

able" and that the SEC would be empowered to sue in court to enforce its position in this area. In claimed support for these two proposals the SEC points out that under the existing court decisions *advisory fees* are now judged by a "waste" standard. The SEC also claims that this is a different rule of law than normally prevails for other corporations. (Actually it is the same rule of law that applies to all corporations that have contracts approved by their shareholders.) However, apart from the legal situation with respect to "advisory fees", as to fund officers and directors, no claim is made by the SEC that a different rule of law is applicable to their compensation than is applicable to the compensation of corporate executives generally. Thus, the reason the SEC claims as justification for changing the law to have "advisory fees" judged by a different standard has no application to compensation of fund "officers and directors". (Compare Technical Statement of SEC pages 1-10). We accordingly suggest that H.R. 9510-9511 be amended at page 20, lines 2 and 4, to strike the words "officer, director" where same appear.

Many of the complaints of the SEC really constitute a criticism of the services rendered by some Fund directors. This could be remedied by good directors, but if H.R. 9510 is passed in its present form, it is our opinion that it would increase the difficulty of obtaining good directors for the Funds because the statute would encourage suits by the SEC against them over their compensation by a different rule of law than applies to corporations generally. We consider this to be an unreasonable provision. Various legal restrictions now make it difficult to get good directors. The Federal Reserve Act prohibits all bank directors from serving as directors of open end Funds. The Investment Company Act restricts the ability of Investment Bankers to serve as fund executives. (See Sec. 10(b)(3).) Many brokers and dealers are not candidates for Fund directors because they desire to sell securities to the Funds. (See Sec. 10(b)(1) of the Investment Company Act.) Thus, the area of eligible Fund directors is narrow and we hope Congress will not restrict it further by unreasonably encouraging litigation against directors and officers over their compensation.

C. Breach of fiduciary duty

Heretofore the SEC could take action against an officer, director or affiliated person of a mutual fund if he were guilty of "gross misconduct or gross abuse of trust". It is now proposed to change this standard and to authorize the SEC to take action against such persons if there is any "breach of fiduciary duty". What is a "breach of fiduciary duty?" This standard practically defies description. It is not a sufficiently definite standard upon which to base a violation of the act. "A fiduciary relationship" extends to every possible case in which there is confidence reposed on one side and resulting superiority and domination on (the) other. *Warren v. Pfeil*, 346 Ill. 344, 178 NE 894, 900.

If the practically unlimited power to intervene in what they consider "breach of fiduciary duty" cases is given the SEC, under their interpretation practically anything that a person does that they consider should not have done or should have been done differently in a corporation they would consider to be a "breach of fiduciary duty". No showing has been made that there is any substantial wrongdoing in these mutual fund companies. Hence, it is submitted, there is no reason to change the present standard. If violation occur the present act is sufficient for the purpose. In our opinion the proposed amendment to Section 36 would confer too much power based on too indefinite a standard. The proposed standard is vague and uncertain. We recommend no change in this section of the statute. If any amendment is made to this section it should be fashioned on the lines of the pattern Congress provided with respect to Banks and Savings and Loan Associations in dealing with a similar problem in the Financial Institutions Supervisory Act of 1966 (80 Stat. 1028). An amendment as follows is suggested:

"SEC. 36. The Commission is authorized to bring an action in the proper district court of the United States or United States court of any territory or other place subject to the jurisdiction of the United States, alleging that a person serving or acting as officer, director, member of an advisory board, investment adviser, or depositor, or as principal underwriter, if such registered company is an open-end company, unit investment trust company, or face-amount certificate company, has in such capacity been guilty within five years of the commencement of the action or is about to engage in any act or practice, in respect of any registered investment company for which such person so serves or acts, constituting a breach of fiduciary duty and (1) that the company has suffered or will