'overbreadth' has been held by this Court in prior decisions to accord standing by reason of the 'chilling effect' that a particular law might have upon the exercise of First Amendment rights, that doctrine has not been applied to constitutional litigation in areas other than those relating to the First Amendment."

III. THE SUBSTANTIVE ISSUES RAISED IN PLAINTIFFS' COMPLAINT ARE NOT RIPE FOR JUDICIAL RESOLUTION AT THIS TIME.

While plaintiffs' pleadings suggest an irreconcilable clash between the States and the Congress over the States' ability to obtain adequate financing to permit them to govern, the defendant Commission, in this case, is concerned solely with the problem of the protection of investors. The Commission's staff has concededly been inquiring into the possibility that the national securities markets and the facilities of interstate commerce have been utilized to obtain the funds of public investors by deleterious means. Those investors, and the Commission may be under a misapprehension that all issuers and sellers of securities must tell the truth, but the defendants have simply requested cooperation from the plaintiffs to gain access to documentary material and witnesses to determine the facts and circumstances pertaining to the public distribution of Philadelphia's securities.

22/ Accord, California Bankers Association v. Shultz, 416 U.S. 21, 55-57 (1974) (First Amendment challenge on behalf of depositors premature prior to attempt by government to subpoena records).

As previously discussed, plaintiffs were not and are not legally obligated or compelled to cooperate with defendants in the course of a preliminary inquiry and, to date, have not done so. If another informal request for information were to be made, plaintiffs could refuse once again to cooperate. Because such self-help is available, no genuine harm exists or is imminent and this case must be dismissed as not ripe.

While it is speculative now to assume whether the Commission would seek to use its subpoena power upon the City to require the City's cooperation in an investigation of possible fraud by the City and/or others, a case not before this Court, in light of the fact that the plaintiffs seek injunctive relief against the institution of such a formal investigation or the use of compulsory process pursuant thereto (Complaint, Prayer ¶¶ 2(b), 3(b)), it seems appropriate, herein, to address the prematurity of an action based on that eventuality, as well.

- A. Plaintiffs' action involves a challenge to the federal commerce power, the resolution of which requires complex factual analysis to which the pleaded facts are not susceptible; this action therefore does not meet the constitutional prerequisite of ripeness.

That plaintiffs' challenge is based upon the Tenth Amendment (Complaint ¶¶ 30, 31), insofar as the federal securities laws are alleged to encroach upon the sovereignty of the States, does not alter the constitutional prohibition against advisory opinions by federal courts nor the concomitant requirement that an issue be ripe before the courts seek to adjudicate it. See, e.g., New Jersey v. Sargent, 269 U.S. 328 (1926); Massachusetts v. Mellon, 262 U.S. 447 (1923); Texas v. ICC, 258 U.S. 158 (1922). 23/

23/ Plaintiffs' second cause of action, challenging the application to them of the antifraud provisions of the Securities Act and Securities Exchange Act as violative of their Fifth Amendment rights should be dismissed as insubstantial.

Plaintiffs presumably rely on National League of Cities v. Usery, 96 S.Ct. 2465 (1976), for their contentions respecting the unconstitutionality of the federal securities laws. 24/ But, as we would show if there is ever an appropriate opportunity to litigate the merits of this presently abstract constitutional issue, Usery virtually compels the conclusion that no unconstitutional enactment is here present.

23/ (footnote continued)

Plaintiffs cannot rely upon the Self-Incrimination Clause of the Fifth Amendment, since that privilege extends only to natural persons, and cannot be claimed "by or on behalf of any organization, such as a corporation." United States v. White, 322 U.S. 694, 699 (1944). See also Essgee Co. v. United States, 262 U.S. 151, 155-156 (1923); Wilson v. United States, 221 U.S. 361, 382-385 (1911); Hale v. Henkel, 201 U.S. 43, 74-75 (1906). Nor may the privilege be claimed by officials of such entities in regard to information in their official custody, even if such information could incriminate them personally. See United States v. White, *supra*, 322 U.S. at 699-700; Wilson v. United States, *supra*, 221 U.S. at 384-385.

