Supreme Court of the United States

OCTOBER TERM 1970

In the Matter of:

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., Petitioners, vs. SECURITIES AND EXCHANGE COMMISSION ET AL., Respondents.	Docket No. 59 Pt. 2

Place Washington, D.C.

Date December 14, 1970

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., Petitioners	:	
vs.	:	No. 59
SECURITIES AND EXCHANGE COMMISSION ET AL., Respondents	:	

Washington, D.C.
Monday, December 14, 1970

The above entitled matter came on for discussion at 2:20 p.m.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HENRY BLACKMUN, Associate Justice

APPEARANCES:

JOSEPH B. LEVIN, ESQ.
Washington, D.C.
On Behalf of Petitioner

APPEARANCES, (continued)

ARCHIBALD COX, ESQ.
Cambridge, Massachusetts
On Behalf of Respondent

DANIEL M. FRIEDMAN, ESQ.
Office of the Solicitor General
Department of Justice
Washington, D.C.
As Amicus Curaie
In Support of Respondent

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in No. 59, National Association of Securities Dealers against the Securities and Exchange Commission.

MR. LEVIN: May it please the Court, my name is Joseph Levin, I represent the National Association of Securities Dealers, Inc.

The Association is made up of some 4400 members who are engaged in the securities business and a great majority of them sell mutual fund shares. At issue here is an order of exemption, entered by the Securities and Exchange Commission under the Investment Company Act of 1940. And that order enabled the First National City Bank to go into the Mutual Fund business.

At the outset I would like to emphasize the fact that the Commission has washed its hands of its decision in this case. The Commission, it is believed for the first time in its history, has refused to appear in support of a Commission order. Furthermore, the Commission in its response to the petition for Writ of Certiorari, which we filed, stated there is no assurance that the Commission would reach the same judgement if a similar matter is again presented.

Q Has the Commission changed since the order?

A Yes. The explanation for the Commission position appears in the brief of the United States as amicus curaie, on

page 3. The statement there is that only two of the members of the Commission who participated in this case remain as members of the Commission, one of whom supported the decision, and one of whom dissented.

The three subsequently appointed members of the Commission are not prepared to take any position. Accordingly, the Commission expresses no position on the merits and urges neither affirmance nor reversal of the judgement of the Court of Appeals.

In this setting, with the agency taking the position that it does, the Court is urged here to accept here as agency expertise, which for all practical purposes at least the present Commission has disowned. I might also point out that two of the three judges in the Court of Appeals relied upon administrative expertise in reaching their decision. The third judge, who also affirmed the order of the Commission did consider the merits of the case.

The question presented involves Section 6C and Section 10C of the Investment Company Act. Section 10C provides, and I quote, "That no registered investment company shall have a majority of its Board of Directors consisting of persons who are officers or directors of one bank." As I shall more fully develop later, this was a prophylaxis prescribed to deal with conflicts of interest problems resulting from the investment company/commercial bank interlock.

And the prophylaxis resulted form a record of gross abuse

in the relationship. Here the bank has created an investment company which it operates and manages, and as the Commission acknowledged, there are potential conflicts of interest between the bank in its commercial banking activities, and the investment company.

Q Is the investment company incorportaed?

A No.

Q You;re just calling it an investment company.

A Well, it·s an investment company under the Investment Company Act. The question of whether or not it is an investment company in fact, is not raised in this litigation. In fact the particular account has registered under the Investment Comoany Act as an open end investment company.

The question presented here is whether in these circumstances, that is where there are potential conflicts of interest the Commission may grant the bank an exemption from 10C by invoking Section 6C of the Act.

Section 6C permits the Commission to grant an exemption from any provision of the statute, and I quote " if and to the extent that such exemption is necessary or appropriate in the public interest, and consistent with the protection of investors, and with purposes clearly intended by the policies and provisions of this title.".

Before considering the policy of the statute, its provisions, I'd very briefly like to describe this particular in-

vestment company which is called a Commingled Investment Account.

At the time of the SEC proceedings, the Account had not yet come into being; it has now come into being. The Account, as I said, is registered under the Investment Company as an open end investment company, it s objectives are the investments in common stock and convertables which offer the opportunity for long term growth of capital and income, a prospect offered generally by investment companies.

It is an open end investment company or mutual fund, because it stands ready to redeem its shares at net asset value, and it makes a continuing offering on that basis.

The participations in this particular mutual fund are called units and the minimum unit of participation is ten thousand dollars. There is no sales charge when an investor buys into the fund and in that respect the fund is like the No Load Investment Company.

