and the value of all benefits received by the advisor by reason of his relation to the fund ((d)(2)(D)). Much of this information is in the possession of the investment advisor, a separate corporate entity, to whose books and records a mutual fund shareholder's inspection rights do not extend under state law, although liberal discovery may somewhat ease the task.

I conclude that the bill should place the burden of proving reasonableness upon the defendants because they are in the best position to produce relevant data—far more so than the outsider seeking to obtain records and information of which he necessarily has only vague knowledge. Indeed, state corporate law has often recognized that a fiduciary is in a better posture to prove the reasonableness or fairness of his action than the challenger is to establish the contrary. Unless the burden is imposed on the defendants, I believe that the proposed law may effect only a paper change—from the restrictive state law standards currently applicable, to a theoretically generous federal standard impaired in practical effect by its pendant burden-of-proof rule.

An additional reason for placing the burden of proof on the advisor-underwriter, and affiliated persons is that they are properly viewed as fiduciaries for the fund and for its shareholders. Although some sharply contest this view, contending that the advisor bargains at arms length with the fund whose interests are protected by the unaffiliated directors, the fact is that even state law now tends to view a person or entity in control of another as having at least some responsibilities of a fiduciary character. Instances include a controlling shareholder who may or may not also be a director or officer of a corporation. But the principle is not necessarily limited to one whose control is achieved through means other than shareholdings. Thus, in the mutual fund fee cases control is exercised through the affiliated directors, coupled with the facts that the advisor is usually the fund's founder and that the contract between advisor and fund is for practical purposes not terminable either by the unaffiliated directors, the fund shareholders, or by someone seeking to stage a proxy fight and substitute another advisor.

Accordingly, I believe that the bill should place the burden of proving reasonableness on the defendants. If so, it should also make clear that this burden remains there even though the contract is approved by a majority of unaffiliated directors or by vote of the shareholders. If this is thought to be too strong, I would suggest the following alternatives: (1) The burden of proof should never shift as a result of shareholder ratification, but (2) the burden of proof could shift to the objector if, but only if, the contract is specifically approved by a majority of directors, none of whom is an "interested person" within the meaning of that term as it would be defined in proposed Section 2(a)(19) (see Section 2(3) of the Investment Company Amendments Act of 1967). As indicated later,[3] I believe that this definition should be enacted, for it is essential for protecting fund shareholders from serious conflicts of interest, not touched by existing law, that the statutory provisions go beyond the somewhat narrowly defined "affiliated person" (Section 2(a)(3) and embrace others whose interests may be at least as adverse to the fund and its shareholders as "affiliated persons." Thus, if the contract has the approval of a majority of genuinely disinterested directors—whether or not affiliated under the existing definition—it would seem appropriate to permit the burden of proof to shift to the objector.

I reiterate my main contention that any enactment should impose on the defendants the burden of proving reasonable compensation (subject to possible modifications as noted above), rather than, as in the proposed bill, requiring the objectors to demonstrate unreasonableness by a preponderance of the evidence.

II. FIDUCIARY DUTIES AND THEIR ENFORCEMENT

The Investment Company Amendment of 1967 would more effectively enforce the fiduciary duties of fund directors, advisors, underwriters, and others in position of control or significant influence. I comment on several which I think are essential.

1. Definition of "interested person"

Section 2(3) of the bill would add Section 2(a)(19) to the 1940 Act defining a new term "interested person" which would then be employed elsewhere in the Act, notably in Section 10 (relating to permitted and prohibited affiliations of

[3] *Infra*, pp. 804–806.