Plaintiffs likewise cannot rely upon the protection of the Due Process Clause. The Supreme Court has held that the "word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union, and to our knowledge this has never been done by any court." South Carolina v. Katzenbach, 383 U.S. 301, 323-324 (1966). Municipalities, although technically corporations (which, as such, would enjoy the protections of the Due Process Clause, see, e.g., Sinking Fund Cases, 99 U.S. 700, 719 (1879)), are for the purpose of this action, political subdivisions of the states, National League of Cities v. Usery, *supra*, 96 S. Ct. at 2476 n. 20. Thus they can only claim such rights and powers as are derived therefrom. While this precise issue appears to be *sui generis*, it is unlikely that the States could constitutionally bring themselves within the protection of this clause simply by granting corporate charters to their instrumentalities and subdivisions.

24/ Usery is the only Supreme Court decision to hold a commerce power-based statute unconstitutional in derogation of the Tenth Amendment. Id. at 2477 (Brennan, J., dissenting).

Thus, the Fair Labor Standards Act, which was held unconstitutional as applied to the States in Usery, presented a significantly different statutory scheme than the federal securities laws challenged in the instant action. The minimum wage and maximum hour provisions placed direct and affirmative requirements upon the States as employers to the extent that:

"[t]he only 'discretion' left to them under the Act is either to attempt to increase their revenue to meet the additional financial burden imposed upon them by paying congressionally prescribed wages to their existing complement of employees, or to reduce that complement to a number which can be paid the federal minimum wage without increasing revenue."

Id. at 2472 (footnote omitted).

The federal securities laws, in contrast, impose no comparable administrative burdens on the plaintiffs. Municipal securities are exempt from the registration provisions of Section 5 of the Securities Act, 15 U.S.C. 77e, and the issuers of municipal securities are likewise exempt from the registration and periodic reporting provisions of Sections 12, 13 and 15 of the Securities Exchange Act, 15 U.S.C. 78l, 78m and 78o; and see Section 3(d) of the Securities Exchange Act (note 8, supra). The only substantive obligation imposed upon these plaintiffs by the Congress in the challenged securities statutes is, with respect to their securities transactions, to abide by the antifraud provisions contained therein (see note 11, supra). Consistent with those provisions, the plaintiffs may not, in connection with the offer, purchase, or sale of any securities in interstate commerce:

"employ any device, scheme, or artifice to defraud, or * * * obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or * * * to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

Securities Act, Section 17. See also Securities Exchange Act Rule 10b-5, which is substantially verbatim.

But even if Usery were not adversely dispositive of the plaintiffs' claims, the Supreme Court's constitutional analysis of the conflict between State sovereignty and the power of the federal government to regulate commerce in that case demonstrates the difficulties involved in ruling upon a Tenth Amendment claim which is prematurely brought. That analysis required a two-step factual test.

First, a court must determine that the challenged federal activities significantly and adversely affect "'functions essential to [the States'] separate and independent existence' * * * ." Id. at 2471. Secondly, assuming that such functions are indeed involved, a court must then decide whether the challenged actions "operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions * * * ." Id. at 2474.

The Court in Usery required such judgments as "estimates of substantial costs which will be imposed upon" the States, (id. at 2471); the likelihood of "forced relinquishment of important governmental activities," (id. at 2472); and the degree to which the challenged action "displaces state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require," (id.). Mr. Justice Blackmun, whose concurring opinion was critical to obtain the bare five-Justice majority in Usery, noted that the Usery decision "adopts a balancing approach, and does not outlaw federal power in areas * * * where the federal interest is demonstrably greater * * * ." Id. at 2476. It would be difficult, if not impossible, here for this Court to attempt to balance plaintiffs' sheer speculation in any similar manner.

It is anything but apparent how the antifraud requirements of the federal securities laws could effect the sovereign immunity claimed by plaintiffs.

Compare, e.g., Buchanan v. Warley, 245 U.S. 60 (1917) (statute unconstitutional on its face). Moreover, the very harm posited by the plaintiffs--the potential collapse of the interstate market for municipal securities--would easily appear to be cause for finding the overriding federal interest mentioned by Justice Blackmun in Usery. Such national concern--both for the protection of the municipal issuers and the investing public--is presumptively only within the federal power to effectuate.

B. Plaintiffs improperly seek to persuade this Court to enjoin the operation of a complex statutory scheme in a vacuum, prior to its application to them.

Nonetheless, assuming for the purpose of this motion that the securities laws challenged in this action might affect the type of sovereign interest recognized in Usery, an attempt to apply the factual analysis of Usery to the possible effects of those Acts upon the plaintiffs at this time would only result in an opinion based upon speculation both as to the actions the Commission might take and their possible effect upon the plaintiffs' sovereign interests. Cf. Toilet Goods Association v. Gardner, 387 U.S. 158, 166 (1967); as we note, infra, possible Commission action might involve, wholly apart from further investigation, injunctive enforcement action (against the plaintiffs or others), proposed rulemaking, submission of a report to Congress, or no action at all.

