approved in which one of the directors may have had an interest, corporate enterprise would be severely hobbled.

3. APPROVAL BY STOCKHOLDERS

Stockholder ratification of a transaction, assuming adequate disclosure of the relevant facts, does not essentially change the situation from that described in paragraph 2 above where an independent board has approved a transaction. Where there is no independent board, stockholder ratification is considered to have the same general effect as the approval of an independent board. *Kaufman* v. *Shoenberg*, 33 Del. Ch. 211, 91 A.2d 786 (Ch. Ct. 1952). The basic theory of corporate government is even clearer here. If the majority of the shareholders are in favor of a particular corporate transaction, the minority are bound by this decision of the majority. That is always the position of a dissenting minority shareholder in a corporate enterprise unless the state corporate law provides a right to receive fair value for his stock by appraisal as in the case of mergers or sale of assets. (A right which open-end shareholders have automatically at all times.) However, his property rights as a stockholder are such that, if there is a transaction amounting to a "waste" of the corporate property, this can be said to be something he did not bargain for and is not within the power of either a board of independent directors or a majority of the stockholders to approve. As in the case of approval by independent directors, the underlying principles of corporate enterprise and corporate government require the complaining minority shareholder to show that the arrangement was so excessive that it improperly deprived him of a property right as a stockholder in the corporation.

The standard applied is described by the courts in varying words such as "excessive", "waste", etc. These terms standing alone do not reveal the true nature of the judicial inquiry and protection offered to dissenting shareholders. A determination of "waste" or "excessive" does not involve the court's subjective judgment of what it would consider fair or reasonable compensation for the specific services rendered; that difficult decision is properly vested in the business judgment of corporate management or in the stockholders if the matter is submitted to them. The test is whether as a matter of law the compensation exceeds the range of reasonable business judgment, or, as stated in *Saxe* v. *Brady*, "whether the cost . . . of obtaining advisory services bears some reasonable relation to the value of the services rendered." 40 Del. Ch. 474, 492, 184 A.2d 602, 613 (Ch.Ct. 1962). See also *Rogers* v. *Hill*, 289 U.S. 582, 591–92 (1933); *Heller* v. *Boylan*, 29 N.Y.S.2d 653, 668 (Sup.Ct. 1941), *aff'd*, 263 App. Div. 815, 32 N.Y.S. 2d 131 (1941); *Kerbs* v. *California Eastern Airways, Inc.*, 33 Del. Ch. 69, 74, 90 A.2d 652, 656 (Sup.Ct. 1952). This is an inquiry that the courts are qualified to make and offers shareholders of mutual funds the protection enjoyed by all stockholders under the general corporate law.

GASTON, SNOW MOTLEY & HOLT.
SULLIVAN & CROMWELL.

EXHIBIT TO ANSWER TO QUESTION NO. 10

SECTION 22(D) OF THE INVESTMENT COMPANY ACT OF 1940

During the course of the hearings on H.R. 9510 and 9511 a few witnesses commented on Section 22(d) of the Investment Company Act, and some members of the Committee appeared interested in the purpose of this statutory provision.

Section 22(d) permits retail price maintenance in the mutual fund industry. In this sense it is not unlike the fair trade laws which exist in a number of states. Under such laws a manufacturer is permitted to fix the retail price of his product and has recourse to the courts should a dealer engage in price-cutting. However, 22(d) is even more closely analogous to the provisions of the laws of all 50 states which prevent fee splitting by prohibiting rebates of insurance commissions. The effect of these laws is that the sales commissions of particular companies are not subject to price-cutting and to discrimination between customers. As stated below, the necessity for Section 22(d) in the mutual fund industry goes further than in the case of insurance companies.

At the outset it should be made clear that Section 22(d) does not require that all funds charge the same sales price, and as pointed out during the hearings, sales charges range from "no-load" funds to those charging a maximum of about 8½%. It should also be noted that the SEC has had regulatory experience