

Various safeguards are provided: (a) Funds are given 1 year to review their contracts and, if necessary, put their houses in order; (b) the burden of proof that the advisers fee is unreasonable is upon the person attacking the fee; (c) liability for damages is restricted to those persons receiving the compensation; and their liability is limited to any excess received beyond a reasonable fee as found by a court; (d) there is no recovery for compensation paid more than 2 years before the dates on which an action is filed.

The SEC's finding that the management and advisory costs of the externally managed funds are, as a general rule, appreciably higher than the corresponding costs of internally managed funds of comparable size is not surprising. It can be argued that there is no more reason for a mutual fund to contract out various management services than for General Motors Corp. to make contracts with various managerial groups to perform management services, sales services, and the like for fixed fees unrelated to performance or expense ratios.

Parenthetically, I think it would be a curious thing to have an ordinary business corporation operated in that fashion.

The SEC does not challenge the fund structure, however. The modest proposal contained in section 8 that judicial review of such fees as to reasonableness be spelled out is long overdue. Again, in view of the conflict of interest, it would not be unreasonable to impose upon the adviser the burden of establishing the reasonableness of the fee. This, incidentally, is a normal rule as to fiduciaries, that the burden where there is a conflict of interest is upon the fiduciary to establish the fairness and reasonableness of the transaction with the beneficiary.

However, the Commission has made the more moderate proposal of placing the burden of providing unreasonableness upon the person attacking the adviser's fee. Surely if the person can carry this burden, he should be permitted a judicial remedy against unreasonable adviser's fees.

A transfer of control of the investment adviser is related to the problem of fees. If fees are excessive, the price received by the sellers of a controlling block may represent a capitalization of the excessive profits being taken from the fund, and therefore, may be in equity an asset of the fund. The bill proposes to amend section 15(g) to meet this problem. It is made unlawful to transfer control of an investment adviser of a fund, if the terms are likely to impose additional burdens on the fund, limit its freedom of action, or be otherwise inequitable to the fund.

2. *Amendment to section 36—enjoining breach of fiduciary duties.*—Section 36 now authorizes the SEC to bring an action in the Federal court to enjoin any officer, director, investment adviser, and certain other affiliated persons from performing his respective role if such person has been guilty of gross misconduct or gross abuse of trust. The amendment would authorize an injunction against such persons engaged in actions which involve a breach of fiduciary duty to the fund. The fiduciary standard is one the courts understand; it does not carry the taint of gross misconduct or gross abuse of trust, thereby giving the court greater flexibility; and the standard is that now imposed upon broker-dealers and investment advisers under other acts