Plaintiffs' obvious attempt to pattern their complaint after the Usery analysis results merely in a series of speculative inferences and should be indication enough of the prematurity of this action and the unripe nature of

their claims. (See supra pp. 22-26.) Indeed, the alleged harmful effect of the federal securities laws is claimed by the plaintiffs to result from the actions of third parties and is only tenuously traceable to the existence of a Commission investigation. Moreover, no harm is alleged to flow directly from the substantive provisions of these statutes.

Thus, it appears that plaintiffs' objections to the antifraud provisions of the federal securities laws are really a challenge to stop the Commission from an inquiry which might ascertain whether plaintiffs in fact refrain from misleading investors. As we demonstrate, infra, however, such a challenge to the power to investigate is per se premature.

If, however, plaintiffs seek directly to challenge the antifraud provisions of the statutes at issue, we submit that that challenge must be dismissed.

"Appellants in effect asked the District Court to rule that a statute the sanctions of which had not been set in motion against individuals on whose behalf relief was sought, because an occasion for doing so had not arisen, would not be applied to them if in the future such a contingency should arise. That is not a lawsuit to enforce a right; it is an endeavor to obtain a court's assurance that a statute does not govern hypothetical situations that may or may not make the challenged statute applicable. Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function."

International Longshoremen's Union v. Boyd, 347 U.S. 222, 223-224 (1954)

(citations omitted).

The essence of plaintiff's request is that a complicated statutory scheme be found unconstitutional, in advance of its application to them or to any of the class they purport to represent. In the absence of some Commission action, complete with allegations of fraud and prayer for relief, this request seeks only an advisory opinion, which federal courts are prohibited from rendering by the "case or controversy" requirement of Article III of the Constitution.

"This Court is without power to give advisory opinions. It has long been its considered practice not to decide abstract, hypothetical or contingent questions, or to decide any constitutional question in advance of the necessity for its decision, or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, or to decide any constitutional question except with reference to the particular facts to which it is to be applied. * * *"

Alabama State Federation of Labor v. McAdory, 325 U.S. 450, 461 (1945)

(citations omitted).

The infirmity in an action such as this is that it has been brought too soon: "ripeness is peculiarly a question of timing." Regional Rail Reorganization Act Cases, 419 U.S. 102, 140 (1974). Essentially, an issue is not ripe if its judicial resolution would evoke an advisory opinion.

Where, as here, the appropriate officials have not threatened enforcement of the challenged statutes against the plaintiffs, the action has been held not ripe for judicial determination. See, e.g., United Public Workers v. Mitchell, 330 U.S. 75, 89-91 (1947). Cf. Steffel v. Thompson, 415 U.S. 452, 459 (1974). See also Younger v. Harris, 401 U.S. 37, 42 (1971) (the threat of sanctions cannot be "imaginary or speculative"); Poe v. Ullman, 367 U.S. 497, 508 (1961) (alleged threat cannot be "chimerical" but must be "grounded in a realistic fear of prosecution"). Federal courts can only entertain such a constitutional challenge, in the absence of at least the threat of imminent enforcement, when the claimant has actually been injured by the potentiality of enforcement of a statute unconstitutional on its face. See, e.g., Buchanan v. Warley, 245 U.S. 60 (1917); Traux v. Raich, 239 U.S. 33 (1915).

Plaintiffs will have ample opportunity to raise their constitutional objections to the Securities Act and Securities Exchange Act if, and when, those Acts are actually applied. Those objections will not be lost in the interim, but will be preserved to be raised at an appropriate time and will thus become,

if at all valid, all the more apparent. 25/

IV. THIS ACTION IS ACADEMIC AT THIS TIME, AND THE CHALLENGE WILL REMAIN PREMATURE AND OTHERWISE UNSUCCESSFUL EVEN IN THE FACE OF A FORMAL COMMISSION INVESTIGATION.

We have previously stressed the fact that the Commission's actions were taken pursuant to an informal inquiry, and that plaintiffs' remedy is self-help -- that is, ceasing to cooperate. (See pp. 9-14, supra.) Even if, however, the Commission issued a formal order of investigation, involving the use of compulsory process to obtain information, that fact alone would not change the disposition of this action.

