

investors, persons who may have a private right of action in federal court against a respondent do not thereby have standing in the Commission's enforcement proceeding against that respondent to challenge a plan of disgorgement solely because of dissatisfaction with their potential eligibility to receive funds from the Commission's disgorgement pool. See *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (per curiam) (explicitly disapproving of the suggestion in *SEC v. Certain Unknown Purchasers*, 817 F.2d 1018, 1021 & n.1 (2d Cir. 1987), cert. denied, 484 U.S. 1060 (1988), that a person has standing to appeal whenever he "has an interest that is affected by the trial court's judgment.").

The limitations in Rule 620 on participation in the proceedings before a hearing by a person with potential claims against the disgorgement pool does not preclude a person who is aggrieved by a decision concerning the disposition of disgorgement assets and entitled to review of the decision from petition the Commission for such review. A person aggrieved by a final decision of the Commission who is entitled to review may also seek a stay of the Commission order or judicial review of the order. See Rules 360, 401 and 410; Section 702 of the Administrative Procedure Act, 5 U.S.C. § 702. See also *SEC v. Wozniak*, 33 F.3d 13 (7th Cir. 1994) (persons not parties to the litigation who objected to a disgorgement plan could have sought a stay of district court's judgment and distribution of the plan in order to have standing to appeal).

Rule 630. Inability to Pay Disgorgement, Interest or Penalties

(a) *Generally.* In any proceeding in which an order requiring payment of disgorgement, interest or penalties may be entered, a respondent may present evidence of an inability to pay disgorgement, interest or a penalty. The Commission may, in its discretion, or the hearing officer may, in his or her discretion, consider evidence concerning ability to pay in determining whether disgorgement, interest or a penalty is in the public interest.

(b) *Financial Disclosure Statement.* Any respondent who asserts an inability to pay disgorgement, interest or penalties may be required to file a sworn financial disclosure statement and to keep the statement current. The financial statement shall show the respondent's assets, liabilities, income or other funds received and expenses or other payments, from the date of the first violation alleged against that respondent in the order instituting

proceedings, or such later date as specified by the Commission or a hearing officer, to the date of the order requiring the disclosure statement to be filed. By order, the Commission or the hearing officer may prescribe the use of the Disclosure of Assets and Financial Information Form (see Form D-A at § 209.1 of this chapter) or any other form, may specify other time periods for which disclosure is required, and may require such other information as deemed necessary to evaluate a claim of inability to pay.

(c) *Confidentiality.* Any respondent submitting financial information pursuant to this rule or Rule 410(c) may make a motion, pursuant to Rule 322, for the issuance of a protective order against disclosure of the information submitted to the public or to any parties other than the Division of Enforcement. Prior to a ruling on the motion, no party receiving information as to which a motion for a protective order has been made may transfer or convey the information to any other person without the prior permission of the Commission or the hearing officer.

(d) *Service Required.* Notwithstanding any provision of Rule 322, a copy of the financial disclosure statement shall be served on the Division of Enforcement.

(e) *Failure to File Required Financial Information: Sanction.* Any respondent who, after making a claim of inability to pay either disgorgement, interest or a penalty, fails to file a financial disclosure statement when such a filing has been ordered or is required by rule may, in the discretion of the Commission or the hearing officer, be deemed to have waived the claim of inability to pay. No sanction pursuant to Rules 155 or 180 shall be imposed for a failure to file such a statement.

Comment (a): A respondent may present evidence of ability to pay a penalty, and the Commission may, in its discretion, consider such evidence. See, e.g., Exchange Act § 21B(d), 15 U.S.C. § 78u-2(d). A respondent's ability to pay becomes a significant issue not only in proceedings in which a penalty is ordered, but also when disgorgement and interest is ordered. Although no statutory requirement addresses inability to pay disgorgement or interest, the Commission considers evidence of ability to pay as a factor in determining whether a respondent should be required to pay disgorgement and interest as well as penalties. Rule 630 codifies this practice.

Comment (b): A respondent may not be entirely candid about his or her financial position when asserting an inability to pay disgorgement, interest or penalties. The Commission or a hearing

officer may require persons who assert an inability to pay disgorgement, interest or penalties to file sworn, verifiable financial disclosure statements before consideration of inability to pay as a basis for waiving disgorgement, interest or penalties.

Rule 630 provides that the Commission or the hearing officer may require "such other information as deemed necessary to evaluate a claim of inability to pay." Accordingly, the Division of Enforcement may seek an order to question the respondent under oath or may seek the issuance of subpoenas to obtain documents or testimony concerning an asserted inability to pay. In addition, the rule provides that, by order, the Commission or the hearing officer may prescribe a particular financial disclosure form to be used and may specify time periods for which disclosure is required. Form D-A, the Disclosure of Assets and Financial Information Form, includes a waiver by the respondent that authorizes "The Securities and Exchange Commission and any of its staff * * * to obtain any such information from credit bureaus, financial institutions or any other source as may be needed to verify the statements made on this form." If such a waiver is obtained, the Division of Enforcement may rely on it as a basis to seek confirmation of information in the financial disclosure form without further approval from the hearing officer or Commission.

Comment (c): The public's right to review financial disclosure statements submitted in connection with a respondent's claim of inability to pay should be balanced against the respondent's legitimate interest in protecting confidential or personal information from premature or unnecessary disclosure. Each request for confidentiality must be decided based on the procedural status of the case, the extent to which financial information has already been disclosed, and the individual facts and circumstances underlying the request.

While financial circumstances may change during the course of a proceeding, a respondent who intends to assert a claim of inability to pay may be required by the hearing officer to specify in connection with prehearing submissions or conferences whether the issue will be raised. Early submission of a financial disclosure form to support a planned claim of inability to pay will allow the hearing officer and parties to better prepare for hearing and to assess the time needed for the hearing. Part I of Form D-A requires only summary information as to which confidentiality