It would be necessary to develop a type of regulation which would not violate accepted principles of freedom of the press.

Only a few States now provide for the regulation of investment counselors. Furthermore, the experience of these States is of limited value as a guide to Illinois in devising means of regulation. This is due to the short time during which such legislation has been in effect, and to the general absence even in most of these States of attempts at comprehensive regulation.

APPENDIX

Statutes relating to investment counselors [1]

State (and citation)	Do statutes specifically provide for regulation?	Nature of regulation (or comment)
Alabama	No	
Arizona	No	
Arkansas	No	
California (Gen. Laws (1931), Act 3814, sec. 9.)	Yes	Every person or firm, other than a broker [or attorney] acting as an investment counsel must secure a State certificate. Application must give facts showing good business repute of principal officers and agents and show they possess experience and education qualifying them to act; also the general plan of conducting business. Certificates issued if of good business repute and qualified, if they have not violated certain laws, and are not about to engage in fraudulent transactions. License may be suspended or revoked.
Colorado	No	
Connecticut (1937 Supp. to Gen. Stat., ch. 212, sec. 747d).	Yes	Extensive statutory provisions. Require those who engage in business of advising others concerning investments to register, whether advice is given directly, by mail, or through publications, if advice relates to specific securities and is given for a consideration. Excepted from regulation are banks, savings and loan associations, trust companies, and persons registered in State as "brokers." Information is required concerning form of organization, principal officers, their business record and experience, nature and method of conducting business, any convictions of criminal offenses, and any past denials or suspensions of licenses relating to securities. Licenses may not be issued within 5 years after conviction of a criminal offense, etc., and may be refused if reason to believe necessary in order to protect public against fraud. Licenses may be withdrawn for false statements in registration, dishonesty, giving fraudulent advice, etc. Annual registration fees of $50 and $3 for agent, plus costs of any investigation. (NOTE.—Investment counselors and their agents appear to be subject to same type of regulation as are brokers and their agents; same forms are used and same fees charged. In addition detailed information regarding nature of business is required, including copies of all agreements with clients and copies of recent circulars or publications. Act applies only to counselors acting within or from State.)
Delaware	No	
Florida	No	
Georgia	No	
Idaho	No	
Illinois	No	
Indiana	No	
Iowa (letter from State valuation counsel).	No	But if counselors attempt to sell or dispose of securities, there is a disposition by administrative authorities to attempt regulation as a dealer or salesman of securities.
Kansas	No	
Kentucky	No	
Louisiana	No	
Maine	No	
Maryland	No	
Massachusetts (letter from director of State securities division).	No	But some discussion of regulation in State and some effort by administrative officers to regulate counselors as brokers.
Michigan (Public acts of 1935, No. 37, p. 58 (sec. 9789 of Comp. Laws); letter from one member of corporation and securities commission).	Yes	Any person who for a consideration acts as a counselor and advises the purchase or sale of securities must first obtain registration as a dealer in securities (fee of $100 annually). (NOTE.—One of the commissioners in charge of regulation writes that he favors licensing and examination of counselors as such, and not as dealers.)
Minnesota (letter from State commissioner of securities).	No	But the securities division, at the last session of the legislature, attempted to have a law passed giving division same regulatory powers with resepct to investment counselors as exist concerning brokers and security dealers.

[1] Data obtained through a search of the statutes and by means of questionnaires.

