

Moreover, the new role of the outside director or directors would be a quite anomalous one, because the suggested section 15 contains provisions that look in quite opposite directions. On the one hand, it contemplates a greatly enlarged burden on outside directors to make diligent inquiry and apply appropriate criteria to determine the "reasonable" fee level. But on the other hand, this procedure is to be largely ignored in the ultimately significant determination of reasonableness by a court.

Nor could an outside director take comfort in the happy thought that he would not be exposed to personal liability. Although the SEC has said that it intends no personal liability, the bill as drafted would not, in our counsel's view, accomplish this result.

It seems likely that many individuals who might have been willing to serve as outside directors in the past would be unwilling—even if they would pass muster under the new "disinterested" requirement—to take on the sharply increased responsibility and risk of directorships under the new law. Those who would be willing would probably expect, and be entitled to, more substantial compensation for the much greater burdens involved. Moreover, for reasons already indicated, it would almost inevitably be necessary to have more than the minimum number. The combined effect would be that all funds would be hard put to find enough willing and qualified persons to serve, and small funds (several of which are among the members of our group) would have a new and significant expense burden.

In my prepared statement as filed with the subcommittee, on pages 13 and 14, there is some mention of two respects in which the new definition of "interested person" is regarded as unduly broad and burdensome to our type of fund. My understanding is that the agreement between the SEC and the ICI, on the various so-called secondary points in the law, would take care of these particular difficulties, so that I will omit this material from my present testimony.

In closing, what I would like to emphasize is that the bill would amount to a repudiation of the basic concept of no-load funds that had existed for many years before 1940 and that Congress accepted and fostered in the 1940 act—without any showing that no-load funds have not lived up to the 1940 expectation or that the concept was invalid in any way.

In 1940 Congress did not emphasize—it deemphasized—the role of the outside director of a no-load fund, because it regarded such a fund as being essentially a vehicle for investors to obtain investment advisory services that could not practically be made available on an individual basis. Likewise, no need was seen in 1940 to emphasize any distinction between the no-load fund and the counseling firm or to subject the management fee to special judicial scrutiny. The concept was that an investor could move freely among competing no-load funds or to other sources of investment advice, depending on his own estimate of relative benefits and costs.

Today, with no showing that this concept is not as valid as ever, it is proposed to change all this. Although nominally the basic unity of fund and adviser would still be recognized, actually there would be substituted, by enlarging and emphasizing the role of the independent director, a new concept of separateness and independence between fund and adviser. But beyond this, and even more serious, there would