The Account uses an arrangement common to mutual funds. It is managed by an investment advisor, in this case the bank serves that function, the bank maintains a continuous investment program for the Account, determines what securities are to be bought and sold, and executes those transactions.

For services, the bank recieves an annual fee equal to ½ of1% of the average net asset value of the account. This is a type and amount of fee that's customary in the mutual fund busi-

ness.

Operation of the Account is subject to the supervision of the committee that is annually elected by the participants. This committee is under the statute as the equivalent of the Board of Directors, and it was this Board of Directors for which the Commission granted the exemption from Section 10 (c), with one Commissioner dissenting, as I've indicated.

The Board has five members, three of whom are officers of the bank. The account is subject to the supervision of the Comptroller of the Currency, this particular type of operation did not become permissible until the Comptroller adopted certain regulations in 1963, and the validity of those regulations is the subject of No. 61, which is to be argued after this case.

Now as far as Section 6(c) of the Act is concerned, it was intended for persons who were not within the intendment of the legislation. Now the Commission in its decision here referred to its traditional standards that it relies upon in invoking Section 6(c). And as the Commission put it, "the propriety of granting an exemption largely depends upon the purposes of the Section from which an exemption is requested, the evils against which it is directed and the end which it seeks to accomplish." And then it continued by saying that the showing required in order to meet the standard set forth in Section 6(c) as the compliance from which exemption is sought, is not necessary to accomplish the Acts' objectives and policies.

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Our position here is that the action of the Commission does controvene the policies and objectives of the statutes. The Investment Company Act resulted from a comprehensive study of investment companies which the Commission made and the Commission itself initiated legislation.

That study revealed---

Q As you suggested, Mr. Levin, there's a companion case to be heard, I guess, tomorrow morning, and if by chance the Court should decide that case, should decide in that case to reverse the judgement of the Court ofAppeals, then the Court need not and might not ever reach this case.

A I think that's correct. I think in this case, the--

Q Of course, I suppose also vice versa. But---

Q I believe so. In order to offer a---

Q In other words, if it decides in your favor in this case, it wouldn't reach the---

A That's right. In order to operate this mutual fund, the regulations of the Comptroller would have to be sustained under the Banking Act of 1933---

Q In the first place.

A And the order of the Committee---

Q And that really does come first---

A The order of---

Q I suppose, doesn't it, because---

A Well, the---

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Q In---

A Which---

Q In the logical look at this---

A Well, the---which comes first here? Let me answer it this way. The matter was presented to the Commission in the first instance on an application for the exemption. The Commission acted. The Commission in its opinion assumed that there was compliance with the (inaudible). It didn't consider the issues. And then subsequently, an action was initiated in the District Coutt challenging the validity of the Comptrollers regulations.

Q Well that was the basis of the motion to change the order in the first place.

A Yes.

Q Reverse the order of argument.

A This study that the SEC conducted, which led to the passage of the Investment Company Act, revealed a history of abuse on the part of insiders.

And a paramount purpose of the statute was to treat with the conflict of interest problem, particularly as it relates to investment company officers and directors and their affiliates.

Section 10(c) is part of the statutory arsenal that is directed at that conflict problem. To contend with the conflicts problem, the statute contains a variety of provisions. It prohibits self dealing by insiders in very, very broad terms, it

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restricts agency transactions by insiders, it imposes feduciary obligations on investment company managements, it provides for pervasive supervision by the Commission of Investment Companies, and in that respect it provides for periodic examinations by the Commission of investment companies, detailed filings by investment companies with respect to their operations, and things of that nature.

It also provides for civil and criminal enforcement measures. But the statute went one step further in terms of dealing with the conflicts of interest problem. It felt that the imposition of feduciary duties,prohibition of self dealing, and Commission supervision and inspection was not enough.

In Section 10, which the Commission describes as a keystone provision of the statute, and which during the Congressional hearings on legislation was referred to as a double barrel protection, the statute imposes certain restrictions on the composition of the Board of Directors of an investment company. Apart from the restriction of commercial bankers in Section 10 (c), it also places restriction on membership by investment bankers, by the investment companies' principal underwriter, by its regular broker, by its investment advisor, and by people that are affiliated with it.

Now turning specifically to Section 10(c), to use the language of one of the Commission spokesmen during the Congressional hearings, it is the consequence of horrible examples of

abuse in the bank dominated investment company.