Statutes relating to investment counselors—Continued

State (and citation)	Do statutes specifically provide for regulation?	Nature of regulation or comment)
Mississippi	No	
Missouri (letter from commissioner of securities).	No	But State securities division has taken the position that investment counselors should register as dealers in securities, since in advising clients they are believed to act in some manner within the scope of the statutory definition of dealer. It is not known whether the courts would sustain this position.
Montana	No	
Nebraska	No	
Nevada	No	
New Hampshire (Public Laws, ch. 284, sec. 2; also letter from State insurance examiner.	Yes	Law treats sellers of contracts of services or advice relating to investments, or sellers of memberships in organizations purporting to render such services or advice, as dealers in securities. Must be licensed as dealer whether services are offered by letter, circular or advertising (annual license of $25 for counselor and $10 for agents). Application held 4 weeks for investigation, and issued only if person or firm deemed of good repute, financial standing, reliability and possessed of right to public confidence. Various data may be required, including copies of circulars or advertisements. State may disapprove in advance any advertising, offering or selling if they do not disclose pertinent facts or if there is serious financial danger to purchaser. License may be revoked for dishonest, deceitful or fraudulent conduct. Banks and trust companies are excepted from act.
New Jersey	No	
New Mexico	No	
New York	No	
North Carolina	No	
North Dakota	No	
Ohio	No	
Oklahoma (Okla. Stat. (1931), sec. 4907 as amended by laws of 1933, p. 265; also letter from assistant bank examiner).	Yes	Investment counselors must be registered as dealers in securities and are subject to same regulations (fee of $25 for principal and $5 for salesmen, but maximum of $500 for any firm). Applies whether advice is given directly or by publications or writings. License issued if of good repute. Bond of $5,000 required. Law excepts attorneys who perform such services in connection with practice of law and certified public accountants who make analyses or issue reports concerning securities.
Oregon	No	
Pennsylvania	No	
Rhode Island (Gen. Laws) (1928), ch. 121, sec. 1; also letter from securities commissioner.	Yes	Registration as broker (agents as salesmen) is required of every person who, for any consideration, acts as an investment counselor and advises the purchase and sale of securities (annual fee of $25 for broker and $2 for salesmen). Must be of good character. (NOTE.—Effect is requirement of periodic financial statements to determine standing and responsibility.)
South Carolina	No	
South Dakota	No	
Tennessee	No	
Texas (letter from securities commissioner).	No	State securities commissioner writes that opinion of his department is that some regulation is needed to prevent counselors from also acting as dealers in securities in order to assure unbiased advice.
Utah	No	
Vermont	No	
Virginia	No	
Washington	No	
West Virginia	No	
Wisconsin	No	
Wyoming	No	

Mr. SCHENKER. Senator, we promised that we would submit a memorandum on the constitutionality of section 18 (d) of the investment company bill. We should like to submit that memorandum at the present time. We may want to supplement it.

Senator HUGHES (presiding). Very well; it will be admitted.

(Memorandum entitled "Constitutionality of Section 18 (d) of the Investment Company Bill" is as follows:)

MEMORANDUM

APRIL 25, 1940.

To: The Securities and Exchange Commission.
From: The General Counsel.
Re: Constitutionality of section 18 (d) of the investment company bill.

"After 2 years from the effective date of this title, the Commission shall, upon application by the holder of any outstanding security of a registered management investment company, and may upon its own motion, require by order that such company, and every other registered investment company in the same investment company system, take such steps as are necessary or appropriate to effect an equitable redistribution of voting rights and privileges among the holders of the outstanding securities of such company or companies" (Section 18 (d)).

The power of Congress to achieve this end by the means employed is clear.

I

The provision is within the power of Congress to regulate interstate commerce.

The investment industry in almost every phase of its activities uses the mails and interstate commerce. The form of organization and the nature of the business of an investment company is such that it cannot help being engaged in interstate commerce. National securities exchanges, over-the-counter markets, and the mails are employed in accumulating trading in and disposal of portfolio securities and in the distribution of securities of the investment company itself. Investors scattered over the face of the country purchase these securities and are affected by fluctuations in their value. The investment practices of such companies direct the flow of capital supply to industries engaged in interstate commerce, over interstate channels; and by their accumulations of portfolios investment companies may dominate the policies of interstate businesses. The industry is well within the scope of the power of Congress to regulate by the exercise of its plenary control over interstate commerce (*South Carolina* v. *Georgia*, 93 U. S. 410). And, in the exercise of that power Congress may implement, by any reasonable regulatory device, its policy to protect the welfare of the public (*Hamilton* v. *Kentucky Distilleries and Warehouse Co.*, 251 U. S. 146, 156, and investors, *Electric Bond and Share Co.* v. *S. E. C.*, 303 U. S. 419). Congress has already exercised its power to procure an equitable redistribution of voting power in an industry subject to its plenary control over interstate commerce (section 11 (b) (2) Public Utility Holding Company Act of 1935).

