

trasts with the existence of (1) no-load funds which, while relatively small in relation to the load funds, are nonetheless substantial investment companies, and with (2) the closed-end funds on which sales charges are normal stock exchange commissions. Like stock exchange commissions, the much higher mutual fund sales load is not subject to competitive forces working in favor of the customer seeking a lower commission; but it stands at a rigid and fixed level protected against downward competitive pressures by the resale price maintenance provisions of the Investment Company Act.⁹ The sales load itself is also supplemented indirectly by the mutual funds, either in the form of give-ups to brokers vigorously promoting sales of a fund's shares, or indirectly by the fact that the fund itself prepares much of the sales literature.

I believe that, in view of these factors, the mutual fund load is excessive. This is, I submit, especially true in light of the great (and, on the whole, deserved) increase in the size of the funds since 1940, whose economies of scale should operate both to reduce the sales load and the investment advisory fee.

2. *Objections to the Proposed 5% Maximum.*—Before considering the specific industry objections, I stress that the 5% figure is not a rigid ceiling. The bill would specifically empower the SEC, by rule or order, to exempt persons, securities or transactions from the 5% figure. The relevant and familiar standard is whether the requested exemption is "necessary or appropriate in the public interest and consistent with the protection of investors and the purposes" of the Act. Where the SEC has administered the Act in other areas, it has employed its exemptive powers in a fair and just manner so as to achieve the test's objectives of serving the public interests and protecting investors. Accordingly, the exemptive power given here should carry persuasive weight in establishing a fixed ceiling.

(a) It is suggested that 5% is an arbitrary, indeed capricious, figure without foundation in economic studies. It is apparently true that the SEC Study has not reported specific economic data for choosing 5% rather than some lower or higher figure. It would seem, however, entirely fair to adopt a percentage figure lying roughly halfway between the aggregate 2% commission for stock exchange commissions and the existing 9.3% sales charge (8.5% load). It seems no more objectionable than the NASD's declaration of a 5% ceiling (subject to exceptions) for charges on transactions in over-the-counter stocks. For reasons later indicated, I doubt that a comprehensive study of all economic factors and impacts would enable the Congress to come up with a more exact percentage figure, in view of the many variables. Coupled with the exemptive power, the 5% figure seems appropriate. Its fairness is indicated by the fact that many funds have been able to exist and serve their shareholders without exacting any sales load at all.

(b) It has been suggested that the SEC would enter the area of ratemaking for the first time by having power to administer a 5% ceiling, and that this converts the investment company industry into a public utility. The fact is that Congress in 1940 decided to treat investment companies as a type of public utility when it established the comprehensive regulation of the 1940 Act. Although "rate making" did not figure prominently, Section 27(a) of the 1940 Act did indeed confine sales loads to a 9% maximum and also limited initial sales loads in connection with front-end load (contractual) plans. The issue is not whether investment companies shall become public utilities—for they are that already—but whether a certain type of regulation of sales charges is appropriate.

(c) It is contended in industry sources that cutting the sales load to 5% from existing levels will drastically reduce the profitability of many broker-dealers, especially small firms. I put to one side the tendency of virtually any industry confronted with possible regulation to claim that irreparable economic injury will result, and especially the disposition to play upon sympathies for "small business". Turning to the merits, the chief contentions are based upon a study by Booz-Allen Applied Research, Inc., for NASD, indicating that a large number of firms would have fallen into a net loss position if the 5% figure had been in effect during 1966. I believe that this type of speculative conclusion should not carry the weight which the industry would urge:

(A) The study evidently assumed that there would be no changes at all in methods of operation, number of personnel, etc.; but merely applied the 5%

⁹ Investment Company Act of 1940, § 22(d).