25/ In the analogous context of review of administrative actions, the Supreme Court has elaborated a similar concept of ripeness. Thus, as a general rule, "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." See e.g., Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938). Certain exceptions to this rule have been made to avoid hardship to litigants in cases where the only issue is one of statutory interpretation, see, e.g., McKart v. United States, 395 U.S. 185 (1969), or the constitutionality of applying the administrative procedures to the claimant, see, e.g., Public Utilities Commission v. United States, 355 U.S. 534 (1958).

Not deferring decision until the administrative process has run its course will often put a court in the posture of rendering a premature decision on a constitutional question presented in an abstract form. The Supreme Court has noted the wisdom of judicial restraint in this context.

"It is evident that Congress has provided a way for appellants to raise their constitutional claims. But appellants, denying that they are within the coverage of the Act, wish to litigate these claims in an injunctive proceeding in the District Court. The effect would be that important and difficult constitutional issues would be decided devoid of factual context and before it was clear that appellants were covered by the Act. We have previously refused to decide the constitutionality of the very provisions involved here because it was not clear that the Act would be applied to the objecting parties. Similarly, the District Court should not be forced to decide these constitutional questions in a vacuum."

DuBois Clubs of America v. Clark, 389 U.S. 309, 311-312 (1967) (footnote and citations omitted). See also Allen v. Grand Central Aircraft Co., 347 U.S. 535, 553 (1954).

The scope of the investigatory powers of an independent administrative agency such as the Securities and Exchange Commission are broad. For example, in United States v. Morton Salt Co., 338 U.S. 632 (1950), the Supreme Court compared the investigation of an agency like the Commission here to that of a grand jury, which can investigate merely on suspicion that the law has been violated without establishing a basis for determining the existence of probable cause that a violation in fact had occurred:

"Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on mere suspicion that the law is being violated, or even just because it wants assurance that it is not. When investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probable violation of the law.

* * * *

"Even if one were to regard the request for information in this case as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest." Id at 642-643, 652. 26/

26/ The Commission, like the Federal Trade Commission, the agency involved in Morton Salt, is a fact-finding body. As such, the Commission "performs a function similar to that of a grand jury, 'the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation.'" Woolley v. United States, 97 F. 2d 258, 262 (C.A. 9), certiorari denied, 305 U.S. 614 (1938). See also Securities and Exchange Commission v. First Security Bank, 447 F. 2d 166, 168 (C.A.10, 1971), certiorari denied, sub nom. Nemelka v. Securities and Exchange Commission, 404 U.S. 1038 (1972); Boehm v. United States, 123 F.2d, 791, 808 (C.A. 8, 1941), certiorari denied, 315 U.S. 800 (1942); Consolidated Mines v. Securities and Exchange Commission, 97 F. 2d 704, 708 (C.A. 9, 1938); In re Securities and Exchange Commission, 84 F.2d 316, 318 (C.A. 2), reversed and vacated as moot, sub nom. Bracken v. Securities and Exchange Commission, 299 U.S. 504 (1936).

As the Supreme Court noted in Blair v. United States, 250 U.S. 273, 282-283 (1919) (citations omitted),

"in our system examination of witnesses by a grand jury need not be preceded by a formal charge against a particular individual. It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. As has been said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning.

"And, for the same reasons, witnesses are not entitled to take exception to the jurisdiction of the grand jury or the court over the particular subject-matter that is under investigation. In truth it is in the ordinary case no concern of one summoned as a witness whether the offense is within the jurisdiction of the court or not. At least, the court and grand jury have authority and jurisdiction to investigate the facts in order to determine the question whether the facts show a case within their jurisdiction."

Investigative powers traditionally have been construed broadly, without regard to the title or position of the witness. In conducting its investigations, the Commission is entitled to everyman's evidence. 27/ See, e.g., United

27/ As early as 1827, Jeremy Bentham wrote

"Are men of the first rank and consideration, are men high in office, men whose time is not less valuable to the public than to themselves, are such men to be forced to quit their business, their functions, and what is more than all, their pleasure, at the beck of every idle or malicious adversary, to dance attendance upon every petty cause? Yes, as far as it is necessary -- they and everybody! What if, instead of parties, they were witnesses? Upon business of other people's, everybody is obliged to attend, and nobody complains of it. Were the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor, to be passing by in the same coach while a chimney-sweeper and a barrow-woman were in dispute about a half-pennyworth of apples, and the chimney-sweeper or the barrow-woman were to think proper to call upon them for their evidence, could they refuse it? No, most certainly."