The activities of investment companies have a direct and profound effect on interstate commerce; and the manipulations of insiders in investment companies which result in loss to investors are, at the same time, a direct and heavy burden on commerce. They result in a toll upon the flow of capital from savings into industry. Congress may remove this burden by removing the insulation which surrounds insiders. No more direct and reasonable device for this purpose can be provided for, than the device of ordering, where necessary, equitable redistribution of voting control.

The inequitable distribution of voting rights tends to spread loss and harm among investors and to industry. Such being its tendency it is subject to regulation by Congress, under its power to regulate interstate commerce (*Brooks* v. *U. S.*, 267 U. S. 432). Although the inequitable distribution of voting rights may not in itself involve interstate commerce, if, as is the case, the maintenance of such inequitable distribution affects, or burdens interstate commerce, Congress has undoubted power to order a redistribution (*Northern Securities Co.* v. *United States*, 193 U. S. 197; *Minnesota Rate Cases*, 230 U. S. 352; *United States* v. *Ferger*, 250 U. S. 199; *New York* v. *United States*, 267 U. S. 591; *Colorado* v. *United States*, 292 U. S. 522; *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1; *Santa Cruz Fruit Packing Co.* v. *N. L. R. B.*, 82 L. Ed. 653).

There is no doubt that Congress, by virtue of its power to regulate interstate commerce, could require the compulsory incorporation under Federal law of companies desiring to engage in that commerce.[1] In fact Congress has, in

[1] Watkins, "Federal Incorporation" (17 Mich. L. R. 64, 145, 238); Morawetz, "The Power of Congress to Enact Federal Incorporation Laws and to Regulate Corporations" (26 Harv. L. R. 667); Kellogg, "Federal Incorporations and Control" (20 Yale L. J. 177); Wickersham, "State Control of Foreign Corporations" (19 Yale L. J. 1). The proposals for Federal incorporations and businesses engaged in interstate commerce have been very frequent. For an excellent historical revue of the proposal, see Department of Justice file 146108–163.

the exercise of its fiscal power, and in the exercise of its power to regulate interstate commerce, employed the device of Federal incorporation (*McCulloch* v. *Maryland*, 4 Wheat. 315; *Pacific R. R. Removal cases*, 115 U. S. 1).

In a Federal incorporation law Congress might prescribe the various incidents of voting privileges to be attached to the various classes of shares. In such legislation it might specially provide that all stockholders shall have equal or proportionate voting rights.[2] Congress may, in the exercise of its lesser power, without resorting to Federal incorporation, condition the use of the mails or the channels of interstate commerce with requirements addressed to removing burdens from, and fostering that commerce, by requiring an equitable redistribution of voting power (*Tagg Brothers & Morehead* v. *United States*, 280 U. S. 420; *Stafford* v. *Wallace*, 288 U. S. 496; *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1; *United States* v. *Joint Traffic Association*, 171 U. S. 505).

The doctrine is clear that in the exercise of this power activities may be regulated which do not, of themselves, involve interstate commerce (*Houston, E. & W. T. R. Co.* v. *United States* (Shreveport case), 234 U. S. 342; *Bedford Cut Stone Co.* v. *Stonecutter's Association*, 274 U. S. 37).

II

The requirement that registered companies take steps to redistribute equitably voting rights does not violate the "due process" clause of the Fifth Amendment.

Congress, in its regulation of the affairs of businesses engaged in, and affecting interstate commerce, may penetrate deeply into their affairs and arrangements and make profound changes therein. As set forth, the provision relates merely to the redistribution of voting power. It does not affect the extent of the shareholder's claim on corporate assets. Yet Congress has the power, in effecting a valid purpose, to order a complete redistribution of the material rights of corporate securities, or to order a complete cessation in the conduct of a business.[3] In *Radio Commission* v. *Nelson Bros. Co.* (289 U. S. 266), the Supreme Court held that Congress may delegate authority to delete radio stations as part of a scheme of Federal control over the communications industry. The court said:

"This broad authority (to grant or revoke licenses) plainly extended to the deletion of existing stations if that course was found to be necessary to produce an equitable result * * * that the Congress had the power to give this authority to delete stations, in view of the limited radio facilities available and the confusion that would result in interferences is not open to question. *Those who operated broadcasting stations had no right superior to the exercise of this power of regulation. They necessarily made their investments and their contracts in the light of, and subject to, this paramount authority. This court has had frequent occasion to observe that the power of Congress in the regulation of interstate commerce is not fettered by the necessity of maintaining existing arrangements which would conflict with the execution of its policy* * *." [Citing cases.]

