

demanding than the common law rules as they apply to fiduciaries, would impose on the plaintiff the burden of proving unreasonableness; there would be no personal liability attaching to the directors; only the adviser would be liable and then only for the portion of any fees paid within two years of the commencement of a suit found to be excessive.

10. THE INDUSTRY'S CHARGE THAT THE COMMISSION WILL BE IN A POSITION TO CONTROL ADVISORY FEES DEFIES THE PLAIN LANGUAGE OF THE BILL

The plain fact is that under the provisions of the Bill, the courts, not the Commission, would determine whether fees are reasonable. Nevertheless, it is charged that the Bill would give the Commission the power to "control" the fees.¹ Such a charge only reflects the industry's posture of seeking to avoid any kind of independent scrutiny of the reasonableness of their fees. When actions by stockholders are suggested as a means of enforcing the standard of reasonableness the industry complained that this will produce "strike suits" and a multiplicity of litigation. If Commission action is suggested as a means of avoiding shareholder litigation, it is argued that the Commission may "coerce" the advisory firms.

If the industry is satisfied, as it asserts, that the independent directors and other controls have kept fees at reasonable levels, they have nothing to fear from court review. The statutory proposal, which in a number of respects is less demanding than the common law rules as they apply to fiduciaries, would impose on the plaintiff the burden of proving unreasonableness; there would be no personal liability attaching to the directors; only the adviser would be liable and then only for the portion of any fees paid within two years of the commencement of a suit found to be excessive.

Even though the courts, not the Commission, would determine whether fees are reasonable, it is suggested that, without recourse to the courts, the Commission will blackmail the adviser by requiring it to state in a proxy statement, or a prospectus, the opinion of the Commission or that of the staff, that the fee may be unreasonable although no litigation has been commenced, or is even contemplated. This implication of misconduct on the part of the Commission is totally unwarranted. If litigation with respect to a fee has been instituted, Commission rules require disclosure of the existence of such litigation to the extent that it is material. Those rules do not—and we would not—require disclosure with respect to the opinions of anyone associated with the Commission concerning the reasonableness of a fee at any other time. It would seem to be to the advantage of the fund advisers to discuss any substantial questions which may arise with the Commission before suit is instituted. It may be assumed that the industry does not want the Commission to sue first and ask questions later, yet they turn even this opportunity into one of coercive portent. This is nonsense.

Any possibility of litigation is, of course, in a sense coercive. In that sense a minority stockholder, whether or not our proposal is enacted, could "coerce" a mutual fund management by telling them the fee was too large and if they did not reduce it, he would file suit. In other areas, under existing legislation, the Commission has the power to initiate, and in many situations has initiated, litigation designed to halt violations of law. All such actions are also, of course, coercive in a sense. The industry position on this question comes down to the argument that no agency should be empowered to enforce the law because it might "coerce" people by telling them that it thought they were violating the law and if they didn't stop, it would be forced to take action. This possibility, which is inherent in the very existence of law enforcement agencies is not an adequate basis for declining to permit enforcement of the well-established fiduciary standard of reasonableness as to investment advisory fees.

II. THE INDUSTRY HAS PRODUCED NO MEANINGFUL ALTERNATIVES

Since publication of the Commission's Report in May, 1966, both the Commission and members of Congress have repeatedly asked industry representatives to come forth with workable alternatives to the proposals that have been set forth in the Bill. It has been made clear to all that careful consideration would

¹ ICI Statement, 31.