The legislative history, which is fully set forth in our brief, this is with passages that condemn that particular interlock. For example, Commission spokesmen, in justifying the provisions of Section 10(c) during the course of the Congressional hearings, made the following observations. There were very undesirable consequences flowing from the relationship, some of the worst examples of abuses we had in the whole study arose out of that relationship. The conflicts problem becomes more acute in the case of the commercial banker. The publics funds are used to further the banking business of the insider. The Congressional concern, as it was expressed in the Senate report that accompanied the legislation was the concern with the unscrupulous banks who advance their own pecuniary interest at the expense of the investment companies and their security holders.

Indeed the question in 1940 was not how little, but rather how much should be done to restrict the bank interlock, and indeed whether it should be permitted at all.

And Section 10 (c) was viewed as a minimum safeguard for there were those who advocated the complate segregation of commercial banks from investment companies. For that matter that position was even advocated by commercial bankers themselves in the light of their unhappy experiences during the twenties in terms of conflicts in the operations of bank sponsored investment companies.

And particularly significant in this regard is the observation of Senator Robert Wagner who was Chairman of the Senate Banking and Currency Committee, after the Commission had put in its testimony he made the observation, I think it would be better if the Board were free of any kind of influence from bankers. Of course, I know that that is ideal and that we are not going to get that far, but then there would be no chance of their loyalty being consciously or subconsciously only to their investment trust rather than to outside interests.

The Commission explained 10 (c) in saying that it viewed 10 (c) as a middle of the road approach. As a compromise. As, instead of having complete segregation of Commercial bankers, an attempt was made to permit it, and then to circumscribe it.

The statutory concern with bank domination of investment companies is not only limited to Section 10 (c), but it is further manifested in Section 10 (h) (2) of the Act.

That section deals with the type of investment company that does not have a Board of Directors. Section 10 (h) (2) provides that the investment advisor to such a company must satisfy the standards of Section 10 (c). A bank (inaudible) could not be an investment advisor to one of these companies that does not have a Board of Directors.

In other words, a, under the statute, a bank may only serve as an investment advisor if there is a buffer of a Board of Directors meeting the conditions of Seciton 10 (c).

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In our view, it is unmistakable that Section 10 (c) is intended as a minimum investor protection, certainly where there are potential conflicts of interest.

And now turning to the matter of the conflicts of interest that exist in this situation.

As I've indicated, the Commission acknowledged that there are potential conflicts of interest here which could arise as a result of the banks' commercial banking business.

In fact, one of the spokesmen for the banking industry recently, in urging the amendment of Section 10 acknowledged the fact that the conflicts problem is inherent in the relationship.

And in a situation such as is involved here, where the bank has control of the day-to-day management of the investment company, with full rein in the conduct of its operations the conflicts problem emerges probable as sharply as it ever could.

The only aspects of the problem, of the conflicts problem, to which the SEC addressed itself, were those that it, itself had referred to, in 1963, in urging that the Section 10 prophylaxis was necessary for the type of arrangement that's involved in this kind of agency.

Q You have to begin from the premise that the Commission had power to do what it did, don't you?

A The Commission---

Q The power, I'm not talking about the descretion. Th The power to do what it did.

A The Commission has authority under the statute to exempt from any provision of the statute, but in exercising that---

Q Yes---

A It must bear in mind the statutory policies---

Q I see---

A And objectives. It cannot be---

Q But your attack is not on the authority of the Commission but the claim that it abused its discretion in what it did.

A Well, in abusing its discretion it exceeded its authority.

Q Yes.

A ---of the statute.

Q Yes.

A The issue as it's posited here is whether the Commission, in the circumstances where there ace potential conflicts of interest, may consistent with the public interest in policy of the statute---

Q Yes---

A Grant an exemption.

Q That is whether or not the bank can have three rather than two---

A That's right. That's right.

Q ---the Board.

A That's right. Whether or not it may have majority control of that Board of Directors, and it was at that line that Congress drew the line of prophylaxis.

It said, you may have two, our of a Board of five, you may have as many as two, but as a matter of prophylaxis, as a matter of policy, you may not have three.

Q Unless the Commission finds that it is appropriate in the public interest? Consistent with the protection of investors and so on?

A No. A word about the structure of the statute.

The statute grants the Commission considerable flexibility in many areas of the statute. It permits the Commission to exempt, permits the Commission to grant various types of orders and what is necessary in the public interest, and things of that nature.

However, it withheld, or the statute withholds, that type of specific statutory authority, exemptive authorigy or (inaudible) authority, in Section 19 (c). And in fact the legislative hearings show that it was intended in Section 10 not to provide flexibility.