In the exercise of its power over interstate commerce Congress may require, under the antitrust laws the dissolution of State-formed corporations, and may prevent the voting of securities when held contrary to an expressed legislative policy without violating "due process" (*Northern Securities Co.* v. *U. S.*, 193 U. S. 197; *U. S.* v. *Standard Oil Co.*, 221 U. S. 1; *U. S.* v. *American Tobacco Co.*, 221 U. S. 106; *U. S.* v. *Union Pacific R. Co.*, 226 U. S. 61; *Continental Insurance Co.* v. *U. S.*, 259 U. S. 156).

Voting rights in corporations are not "vested rights."[4] Although the granting of equal voting rights to all outstanding security holders will deprive the holders of "insiders" shares of their exclusive control, no "vested right" will be taken away. The centralization of control in small minorities has been used

[2] Proposals for the mere licensing of corporations desiring to engage in interstate commerce have made provisions for equal voting rights. See, for example, the Borah-O'Mahoney Federal licensing bill introduced into the Senate of the United States in the 76th Cong., 1st sess. (S. 330), sec. 5g.

[3] See *Continental Insurance Co.* v. *U. S.* (259 U. S. 156), where a decree to enforce compliance with the Sherman and Hepburn Acts compelled bond holders to exchange obligations constituting claims against one large group of assets for separate claims against individual parts of such assets. The court said: *"The power of the court under the Sherman antitrust law to disregard the letter and legal effect of the bonds and general mortgage under the circumstances of this case in order to achieve the purpose of the law we cannot question."*

[4] *Morris* v. *American Public Utilities Co.* (14 Del. ch. 136, 122 Atl. 696). See also *In re Sharood Shoe Corporation* (192 F. 945).

for the purpose of manipulation and overreaching. No one has a "vested right" in the perpetration of a scheme of distribution of voting privileges which permits such practices, and the deprivation of such a "right" is not subject to attack.[5]

If Congress finds that the inequitable distribution of voting privileges is an evil requiring correction, its findings will not be disturbed (*Norman* v. *Baltimore and Ohio R. R.*, 294 U. S. 240, 311). If the regulations enacted are reasonably addressed to the correction of the evils, they will not violate the "due process" clause of the fifth amendment.

"The fifth amendment in the field of Federal activity, and the fourteenth as respects State action, do not prevent governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process, and *the guarantee of due process as has often been held demands only that the law shall not be unreasonable, arbitrary, or capricious and that the means selected shall have a real and substantial relation to the object sought to be attained*" (*Nebbia* v. *New York*, 291 U. S. 502, 525).

There can be no more reasonable provision for the correction of inequities in the distribution of voting power than a requirement that a redistribution shall take place.

United States v. *Lowden* (Supreme Court, October 1939) reaffirms the doctrine (questioned in *Railroad Retirement Board* v. *Alton Railroad Co.*, 295 U. S. 330) that Congress has broad discretion, as against the claim that "due process" has been violated, to determine whether particular types of regulation will promote the efficiency of businesses in interstate commerce.

The Court in that case, in upholding a condition, fixed by the I. C. C. to its grant of authority to a railroad to acquire lease control of another road, that the acquiring road provide for those employees who would lose their jobs, status, or homes as a result of the merger, said:

"It is said that the statute, as we have construed it, is unconstitutional because not within congressional power to regulate interstate commerce, and is a denial of due process. It is true that in *Railroad Retirement Board* v. *Alton Railroad Co.* (295 U. S. 330), in declaring the Railroad Retirement Act of June 27, 1934 (48 Stat. 1283), not to be a valid regulation of interstate commerce, it was said, among other reasons advanced to support that conclusion, that a compulsory retirement system for railroad employees can have no relation to the promotion of efficiency, economy, or safety of railroad operation. But notwithstanding what was said there, and *even if we were doubtful whether the particular provisions made here for the protection of employees could have the effect which we have indicated upon railroad consolidation, and upon the adequacy and efficiency of the railroad transportation system, we could not say that the congressional judgment that those conditions have a relation to the public interest as defined by the statute is without rational basis.*" [Italics added.]

