

SEC Seeks Fund Responses to Distribution-In-Guise Guidance

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Edmund J. Zaharewicz

Since at least March 2016, SEC examiners have reportedly been checking whether mutual fund firms are complying with the SEC staff's recent guidance on "distribution-in-guise."

The guidance suggests that fund boards, investment advisers, and other relevant service providers consider assuming what some regard as significant new responsibilities. The guidance seeks principally to ensure that so-called "subaccounting fees," which funds pay to intermediaries for shareholder and recordkeeping services, are not being used directly or indirectly to pay for distribution without complying with the generally applicable legal requirement that fund distribution payments be covered by a "Rule 12b-1 plan." According to the guidance, regardless of whether a fund has a Rule 12b-1 plan, "the fund should have adequate policies and procedures for reviewing and identifying any payments that may be for distribution-related services that are not paid through the plan."

With the ink barely dry on the guidance, which was published in January, the staff's seeming impatience surprises some. Their reaction results from the significant nature of the guidance, plus the fact that the guidance mostly just identifies procedures that funds and their service providers could consider given their own particular circumstances, instead of prescribing specific procedures that funds should generally adopt. This, in turn, also raises a question as to whether the staff is inappropriately treating any aspects of the guidance as a regulation without the benefit of public comment.

Nonetheless, the staff is at least clearly signaling its expectations that registrants and chief compliance officers should be well on their way to completing, if they have not already, the task of assessing their exposure to potential distribution-in-guise issues and implementing reasonably-designed compliance controls in light of the guidance.

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