What we have here, though, is a residual authority that the Congress granted, in Section 6 (c), and that authority, the Congress said if you, if there is a situation that isn't within

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the intent of the legialation, it isn't the kind of situation in which the evils of the statute are directed, doesn't fall within the purpose of ths statute, in those circumstances you may grant the exemption.

As I say, the only aspects of the problem to which the Commission addressed itself, were those conflicts which it itself had emphasized in 1963, in the Congressional hearings. Urging that the Section 10 prophylaxis was necessary for the types of arrangements that are here presented.

And the conflicts which the commission reffered to, and they're four in number, is the danger that the bank might retain an unwantedportion of the assets of the bank sponsored fund, in cash inorrder to earn money for the bank.

Secondly, the banks distribute brokerage according to a fommula, which rewards those brokers who keep balances in the bank or have other dealings with the bank. This policy, the Commission pointed out, in 1963, could lead to excessive, portfoloi turnover, or to a fund not recieving maximum benefit from its brokerage business.

Thirdly, that fund-investments could be used to shore up bank loans.

And fourthly, that bankers or underwriters and various dealers of various kinds in government bonds and that they might use the fund as a place to place those bonds.

Now these aren't the only conflicts of interest. These

are the ones that the Commission addressed itself to.

There are others. For example, a bank may use the investment company as a bird dog, that is, it may have the fund make an investnent in a company in the hopes, or in ofder to get the commercial banking business of the particular company.

There is also a competitive problem, the nature of which was aluded to in the Congressional hearings, the situation of where a fund holds securities of a company which is an important commercial banking customer. And the sale would appear to be advisable but the sale would depress the market price, something that company mamagements don't like. The question is whether in those circumstances, the bank would be able---or the bank directors would be able to look at the matter of the disposition of that investment with an eye (inaudible) to the interests of the fund, or would (inaudible) be concerned by the impact on the commercial banking customer.

Q Is this power frequently exercised by the Commission?

A The 6 (c) power? Yes. The 6 (c) power is exercised frequently by the Commission. The matter of the Commissions' authority under 6 (c) I don't believe has ever really been considered by a Court, and the 6 (c) orders ordinarily come up in the context of where there is no opposition to the grant of the exemption so that the 6 (c) grant becomes pretty much a

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formal matter.

There are cases, though, where there is opposition, but as I say, they are relatively rare situations.

The matter becomes one between the staff of the Commission and the applicant and if the Commission is willing to grant the order, the applicant of course is very happy that there isn't anybody to challenge him. And that's why there's very little opposition.

Q Here you of course (inaudible) granted the exemption.

A Pardon?

Q You of course in this case before the Commission opposed the exemption.

A Yes.

Q There was no hearing---

A There was no evidentiary hearing before the commission.

Q There was an (inaudible) hearing.

A It was all argument and briefs. We took the positon before the Commission that the banks application did not make either a factual or a legal basis on which to grant the exemption, we didn't feel that we ought to be asking for an evidentiary hearing.

We thought that the burden was on the bank to show that it---

Q As the applicant for the exemption.

A As the applicant for the exemption, and in fact, the only round that the bank advanced in its application was the fact that unless it got this exemption, it wouldn't be able to go forward in this particular mutual fund business.

Now the overall problem that's presented here, in terms of conflicts, was probably as well presented as possible by one of the Commissioners in this case during the course of (inaudible) argument, and I might add it was not the Commissioner who dissented, who observed that the banks application was presented, as he put it, in a very exaggerated or extreme form.

The problem of the old matter of joint ventures assuming joint ventures where the bank on the one hand in the exercise of its various functions has a relationship with a company and your account for various reasons also has relationships with the company and who is to say where the propriety line should be drawn, and is drawn?

And bank counsels' response at that point was that he acknowledged the problem and he said that the bank would have to live with it.

Finally, as the dissenting Commissioner pointed out, not can the exact form of future conflicts be anticipated.

In these circumstances, we submit, there is presently evil to exception 10 (c) as directed, namely potential conflicts

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of interest, and by the SEC's own standards for the application of section 6 (c) an exemption is therefore improper.

Now the Commission did attempt to rationalize an exemption, and we submit, of course, that the analysis is erroneous.

First, in what is an unusual stance for the Commission, in administering this remedial statute, the Commission endeavored to restrict the intent and scope of the statutes, although the statutes speak in terms of no registered investment company, the Commission said Congress really didn't mean it.

