

would have urged reduction of compensation so that the advisor would pass on to the fund shareholders some of the economies of sale. As Chancellor Seitz stated in *Saxe v. Brady*, 40 Del. Ch. 474, 497-98, 184 A. 2d 602, 616-17 (Del. Ch. 1962), "it is not to be assumed that an independent board would wait until the fees paid under the management contract warranted a finding of waste before attempting to negotiate a better deal," for "ideally a truly independent and active board would be expected to be alert to the factors" bearing on the reasonableness of compensation. In this case, Chancellor Seitz assumed without deciding that "an independent board was not present" despite the requisite number of unaffiliated directors.

The bill's provisions would go far towards correcting these deficiencies in the original act. Section 10(a) would be revised so that no more than 60% of the board will be "interested persons." This substantially enlarges the corresponding prohibition in original 10(a) which barred a like percentage of persons who are investment advisors or "affiliated persons" of the advisor. The enlargement derives from the much broadened definition of "interested person" in Section 2(a)(19). Similarly, the prohibitions of Section 10(b) are reframed in terms of "interested" persons rather than "affiliated" persons as in the original act.

Most significant is the effect on Section 15(c) which presently requires approval of the advisory contract by "a majority of the directors who are not parties to such contract or agreement or affiliated persons of any such party" (unless ratified by the shareholders). The new provision would require approval by a majority who are neither parties to the contract nor "interested persons of any such party." It would add three additional safeguards.

First, ratification by shareholders is deleted—quite properly, I believe, because it has been a convenient northwest passage around the existing statutory requirement of approval by a majority of non-affiliated directors. Indeed, ratification even with full disclosure, is hardly any safeguard at all, because it can be so easily obtained from shareholders who have little interest in what they are being asked to vote on if, indeed, they understand what they are doing let alone its legal significance.

Secondly, the directors must vote on the advisory contract "in person at a meeting called for the purpose of voting on such approval." This insures that each disinterested director will have specific notice of the purpose of the meeting. Presence at the meeting at least insures a forum for a free exchange of views and ideas, whether or not it does in fact occur.

Thirdly, all directors would have a specific duty in this context: to "request and evaluate" information "reasonably necessary to determine the reasonableness of compensation." The advisor has a correlative statutory duty to provide such information. The first part of this provision probably only declares existing law, for directors always have a duty, when voting on compensation, to consider its reasonableness. However, the statutory declaration should bring home this duty much more sharply to all directors and stand as a continuing reminder when the common-law duty may be forgotten. After all, most corporate directors are not lawyers; a specific statutory statement is apt to be quite meaningful to them.

The definition in Section 2(a)(19) of "interested person" is more inclusive than the older term "affiliated person."

(A) It includes any "member of the immediate family" of a natural person who is himself an "affiliated person." This would cover the example, *supra*, p. 805, of the son of the founder and chief stockholder of the advisor, who under present law may be an "unaffiliated" director. (Incidentally, "member of the immediate family" is itself specifically defined at the end of Section 2(a)(9).)

(B) It includes anyone who has a direct or indirect beneficial interest in securities issued by the advisor or others as well as certain fiduciaries (such as trustee, executor or guardian) who hold such beneficial interests.

(C) It includes any person who currently or within the past three years, has "any direct or indirect material business or professional relationship" with the advisor or others. This would cover the situation described, *supra* p. 805, of the attorney for the advisor who may at present sit as an unaffiliated director of the fund.

(D) The definition makes clear that it extends to "interested persons" of an investment advisor, principal underwriter, regular broker, or investment banker and any controlling persons of such entities.