4 The Works of Jeremy Bentham 320-321 (Bowring ed., 1843), quoted with approval in Branzburg v. United States, 408 U.S. 665, 688 n. 26 (1972).

States v. Nixon, 418 U.S. 683 (1974); Hurtado v. United States, 410 U.S. 578 (1973); Branzburg v. Hayes, 408 U.S. 665 (1972); United States v. Bryan, 339 U.S. 323 (1950); Blackmer v. United States, 284 U.S. 421 (1932); Blair v. United States, 250 U.S. 273 (1919).

For example, where the Commission invokes the aid of the courts in enforcing a subpoena duces tecum, it need only show that its inquiry is related to its statutory authority, that the demand for production of documents is not too indefinite and that the documents sought are reasonably relevant to the inquiry. Securities and Exchange Commission v. Brigadoon Scotch Distributing Co., 480 F.2d 1047, 1053-1054 (C.A. 2, 1973), certiorari denied, 415 U.S. 915 (1974). Accord, United States v. Morton Salt Co., 338 U.S. 632, 652 (1950); Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 209 (1946); Federal Trade Commission v. Browning, 140 U.S. App. D.C. 292, 298, 435 F.2d 96, 102 (1970). These standards have been held applicable even in cases where the party challenging a subpoena claims that the First Amendment excluded it from the Commission's jurisdiction. Securities and Exchange Commission v. Wall Street Transcript Corp., 422 F.2d 1371, 1375 (C.A. 2), certiorari denied, 398 U.S. 958 (1970). Cf. Oklahoma Press Pub. Co. v. Walling, supra, 327 U.S. at 209.

An agency's investigative powers reach not only to those over whom it has direct, that is, regulatory, control, but also to others "if those persons may have information relevant to a matter properly under investigation." Waterfront Commission of New York Harbor, 160 A.2d 832, 838 (N.J., 1960). Cf. United States v. Nixon, supra. While we do not dispute that the inquiry complained of in this action concerned conduct of the City of Philadelphia, it was also necessarily concerned with the activities of others--for example, underwriters and broker-dealers--who dealt in the City's securities. We do not understand the plaintiffs to assert that their claimed immunity applies as well to these third parties,

and certainly the City can be assumed to have information relevant to assessing third-party conduct.

The Supreme Court has repeatedly referred to the giving of testimony as a "public duty" in which the "personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public." Blair v. United States, supra, 250 U.S. at 281. See also, Hurtado v. United States, supra, 410 U.S. at 589; Blackmer v. United States, supra. And, as the Court of Appeals for the Second Circuit has recognized in Garland v. Torre, 259 F.2d 545 (C.A. 2), certiorari denied, 358 U.S. 910 (1958), the citizen's duty to provide evidence applies in the civil context as well as the criminal.

"[A]t the foundation of the Republic the obligation of a witness to testify and the correlative right of a litigant to enlist judicial compulsion of testimony were recognized as incidents of the judicial power of the United States. Whether or not the freedom to invoke this judicial power be considered an element of the Fifth Amendment due process, its essentiality to the fabric of our society is beyond controversy. As Chief Justice Hughes put it: '[O]ne of the duties of which the citizen owes to his government is to support the administration of justice by attending its courts and giving his testimony whenever he is properly summoned.'

Without question, the exaction of this duty impinges sometimes, if not always, upon the First Amendment freedoms of the witness. Material sacrifice and the invasion of personal privacy are implicit in its performance. The freedom to choose whether to speak or be silent disappears. But '[t]he personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public.'"

Id. at 549 (citations and footnote omitted). Nor can the City of Philadelphia withhold information relevant to the conduct of others. Cf. United States v. Nixon, supra.

Thus, the plaintiffs' objections to a Commission investigation are largely irrelevant. Regardless of the validity of their claimed immunity, its vindication would nonetheless leave a perfectly proper basis for continuing the very activities as to them which they wish to avoid. More importantly, however, the initial

determination of agency jurisdiction is to be made by the agency, not by the potential witnesses, and that agency's determination often can be made responsibly only after the investigation has been completed. Cf. Blair v. United States, supra, 250 U.S. at 283.

Courts repeatedly have recognized the necessity to avoid premature interruption of the administrative investigating process. As Judge Cardozo observed:

"Very often the bearing of information is not susceptible of intelligent estimate until it is placed in its setting, a tile in the mosaic. Investigation will be paralyzed if arguments as to materiality or relevance, however appropriate at the hearing, are to be transferred upon a doubtful showing to the stage of a preliminary contest as to the obligation of the writ. Prophecy in such circumstances will step into the place that description and analysis may occupy more safely. Only where the futility of the process to uncover anything legitimate is inevitable or obvious must there be a halt upon the threshold."