And in this regard, it was also pointed out that that this (inaudible) did not become permissible until 1963, with the Comptrollers regulation and in terms of endeavoring to try to find a basis to distinguish it, this pargicular fund, it said that the fund was different from the bank dominated investment companies that were described in the Commissions' study.

Now as far as the Account not being, becoming permissible until 1963, I submit that that's irrelevant. In the Accounts' posed after 1940 doesn't negate the potentials for conflict, and that's what it the statutes concern under Section 10 (c).

Insofar as the Commission looked to the bank affiliates of the twenties and tried to find identity, the Commissions' own study in describing these bank affiliates says, and I quote, "That these affiliates acted as investment companies, in buying and selling securities for investment or speculative purposes.

It was for this reason that Section 10 (c) was enacted, and it is precisely this function that the Account, or this bank sponsored mutual fund is engaged."

Furthermore---

Q The majority of the Commission said in its report, as I read it, that the Account involved here is different from that historic one that you just described.

A That's right, and what I am saying is that one of the functions of those bank securities affiliates in the twenties as described in the Commission study is that those affiliates among other things, engaged in the business of buying and selling securities for investment or speculative purposes.

And it was because they engaged in that particular activity, the investment company business, that they became subject to the Investment Company Act and Section 10 (c) was adopted.

In any event, the statute itself, patently rejects this Commission approach, that the application of Section 10 (c) terms on whether a particular company has a kinship to the bank affiliates of the 1920's.

And I refer specifically to Section 10 (d) of the Investment Company Act. Ten (d) deals with so-called "no-load" companies that are managed by investment counselors. Now those companies, it's a special situation, those companies are granted the matter of exemptions of Section 10 was con-

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sidered for those companies. These are open-end companies.

The matter of exemptions for those companies was specicifally considered. THey were granted certain exemptions, from 10 (a) and from 10 (b), the companies have no kinship to the bank securities affiliates of the 1920's but Congress specifically withheld an exemption from 10 (c). And it's particularly interesting that in the so-called "10 (d) company", the "no-load company", there is less of a chance of potential conflict of interest because by hypotheses those companies cannot be mangaed by banks.

And furthermore, the broad provision of Section 10 (c) is such that it reaches to all types of investment companies. For example, I referred already to the so-called 10 (h) (2) company, the company that doesn·t have a Board of Directors.

Congress said, well we want 10 (c) to apply where it can. And furthermore it applies to face amount certificate companies which have absolutely no kinship or identity with the bank security affiliates of the 1920's.

Now, the Commission did attempt to come to grips with the conflicts problem. And what it said was, that there were substantial safeguards here against conflicts. that's its characterization: substantial conflicts.

And we submit that that doesn't answer the statutory question.

Q Well their safeguards were the supervision by the

Comptroller---

A By the Comptroller, and also the self deal prohibitions in the Investment Company Act and in the Comptroller regulation.

Basically, the Comptrollers regulations really don't add anything to what the Investment Company Act provides. The Commission, in its opinion here, in referring to the substantial safeguards made reference in the first instance to the Comptrollers regulations, to the Inspections of the Comptroller.

The fact is, and the Commission made no reference to it, that it has inspection authorities of investment companies and as the Commissioner, who is the spokesman for the Commission during the legislative hearings pointed out, the purpose of that inspection authority is to permit the Commission to engage in the same kind of inspections as it permitted the Comptroller under the---

Q How about investment in the secutiries that the bank has underwritten?

A Well, on that one, the Commission found the Commission imposed a further condition that goes beyond the statute. And the Commission found that it saw no liklihood that there woudl be any over-reaching by the bank while an investment banker. And I might add in that regard that the Commission was very careful to refrain from making that same observation about the fact that---

Q Is there a restriction in the exemption?

A Pardon?

Q Is there, therefore, that restriction in the exemption?

A There is a condition that was added in terms of the underwriting of---the underwritings by the bank.

Turning back to the matter of the supervision of the Comptroller, as I say the statute granted the Commission the authority to inspect investment companies, as I've indicated earlier the Statute authorized the Commission---the statute prohibits self dealing and poses feduciary obligation and nevertheless it imposed, as a prophylaxis, this 10 (c) requirement.

Now the fact that, we submit, the fact that there may also be regulation, or inspections by the Comptroller, inspections that as far as the statute is concerned that are broader then the Commission is empowered to make under the Investment Company Act, there's no reason to deny investors in this mutual fund the specific 10 (c) prophylaxis, against domination by a bank investment company.

