Rule 614 does not specify a method for selecting an administrator. In court proceedings, the Commission may have an advisory role in recommending individuals to the court as possible administrators, but the court itself must select and appoint the administrator. In administrative proceedings, however, the Commission itself is responsible for appointing the administrator. Selection of an administrator by the Commission may be subject to various statutory provisions or regulations regarding personnel matters, procurement and contract requirements, or other matters. In addition, the selection process should promote public confidence that the selection was made on an impartial basis.

In some proceedings, particularly those in which a settlement has been reached, the respondent may be required or allowed to assist in administering a disgorgement plan. *See, e.g., In the Matter of Donaldson, Lufkin & Jenrette Sec. Corp.*, Exchange Act Release No. 27889 (Apr. 11, 1990), 45 SEC Docket 1826, 1834 (Apr. 24, 1990). Especially in such self-administered disgorgement plans, the Commission may require affidavits, an accountant's certification, or other safeguards to assure that funds have been distributed only in accordance with the plan.

Comment (b): Funds or other assets paid as disgorgement will be placed into an escrow, custodial or similar account established by the Commission or with the Commission's approval for the purpose of holding such funds or assets until they are disbursed. No funds will be transferred to the Commission itself. *See* 31 U.S.C. § 3302(b) (requiring agencies receiving funds for the government to deposit the money into the Treasury without deduction for any charge or claim).

Funds paid pursuant to a disgorgement order do not become the property of the Commission and internal control and audit procedures mandated by statute for the Commission's own funds are not applicable to disgorgement funds. Rule 614(b) requires, therefore, that if the administrator is not a Commission employee, the administrator must obtain a surety bond comparable to that when a trustee is appointed in a SIPC liquidation or bankruptcy proceeding. *See* 15 U.S.C. § 78eee(b)(3); 11 U.S.C. § 322. See also Rule 614(e) (quarterly accountings required).

Comment (c): If the administrator is not a Commission employee, reasonable fees may be paid to the administrator. Payment of the administrator's fees may be made only upon a public application filed by the administrator and subject to the approval of the Commission or a hearing officer. Filings by the administrator, including fee applications, should conform to the filing requirements of Rule 151 and be served on all parties pursuant to Rule 150.

Comment (d): The Commission has broad authority to adopt rules, regulations and orders it deems appropriate to implement its authority to order disgorgement. *See, e.g.*, Exchange Act § 21B(e), 15 U.S.C. § 78u–2(e). Paragraph (d) provides that fees and expenses be paid first out of interest earned on disgorged funds, and if the interest is insufficient, then out of the corpus of the funds. Subject to any applicable requirements established by Congress with respect to the use of appropriated funds, and except to the extent a Commission employee is appointed administrator, or an administrative law judge administers a disgorgement fund without the assistance of an administrator, appropriated funds ordinarily will not be used to defray the direct costs of administering a disgorgement plan. Where the value of the available disgorgement funds relative to the expense of administrating a plan of disgorgement from the corpus or the interest earned would not justify distribution of funds, the disgorged funds may be turned over to the general fund of the United States Treasury. *See* Rule 611(c).

Comment (f): After a plan is approved, changed circumstances may require amendment of the plan. 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. Procedures for publication of notice or hearing on the motion will be subject to case by case determination.

Rule 620. Right to Challenge Order of Disgorgement

Other than in connection with the opportunity to submit comments as provided in Rule 612, no person shall be granted leave to intervene or to participate in a proceeding or otherwise to appear to challenge an order of disgorgement; or an order approving, approving with modifications, or disapproving a plan of disgorgement; or any determination relating to a plan of disgorgement based solely upon that person's eligibility or potential eligibility to participate in a disgorgement fund or based upon any private right of action such person may have against any person who is also a respondent in an enforcement proceeding.

Comment: The opportunity to submit comments on a plan of disgorgement does not give a person any right to become a party to or intervene in an enforcement proceeding. *See* Rule 210 (no one may become a party or receive leave to intervene in an enforcement proceeding).

Although return of ill-gotten gains to injured investors is often an appropriate disposition of disgorged funds, the purpose of the Commission's administrative disgorgement remedy is to deprive violators of ill-gotten gains and thus serve as a deterrent to violations, rather than to compensate injured investors. *See* The Securities Law Enforcement Remedies and Penny Stock Reform Act of 1990, S. Rep. No. 337, 101st Cong., 2d Sess. 16 (1990) (''In contrast to an award of damages in a private action, which is designed to compensate an injured plaintiff, disgorgement forces a defendant to give up the amount by which he was unjustly enriched.''). The statutory remedy is consistent in this regard with the equitable remedy available in civil injunctive actions brought by the Commission. *See, e.g., SEC v. First City Financial Corp.*, 890 F.2d 1215, 1230, 1232 n.24 (D.C. Cir. 1989) (the primary purpose of disgorgement is not to compensate investors); *SEC v. Tome*, 833 F.2d 1086, 1096 (2d Cir. 1987), *cert.* denied, 486 U.S. 1014 (1988); *SEC v. Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1307 (2d Cir.), *cert. denied*, 404 U.S. 1005 (1971); Securities Law Enforcement Remedies and Penny Stock Reform Act of 1990, H.R. Rep. No. 616, 101st Cong., 2d Sess. at 22 (1990).

Where it is not practical to locate persons who have been harmed, disgorgement in injunctive actions has been ordered paid into the general fund of the U.S. Treasury. *See SEC* v. *Marcus Schloss & Co.*, 714 F. Supp. 100, 103 (S.D.N.Y. 1989); *SEC v. Courtois*, [1984–85 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,000, at 90,959 (S.D.N.Y. 1985); *SEC v. Lund*, 570 F. Supp. 1397, 1404–1405 (C.D. Cal. 1983). In insider trading cases, courts have required that disgorgement be made available to persons other than investors. *See SEC v. Materia*, [1983–84 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,583, at 97,284–85 (S.D.N.Y. 1983), *aff'd on other grounds*, 745 F.2d 197 (2d Cir. 1984), *cert. denied*, 471 U.S. 1053 (1985). *See generally* Louis Loss, *Fundamentals of Securities Regulation* 1007 (2d ed. 1988) (discussing discretion exercised by courts in designating recipients of disgorged funds).

Since there is not a requirement that funds obtained in an administrative enforcement proceeding be paid to