It is impossible to contend that "the congressional judgment" that there is need for an equitable redistribution of voting rights in investment companies, to insure against the immunized and insulated depredations of insiders, and to free the securities markets, nation-scattered investors and industry of the burden of losses caused thereby is "without rational basis."

III

The provision requiring the equitable distribution of voting rights upon order of the Commission does not constitute an unconstitutional delegation of legislative power.

Any doubt as to the validity of the procision as an "unconstitutional delegation of legislative power" to the Commission must stem from a doubt that the phrase "equitable distribution of voting rights" poses a sufficient standard for administrative action (*Hampton, Jr. & Co.* v. *United States*, 276 U. S. 394). The meaning of invalid delegation has been distilled into the proposition.

"That Congress must first promulgate the primary policy is * * * what the court has meant when denying the right to delegate powers which are 'strictly' legislative * * *" (Comment, 31 Mich. L. R. 786, 789).

[5] Cf. cases arising under the "due process" clause of the fourteenth amendment which permit the States to exercise the equivalent power to discontinue the conduct of pernicious activities (New York ex rel. *Lieberman* v. *Van de Carr*, 199 U. S. 552).

The contention that administrative whim is given rein under the expressed standard is not well founded. If it is true, then reorganization courts have been exercising judicial tyranny for generations, and section 221 of the National Bankruptcy Act, as amended, vests in the courts the power to exercise that tyranny. Corporate history has forged a series of standards which must inevitably govern determinations under this section. These are clear, and well understood, and from them the concept of "equitable distribution of voting rights" gains weight and meaning.

The court has recognized vast powers in Congress to vest quasi-legislative and quasi-judicial functions in nonlegislative and nonjudicial agencies. The capacity of administrative bodies vested with rule-making and adjudicative powers to cope with the increasingly complex problems of our economy has been made possible by the exercise of these powers. Standards set to govern administrative action as broad as "just" suspensions of free importation (*Field* v. *Clark*, 143 U. S. 649, as broad as "public interest"; *New York Central Securities Co.* v. *U. S.*, 287 U. S. 12; *U. S.* v. *Lowden* (U. S. Supreme Court, October term, 1939); "as public convenience, interest or necessity required," *Radio Commission v. Nelson Bros.*, 289 U. S. 266; "reasonable rates," "discrimination," "convenience and necessity," *Intermountain Rate Cases*, 234 U. S. 476, 486; *Railroad Commission* v. *So. Pac. Co.*, 264 U. S. 331, 343, 344; *Avent* v. *U. S.*, 266 U. S. 127, 130; *Colorado* v. *U. S.*, 271 U. S. 153, 163; *C. & O. Ry. Co.* v. *U. S.*, 283 U. S. 35, 42), have been upheld.)

An administrative agency is frequently given power to determine within the terms of more or less specific standards, whether individual action, in individual cases meets those standards. See *New York Central Securities Co.* v. *U. S.* (287 U. S. 12), where the court, sustaining an order of the Interstate Commerce Commission, authorizing the New York Central Railroad to acquire lease control of certain roads, expressly recognized that "* * * the question whether the acquisition of control * * * will aid in * * * securing more efficient transportation service is thus committed to the judgment of the administrative agency upon the facts developed in the particular case." Thus the court will recognize the propriety of the congressional judgment that the Commission proceed to enforce the provision by order in the individual case, adapting its requirements as the individual case requires.

The "hot oil" cases (*Panama Refining Co.* v. *Ryan* 293 U. S. 388), and the N. R. A. case (*Schechter Poultry Corp.* v. *United States*, 295 U. S. 495), are not authority against the provision in question since it cannot be said that the power to determine when a distribution of voting rights is equitable is the power to make an "arbitrary prescription" of legislation. The holding in these cases must also be read in terms of later decisions. (See *N. L. R. B.* v. *Fainblatt*, 306 U. S. 601; *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 188.)