The Congress thought that inspection of government oversight was enough, it was already in the Investment Company Act, it didn't have to provide for 10 (c).

I'll save the rest of my time for rebuttal.

Q Mr. Cox?

ARGUMENT OF MR. ARCHIBALD COX, ESQ.

ON BEHALF OF RESPONDENT

MR. COX: Mr. Chief Justice, and may it please the Court, as remarked earlier, this is one of two related cases. But I think there is one respect in which they were not correctly described.

It is true, as I understand it, that if the case to be argued tomorrow, the ICI case, should be reversed, then this case ceases to be important. But on the other hand, Justice Stewart, even if the exemption should be held improper, which of course we deny, than the ICI case still would be important, first because Regulation 9 is at issue in the ICI case, and because there's some reason to believe that it would be possible to operate managing agency commingled investment accounts even though there were no exemption from Secion 10 (c).

That's a moot point, I don't mean to say that the exemption isn't important. But it isn't quite accurate to say that if it were denied that that would be the end of the managing agency commingled invesment account.

Speaking of them as a category, not of this particular plant.

Q In other words, if you should prevail in tomorrow mornings' case, a differenttmechanism might be found that would not need to he---that would exempt it from---

A Two things are possible, as---

Q the 1940 Act?

A Two things are possible as explained in the amicus brief as filed by the fiduciary associations of Chicago.

One is that it's possible that it might be held that the entire commingling authorized by regulation 9 is not under the Investment Company Act.

Second, it is possible that the Federal Reserve Board, which has given its approval to these plans, and found them in the public interest, might find it sufficient that the bank had the contract to act as an investment advisor. And two bank officers on the Board of Directors.

We couldn't be sure of that, that's why we asked permission to have three, so that it would be wholly within the bank, but if it had to go the other way---

Q Yes.

A I don't think the whole thing could fairly be said to be dead.

Q So I was mistaken in my vice versa comment.

A Sort of uncertain, but not clearly vice versa, right.

There are two general observations, which I think are pertinent to both cases. In the first place, it's important not to slip into such question-begging characterizations, as mutual fund investment company securities business, all on our side of fiduciary relations.

The rule at question here is which is the right characterization? And of course the right characterization depends upon an examination of what it is that the bank is actually doing.

Second, the right characterization has been decided in these cases by the expert agencies unanimously in favor of the view that what the bank is doing is performing a traditional fiduciary banking function, in a way that preserves the fiduciary relationship and which is in the public interest.

This is a view supported not only by the Comptroller, but by the Federal Reserve Board, both in its rule in given to City Bank, and in its testimony before Congress, by the Federal Deposit Insurance Comapny, by the New York banking authorities in parallel situations, and to the extent that it was pertinent under the Investment Company Act, by the Securities and Exchange Commission.

And so here, the question is not as Mr. Levins argument suggests, whether the Commission could properly exempt an ordinary investment company from Section 10 (c), but rather, it's whether the Commission may make permissable expert judgement, when it concluded that this is not the kind of investment company with which the purpose of Section 10 (c) was primarily concerned, but as I say, a fiduciary banking activity, which could be exempted without departing from the purposes of the policy of the Act, and which should be exempted in the public

interest.

That the Commission was correct in that finding, becomes apparent when one goes behind the labels and looks at the development of the commingled investment account.

And to do that it's really necessary to go back to 1913, when Section 11 (k) of the Federal Reserve Act gave the Federal Reserve Board power to issue the national banks permits to act in sundry fiduciary capacities.

The presemt language, with some modifications, is set forth at page 1 (a) of our brief and it describes these powers as the right to act as trustee, executor, administrator, and so forth, or over on the next page, in any other fiduciary capacity in which state banks can act. And there's no doubt that state banks could act in this capacity under the law of New York.

Under this section, banks have, of course, long acted as trustees, executors, guardians, and so forth. They've also acted as agents to keep custody of a customers' assets and securities and to give him advice concerning investments, with the customer retaining the final decision whether tb change his securities.

In addition, banks have frequently acted as mamaging agents in a strict sense. That is to say the customer turns over his assets to them and the bank makes and executes all imvestment decisions concerning the management of the customers assets.

with a true fiduciary relationship between the principal and the agent.

And I would emphasize that this is only one of many fiduciary activities, all of which belong in a single bundle.

Now at first,---

(CLERK) This honorable Court is now adjourned until tomorrow morning at ten o'clock.

(Whereupon argument in the above-entitled matter was adjourned to be reconvened on December 15, 1970.)