In re Edge Ho Holding Corp., 256 N.Y. 374, 381, 176 N.E. 537, 539 (1931). As the Court of Appeals for the Seventh Circuit more recently noted, "if there be a legitimate purpose to which the investigation is pertinent, if the agency does not have the information sought and the formal administrative steps provided in its creative Act have been followed, then courts should not intervene in the initial determinations; they are for the agency to decide at this stage of the inquiry." American International Trading Company v. Bagley, 536 F.2d 1196, 1198 (C.A. 7, 1976) (overturning an injunction against an agency investigation).

In the context of the Usery decision, discussed supra, pp. 23-26, it would seem to be appropriate to protect a Commission investigation from a challenge such as this, so that facts could be developed against which the plaintiffs

could, at an appropriate juncture, meaningfully interpose their assertions of unwarranted "intrusion," if such "intrusion" exists by virtue of the obligations of the federal securities laws. 28/

As to the City and its officials, a Commission investigation is not an end in itself. It represents the preliminary step in a process that may culminate in a variety of conclusions. The Commission may determine that further action is not necessary or, indeed, that it lacks jurisdiction to proceed further. Assuming the Commission determines to proceed, a variety of options are then available,

28/ This is not to say that no challenge to an administrative investigation is cognizable, merely that it should await agency application to a court for enforcement of compliance with a subpoena issued by the agency. Cf. Sea Land Service v. Federal Maritime Commission, 402 F.2d 631 (C.A.D.C., 1968); California Bankers Ass'n. v. Shultz, supra, 416 U.S. at 56-57. The challenge then is restricted to whether the agency shows that the subpoena is (1) for a lawfully authorized purpose and (2) that the materials are relevant to that purpose and (3) the respondent cannot show that compliance is unduly burdensome. Securities and Exchange Commission v. Brigadoon Scotch Distributing Co., supra, 480 F. 2d. at 1056.

The last of the cited conditions for the enforcement of an agency subpoena is significant in this action, where plaintiffs seek to assert a constitutional privilege against federal "intrusion" upon their sovereignty. To the extent that "intrusion" may be perceived as potentially arising from a subpoena requiring testimony or production of documents, that issue may be raised in an action to enforce the subpoena, where a specific factual case of burden may be made out in defense. There, that issue of "intrusion" may be resolved without resort to constitutional confrontation:

"Courts do not review issues, especially constitutional issues, until they have to. In part, this practice reflects the tradition that courts, having final power, can exercise it most wisely by restricting themselves to situations in which decision is necessary. In part, it is founded on the practical wisdom of not coming prematurely or needlessly in conflict with the executive or legislature." Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 154-155 (1951) (Frankfurter, J., concurring) (footnote and citations omitted).

ranging from a traditional enforcement action, 29/ to a broader rulemaking proceeding, to a report to Congress or the Executive Branch with recommendations that particular action be taken to deal with any problems the Commission has identified. 30/

What, if any, appropriate action should be taken is for the Commission to determine in the first instance. It surely has "authority and jurisdiction to investigate the facts in order to determine the question whether the facts show a case within [its] jurisdiction." Blair v. United States, supra, 250 U.S. at 283; Securities and Exchange Commission v. Wall Street Transcript Corp., supra. A challenge to this authority is not only premature, it is "insubstantial" as that term traditionally has been used in the context of federal question jurisdiction.

29/ Even assuming a Commission decision that enforcement proceedings are necessary, a substantial number of other questions are presented, the resolution of which may have a dramatic effect on the impact the enforcement action may have upon particular parties. The most obvious and important of these include the question whether to name particular individuals or entities; the nature of the charges that are to be brought against the persons that are charged; and the nature of the relief to be sought.

30/ See p. 3, supra.

CONCLUSION

The plaintiffs here seek from this Court an advisory judgment which they lack standing to seek and this Court constitutionally may not grant. Accordingly, this complaint should be dismissed.

HARVEY L. PITT
General Counsel

PAUL GONSON
Associate General Counsel

DAVID J. ROMANSKI
Assistant General Counsel

GLYNN L. MAYS
Attorney

SAMMY KNIGHT
Attorney

JOHN P. SWEENEY
Attorney

Office of the General Counsel
Securities and Exchange Commission
Washington, D.C. 20549
Attorneys for Defendants
(202) 755-1108

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