The judicial history of the delegation concept has been one of liberality. The court has been willing to read standards into delegative legislation where none has been expressly set out. In a consideration of section 4 of the "Act to Regulate Commerce" (24 Stat. 380, c. 104) which permitted the Interstate Commerce Commission to impose higher rates for the short than the long haul, and in which no standards were stated, the court, in preserving the delegation, implied that rates were to be keyed to permit the roads to meet competition (*Intermountain Rate Cases*, 234 U. S. 47).

The evils at which this bill is aimed have been carefully studied and set forth by the Commission. The Commission's reports and the hearings before the committee are matters of public record. In this framework the standard of "equitable distribution" of voting privileges has a distinct meaning and perspective. The court will read the standard in its setting.

"In *New York Central Securities Co.* v. *C. C. C. & St. L. Ry. Co.* (287 U. S. 12), we pointed out that the phrase 'public interest' in this section does not refer generally to matters of public concern apart from the public interest in the maintenance of an adequate rail transportation system; that it is used in a more restricted sense defined by reference to the purpose of the Transportation Act of 1920, of which the section is a part and which, as had been recognized in earlier opinions of this court, sought through the exercise of the new authority given to the Commission to secure a more adequate and efficient transportation system." See *New England Divisions case* (261 U. S. 184); *Dayton-Goose Creek Ry.* v. *United States* (263 U. S. 456); *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.* (270 U. S. 266, 267). *"Thus restricted, the term 'public interest' as used in the statute, is not a mere general reference to public welfare, but as shown by the context and purpose of the act,*

has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities." Texas v. *United States* (292 U. S. 522, 531). (Italics added.) *U. S.* v. *Lowden* (U. S. Supreme Court, October term, 1939).

Mr. SCHENKER. We also have a short memorandum, which we may want to supplement, on the constitutionality of the regulation of investment advisers.

Senator HUGHES (presiding). Very well; that will be admitted.

(Memorandum entitled "Federal power to regulate investment advisers" is as follows:)

MEMORANDUM

To: The Securities and Exchange Commission.
From: The General Counsel.
Re Federal power to regulate investment advisers (S. 3580, title II).

Title II of the bill is addressed to the regulation of investment advisers.

An investment adviser is defined as a person who, "for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investment in, purchasing, or selling securities." Persons who, as part of a regular business, issue securities analyses or reports are included. The definition expressly excludes banks, lawyers, accountants, or engineers who perform such services merely as an incident to the practice of their professions. Publishers of bona fide newspapers or magazines are also excluded from the definition. The Commission may exempt such other persons as are not within the intent of the definition (title I, sec. 45 (a) (16), incorporated in title II by sec. 203).

Every prohibition of the title is made to depend on actual use of the mails or facilities of interstate commerce.

Investment advisers are prohibited from using the mails or interstate commerce in connection with their business unless they register with the Commission. However, an adviser whose clients are all residents of the State in which he has his principal office and is doing business, and who renders no service as to securities trade on national exchanges, or in over-the-counter markets out of the State in which he is doing business, need not register.

An adviser may be denied registration, or his registration may be revoked or suspended, if he has within 10 years of the issuance of the order been convicted of a crime involving securities transactions, investment advice, underwriting, securities brokerage or dealing, or in connection with his employment or affiliation with an investment company, bank, or insurance company; or if he is under injunction against engaging in specified activities involving substantially the same matters; or has omitted to state in his application the facts required to be stated; or has willfully made untrue statements or material omissions therein.

The bill provides further that registered investment advisers may not use the mails or means or instrumentalities of interstate commerce—

(*a*) To make contracts containing provisions for compensation based on a share of the capital gain on, or capital appreciation of the client's funds, or permitting assignment of the contract by the adviser;

(*b*) To employ any device, scheme, etc., to defraud a client or prospective client or engage in any transaction, practice, or course of business which defrauds, or would operate to defraud a client, or prospective client;

(*c*) Knowingly to buy or sell to or from a customer any security unless the adviser is a member of a Maloney Act association;[1] or

(*d*) If he is a member of such an association to effect any such transaction unless he discloses at or before the completion thereof the capacity in which he has acted.

I. *It is regulation of interstate commerce.*

The activities of investment advisers are within the power of Congress to regulate interstate commerce. The investment advisers' business involves, habitually uses the facilities of, and profoundly affects, interstate commerce.

