

Comment (b): To minimize the costs of administering a plan of disgorgement, the Commission has in certain civil injunctive proceedings consented to the payment of disgorgement funds obtained as the result of a Commission initiated proceeding into a fund established for the benefit of persons in a related private civil action. See, e.g., *SEC v. Levin*, No. 3-92CV-399D (N.D. Tex. Mar. 2, 1992) (settlement directed payment into court registry); *SEC v. Boesky*, No. 86-CIV-2299, slip op. (S.D.N.Y. Nov. 14, 1986) (settlement directed payment to escrow agent). Rule 611 provides for a similar disposition of disgorgement funds obtained in an administrative proceeding. Transfer of disgorgement funds into a fund established in a judicial proceeding may be subject to conditions on the use of the funds. For example, the Commission has routinely prohibited the use of any funds obtained in a Commission initiated action to pay attorneys' fees in a private lawsuit.

Comment (c): The Commission has the authority to provide for the return of ill-gotten gains to investors, but there is no requirement that it do so. See, e.g., Exchange Act §§ 21B(e) and 21C(e), 15 U.S.C. §§ 78u-2(e) and 78u-3(e) ("[t]he Commission is authorized to adopt rules, regulations, and orders * * * concerning payments to investors"). Returning funds to the United States Treasury when the expense of locating or making distributions to injured investors is prohibitive is consistent with treatment by the courts in similar situations. *SEC v. Marcus Schloss & Co.*, 714 F. Supp. 100 (S.D.N.Y. 1989); *SEC v. Courtois*, [1984-85 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,000 (S.D.N.Y. 1985); *SEC v. Lund*, 570 F. Supp. 1397, 1404-1405 (C.D. Cal. 1983).

Revision Comment (b): The respondent named in a Commission action may have settled a related civil action brought by private parties or may not have been named in a related private party litigation. The rule has been revised to permit the payment of disgorged funds to a fund established in connection with a judicial proceeding against the respondent or against any other person based upon a complaint alleging violations arising from the same or substantially similar facts as those alleged in the Commission's order instituting proceedings.

Rule 612. Notice of Proposed Plan of Disgorgement and Opportunity for Comment by Non-Parties

Notice of a proposed plan of disgorgement shall be published in the *SEC News Digest*, in the *SEC Docket*, and in such other publications as the

Commission or the hearing officer may require. The notice shall specify how copies of the proposed plan may be obtained and shall state that persons desiring to comment on the proposed plan may submit their views, in writing, to the Commission.

Comment: Publication of notice that a proposed plan has been submitted is required in order to provide potential claimants or other persons with an opportunity to make known their views prior to adoption of the plan.

Rule 613. Order Approving, Modifying or Disapproving Proposed Plan of Disgorgement

At any time more than 30 days after publication of notice of a proposed plan of disgorgement, the hearing officer or the Commission shall, by order, approve, approve with modifications, or disapprove the proposed plan. In the discretion of the Commission or the hearing officer, a proposed plan of disgorgement that is substantially modified prior to adoption may be republished for an additional comment period pursuant to Rule 612. The order approving or disapproving the plan should be entered within 30 days after the end of the final period allowed for comments on the proposed plan unless the Commission or the hearing officer, by written order, allows a longer period for good cause shown.

Comment: After submission of comments, if any, the plan should be promptly approved, approved as modified or disapproved. The Commission or the hearing officer may hold a hearing on the proposed plan or may rule on the plan based only on written submissions, if any.

Rule 614. Administration of Plan of Disgorgement

(a) *Appointment and Removal of Administrator.* The Commission or the hearing officer shall have discretion to appoint any person, including a Commission employee, as administrator of a plan of disgorgement and to delegate to that person responsibility for administering the plan. A respondent may be required or permitted to administer or assist in administering a plan of disgorgement, subject to such terms and conditions as the Commission or the hearing officer deem appropriate to ensure the proper distribution of funds. An administrator may be removed at any time by order of the Commission or hearing officer.

(b) *Administrator to Post Bond.* If the administrator is not a Commission employee, the administrator shall be required to obtain a bond in the manner prescribed by 11 U.S.C. 322, in an

amount to be approved by the Commission. The cost of the bond may be paid for as a cost of administration. The Commission may waive posting of a bond for good cause shown.

(c) *Administrator's Fees.* If the administrator is a Commission employee, no fee shall be paid to the administrator for his or her services. If the administrator is not a Commission employee, he or she may file an application for fees for completed services, and upon approval by the Commission or a hearing officer, may be paid a reasonable fee for those services. Any objections thereto shall be filed within 21 days of service of the application on the parties.

(d) *Source of Funds.* Unless otherwise ordered, fees and other expenses of administering the plan of disgorgement shall be paid first from the interest earned on disgorged funds, and if the interest is not sufficient, then from the corpus.

(e) *Accountings.* During the first 10 days of each calendar quarter, or as otherwise directed by the Commission or the hearing officer, the administrator shall file an accounting of all monies earned or received and all monies spent in connection with the administration of the plan of disgorgement. A final accounting shall be submitted for approval of the Commission or hearing officer prior to discharge of the administrator and cancellation of the administrator's bond, if any.

(f) *Amendment.* A plan may be amended upon motion by any party or the plan administrator or upon the Commission's or hearing officer's own motion.

Comment (a): In some circumstances, for example, where the number of potential claimants to a fund is small and the identity of the claimants is known in advance, the plan of disgorgement may be relatively uncomplicated and may not require extensive resources to administer. In such a case, an administrative law judge or a staff member may administer the plan of disgorgement most effectively.

As in court actions, however, if the amount of disgorgement is large or there are many potential claimants, administration of a disgorgement plan may involve extensive time and resources and may be accomplished most effectively by selecting an administrator with expertise in handling disgorgement-type proceedings. Such a person would, as necessary, be able to retain an accounting firm, a law firm, or any other entity necessary to assist in the administration of the disgorgement plan.