

SEC Payments "in Guise" Case Resolves Little

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The SEC has long considered whether mutual funds are making distribution payments “in guise”—*i.e.*, payments primarily intended to result in sales of fund shares but disguised as something else. See [“Feds Dig for Disguised Fund Distribution Fees”](#) in the Winter 2015 *Expect Focus*. Recently, the Commission brought its first enforcement action addressing this issue. In September 2015, First Eagle Investment Management Company, LLC and its subsidiary, FEF Distributors, LLC settled SEC charges that they caused mutual funds advised by First Eagle to make illegal distribution payments to intermediaries outside of a Rule 12b-1 plan. The settlement order noted that the agreements pursuant to which the payments were made stated they were “generally for marketing and distribution” and the order did not include any facts to the contrary. According to the order, however, First Eagle characterized the distribution as being for “sub-transfer agent” services, rendering the mutual funds’ prospectus disclosures about their distribution payments materially misleading. Subtransfer agent services are shareholder services that are commonly paid out of fund assets, and not subject to Rule 12b-1. Although First Eagle agreed to pay disgorgement of nearly \$25 million, plus a \$12.5 million civil penalty, the order did not shed much light on the dilemmas that can arise in cases where the conclusion is less clear, including (1) how to identify and value that portion of an intermediary’s services that are primarily to promote sales, and (2) where the adviser or its affiliate pays for distribution outside the ambit of any Rule 12b-1 plan, how to ensure that those payments are not deemed to be made indirectly by a fund.

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