The bill sets forth, as legislative findings (which will be given great weight by the courts in a consideration of the validity of the regulation (*Borden Farm*

[1] See sec. 15A of the Securities Exchange Act of 1934, as amended.

Products Company v. *Ten Eyck*, 297 U. S. 251; *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1; see *Norman* v. *Baltimore & Ohio R. R. Co.*, 294 U. S. 240, 311; *Electric Bond and Share Co.* v. *S. E. C.*, 303 U. S. 419)) that the usual course of business of investment advisers is carried on by the use of the mails and facilities of interstate commerce; that their advice customarily relates to securities, traded nationally over exchanges and other securities markets, of issuers engaged in interstate commerce; that their advice affects the policies of large financial institutions engaged in banking and interstate business; and that the volume of transactions affected by their advice is so large as to have a vital effect on the national economy (sec. 201).

The report of the Securities and Exchange Commission on Investment Advisers (H. Doc. 477, 76th Cong.) supports these findings.

Investment advisers commonly make use of facilities of interstate commerce and of the mails in the course of business. One class of adviser relies primarily on the use of publications and bulletins for the dissemination of investment advice to clients (report, pp. 20, 21). The other class, though furnishing personalized service, frequently renders advisory opinions through the use of the mails for ultimate action by the client. Such advisers customarily prepare and distribute to their clients as well as to nonclients, financial bulletins, economic surveys, and monographs (report, p. 21). Solicitation of new clients is commonly effected through the use of the mails, by brochures and other advertisements describing the nature of the services offered and their advantages (report, p. 19). The fact that at present 33 investment adviser firms maintain a total of 86 branch offices indicates the extent to which these firms necessarily make use of the facilities of interstate commerce (report, p. 7).

Regulation of the foregoing activities is clearly within the legislative powers granted the Congress by the commerce clause of the Constitution. The dissemination of information across State lines is interstate commerce (*Western Union Tel. Co.* v. *Foster*, 247 U. S. 105; *International Text Book Co.* v. *Pigg*, 217 U. S. 103; *International Text Book Co.* v. *Peterson*, 218 U. S. 664); and the scope of the power of Congress to regulate interstate commerce extends to the business of supplying information or services through the mails or facilities of interstate commerce to persons in other States. *Associated Press* v. *N. L. R. B.* (301 U. S. 103). The Grain Futures Act, section 6, prohibits, save under certain conditions, the transmission of price quotations relating to futures. Although the Supreme Court, in *Chicago Board of Trade* v. *Olsen* (262 U. S. 1) found no occasion to discuss this particular point, it upheld the Grain Futures Act as a whole (262 U. S. at 42).

II. IT IS REGULATION OF ACTIVITIES AFFECTING INTERSTATE COMMERCE

Even if the investment advisers did not, in the course of their activities, make use of the instrumentalities of interstate commerce, they would still be a proper subject of Federal regulation. One cannot engage in conduct which profoundly and directly affects interstate commerce, and escape the regulatory power of Congress over that commerce (*Northern Securities Co.* v. *United States*, 193 U. S. 197; *Minnesota Rate Cases*, 230 U. S. 352; *United States* v. *Ferger*, 250 U. S. 199; *New York* v. *United States*, 267 U. S. 591; *Colorado* v. *United States*, 292 U. S. 522; *N. L. R. B.* v. *Jones Laughlin Steel Corp.*, 301 U. S. 1; *Santa Cruz Fruit Packing Co.* v. *N. L. R. B.*, 82 L. Ed. 653). That the business of investment advisers does have a profound effect on interstate commerce and the national economy is demonstrated, it is believed, by the Commission's Report.

The amount of funds supervised by investment counsel firms actually exceeds the amount managed by investment companies. Only 51 investment advisers (out of a total of 394 considered in the Commission's study) supplied the Commission with information of the amount of funds they supervised. These 51 firms supervised funds in excess of $3,900,000,000 (report, p. 8). Approximately one-third of this amount represents funds of investment companies, banks, and insurance companies largely invested in securities for which national markets exist.

