

Mr. COHEN. We do.

Mr. STUCKEY. I assume, then, if 5 percent is considered reasonable, why not 9.3 being considered grossly excessive?

Mr. COHEN. I would like to explain that because that question is one that I have troubled myself about for many, many years. In section 27, which relates to contractual plans, the Congress fixed the maximum sales load at 9 percent. Now, I might also mention that was the first time, under the 1940 act, the Congress undertook to fix a maximum price in the Federal securities laws.

I think 22 (b) and (c) read in terms of unconscionable and grossly excessive charges, with some residual authority in the Commission.

The NASD has felt, and through the years the Commission has felt, that in the context of that statutory situation which I have explained, it would not be possible to establish that that standard of unconscionable or grossly excessive could be applied to the run-of-the-mill charge which approximated the figure which the Congress itself fixed in section 27.

Mr. STUCKEY. This is the point of our whole question; 9.3 is just about double the 5 percent which you say is reasonable, a complete doubling or close to it, which to me would constitute excessively excessive, and yet this has never been proven. The courts have ruled that it was not.

Mr. COHEN. No, sir; it has never been before the courts.

Mr. STUCKEY. I thought there were three cases.

Mr. COHEN. No, sir.

Mr. MOSS. I think that the point that the chairman was attempting to make, in saying that the fee on the front end load, the Congress set it at 9 percent, and because of that action by the Congress, it was felt that they could not sustain the burden of proving that that fee applied to the non-front-end load was excessively excessive or unreasonably unreasonable.

Mr. STUCKEY. But the point that I still maintain is that the courts themselves do have the right to determine whether it is excessively excessive.

Mr. MOSS. Dr. Jennings yesterday and Judge Friendly both pointed out the virtual impossibility of proving that. They felt it was of little value to protect the investor.

Mr. COHEN. Mr. Stuckey, there have been no cases that I am aware of where that issue has been before the courts. The cases involved management fees.

Now the only way the Commission could attack it, subject to this 22 (b) and (c) thing, as I have explained, is by bringing an action under section 36 charging these people with being guilty of a gross abuse of trust, and the Commission has felt in the context of the statutory situation that it was not authorized to bring that type of action.

Mr. STUCKEY. There have been no actions?

Mr. COHEN. There have been none; no, sir. We have initiated none.

Mr. STUCKEY. Thank you.

Mr. MOSS. Mr. Chairman, on page 5 of your statement you said, "The simplest way to deal with conflicts of interest would be to eliminate them."