SEC Highlights Boards in New Distribution Fee Guidance

By Whitney Curry Wimbish, *BoardIQ*, January 12, 2016 [subscription required]
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The Securities and Exchange Commission granted a long-standing wish of independent directors last week: modern guidance on distribution fee oversight.

It places the responsibility for overseeing the reasonableness of fees paid out of fund assets squarely on independent directors and lists the factors they should consider when looking at payments to intermediaries outside of a 12b-1 plan. But it also emphasizes that advisers and relevant service providers must furnish the information necessary to make that judgment, giving directors more leverage to request and obtain information from the adviser – and for the adviser to get it from sometimes reluctant intermediaries.

Industry experts say the guidance answers virtually all the questions independent directors had about oversight – except one. It doesn't say what happens if a board asks the adviser to get information from an intermediary and the intermediary won't hand it over.

And others say that while the guidance strikes a conciliatory tone, it's still a backdoor way for the SEC to regulate because it avoids the comment period of a formal rulemaking process.

The SEC staff's broad recommendations are that fund boards should have a strong process in place to evaluate whether a portion of sub-accounting fees is used to directly or indirectly pay for distribution, regardless of whether the fund has a 12b-1 plan. Advisers and relevant service providers also should give the board enough information to form an overall picture of the funds' intermediary distribution and servicing arrangements, according to the guidance.

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The guidance is "a significant step forward" for clarifying the process of overseeing intermediary fees, says Niels Holch, a partner at **Holch & Erickson** and executive director of the Coalition of Mutual Fund Investors. Please read his opinion column in this week's issue here.

"For many years, fund boards have been working with ambiguous standards to evaluate these fees and whether they're administrative or whether they have a distribution purpose. I think it's been hard for boards to make those determinations," he says. "The supermarket letter dealt with just one type of distribution, whereas here they're dealing much more broadly."

Still, he says, it's unclear why mutual funds must pay such fees in the first place.