The giving of investment advice does determine in actual practice the direction in which the vast amount of capital subject to the advice of investment advisers will flow in the channels of the national economy. It is not uncommon for investment advisers to accept and recommend to clients that they be vested with discretionary powers over their accounts (report, pp. 13, 14). Such powers imply the

making of the ultimate determination with respect to the sale and purchase of securities for the client's portfolio. In an appreciable number of cases investment advisers are brokers and/or dealers in securities, and as such they not merely order the execution of purchases and sales for their clients' accounts, but themselves execute the orders on national securities exchanges or over-the-counter markets (report, p. 11).

Even in the cases where an investment adviser has only advisory accounts for his clients, it may be assumed that the clients customarily follow the advice of the adviser. It is obvious that the adviser-client relationship will continue only so long as the client, in the great majority of instances, is satisfied with and follows the investment advice he receives. That this is implicit in the adviser-client relationship is apparent from the testimony of the investment advisers who have appeared before the committee It is clear, therefore, that even these investment advisers directly cause the execution of securities transactions on national securities exchanges and over-the-counter markets.

Through their control over the purchase and sale of substantial amounts of securities, investment advisers may shift investments from one industry to another, thus affecting the capital supply that businesses engaged in interstate commerce may command (report, p. 27). The large supply of funds under their supervision may serve to stabilize market in securities (ibid.). Moreover, the forced liquidation which ordinarily follows adverse market conditions may strike overweighted accounts simultaneously, resulting in an intensification of the downward movement of securities prices.

III. IT IS REGULATION OF THE MAILS

The regulatory provisions of title II depend on the use of the mails as well as of instrumentalities of interstate commerce. The power of Congress over the mails is of a proprietary nature. Congress may therefore exclude from the mails matter which it deems objectionable (*Ex parte Jackson*, 96 U. S. 727). Matter used in furtherance of schemes to defraud may be prohibited (*Public Clearing House* v. *Coyne*, 194 U. S. 497). The Supreme Court has recognized that Congress may require, as a condition of using the privileges accorded to publications in second-class mail, that information as to ownership, editors, and circulation be filed (*Lewis Publishing Co.* v. *Morgan*, 229 U. S. 288). The decided cases remove any doubt that Congress, to further a valid policy not directly addressed to postal regulation, may use its power over the mails for that purpose. In *Badders* v. *United States* (240 U. S. 391, 393), Mr. Justice Holmes said:

"The overt act of putting a letter into the post office of the United States is a matter that Congress may regulate. * * * Whatever the limits to the power, it may forbid any such acts in furtherance of a scheme that it regards as contrary to public policy, whether it can forbid the scheme or not."

IV. PARTICULAR REGULATION IS VALID

Since the activities of investment advisers are within the scope of congressional power over interstate commerce and the mails, Congress may require registration as a condition precedent to the use of these facilities to carry on such activities. *Electric Bond & Share Co.* v. *Securities and Exchange Commission* (303 U. S. 419), and cases therein cited. Furthermore, in exercising its power, Congress may properly adopt a scheme of regulation to assure that investment advisers shall not use the mails or interstate commerce to perpetrate fraud upon their clients.[2] (*S. E. C.* v. *Torr*, 87 F. (2d) 446 (C. C. A. 2).)

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[2] There would appear to be no reason for believing that this legislation will be precedent for congressional regulation in other fields which do not present the same national problems. Thus, it is neither sanction nor precedent for the regulation of attorneys who, in the course of their relationships with clients, may find it necessary to render investment advice.

The definition of investment advisers in the bill expressly precludes operation of this legislation as to attorneys. Investment advice rendered by attorneys is often purely incidental to the rendition of legal services. Accounts may be handled by attorneys as fiduciaries, subject to the supervision of probate courts or courts of equity. Frequently, investment advice rendered by attorneys is limited to insuring that fiduciaries shall make up their trust accounts in compliance with the relevant laws of the jurisdiction. In certain States where lists of "legals" are expressly set forth by statute, recourse to an attorney is often necessary to those whose investment policy must be framed pursuant to those lists. It will be noted that attorneys do not solicit investment advisory business, rarely if ever base their fees on the success of an investment account, and for the most part do not give "investment advice" as such. Their advice is, in the vast variety of instances, limited to "legal advice" as to what course of investment conduct is proper for persons in various legal statuses.