

development, submission, approval, and administration of orders of disgorgement, and to the right to challenge orders of disgorgement, and to include them in a new subpart F.

Proposed Rule 1100 would state that the Commission is authorized to create a Fair Fund in any administrative proceeding in which a final order is entered against a respondent requiring disgorgement and payment of a civil money penalty. The Commission may also create a Fair Fund if it approves a settlement of an administrative proceeding that provides for a respondent's payment of disgorgement and a civil money penalty. The proposed Rule would also explain that the Commission may add to the Fair Fund any property received in accordance with section 308(b) of the Sarbanes-Oxley Act.¹⁵

Certain requirements for Fair Funds would suggest that the Commission's Rules should make some distinctions between Fair Funds and disgorgement funds. For example, Fair Funds must be disbursed to the investors harmed by the securities law violations at issue. The purpose of disgorgement is to require a wrong-doer to pay back the ill-gotten gains that the wrong-doer obtained by virtue of his or her violation. Thus, the Commission can order a wrong-doer to disgorge ill-gotten gains whether or not investors suffered any damages as a result of the violation.¹⁶ Where there are no identifiable victims of a violation, the Commission proposes to permit that the disgorgement and civil money penalty amounts be paid to the United States Treasury. The Commission asks for comment on this proposal.

In other respects, the Commission believes that the requirements for Fair Funds and disgorgement funds should be similar. In some cases, the Commission may conclude that it is in the public interest to impose a civil money penalty and order disgorgement even though the relative value of the ill-gotten gains and the number of potential claimants would result in high administrative costs and *de minimis* distributions to individual investors. Under such circumstances, the Commission would continue its practice of ordering that the disgorgement and

civil penalty amount be paid directly to the United States Treasury.

Current Rule 611(b) provides that the Commission may authorize payment of disgorgement funds to any court registry or court-appointed receiver in any case that alleges the same or similar facts against the respondent. The Commission proposes to continue this authority with respect to disgorgement funds and Fair Funds in proposed Rule 1102(a).

The proposed Rules would permit either the Commission or the hearing officer, as appropriate, to oversee the administration of both disgorgement funds and Fair Funds.

Proposed Rule 1101(a) would continue the practice under current Rule 610 of allowing the Commission or the hearing officer at any time to order a party to submit a plan for the administration of either a Fair Fund or a disgorgement fund. Unless ordered otherwise, the Division of Enforcement would be required to submit such a plan within 60 days after the respondent has tendered the funds or other assets pursuant to the Commission's order to pay disgorgement and, if applicable, a civil money penalty.

Proposed Rule 1101(b) would extend the requirements of current Rule 611(a) to require that both Fair Fund or disgorgement fund plans provide for: receiving and holding additional funds, including funds received under section 308(b) of the Sarbanes-Oxley Act; identifying categories of persons who are potentially eligible to receive funds; providing notice to potentially eligible persons of the fund's existence and their potential eligibility; handling claims; termination of the fund and disposition of any remaining assets; administration of the fund; and such other provisions as the Commission or hearing officer deem appropriate.

As discussed above, proposed Rule 1102(b) would continue to permit the Commission or the hearing officer to order that funds be paid directly to the United States Treasury if the cost of administering the fund and the relative value of the disgorgement fund, together with any civil money penalty, and the number of potential claimants would not justify distribution of the funds.

Proposed Rule 1103 would amend and renumber current Rule 612 to require that notice of either a proposed disgorgement plan or a proposed Fair Fund plan be published in the *SEC News Digest*, the *SEC Docket*, and such other publications as the Commission or the hearing officer directs. The notice would specify how to obtain copies of the proposed plan and inform those desiring to comment to submit their

written views to the Commission. The Commission also proposes posting notice of a proposed plan on its website. The Commission seeks comment as to how website posting can be done most effectively.

Proposed Rule 1104 would replace and renumber current Rule 613 to provide that, at any time after 30 days following publication of the notice of a proposed disgorgement plan or a proposed Fair Fund plan, the Commission or the hearing officer may approve, modify, or disapprove the proposed plan. The Commission or the hearing officer may order publication of a substantially modified plan prior to adoption.

Proposed Rule 1105 would replace and amend current Rule 614 to provide for administration of Fair Funds, as well as disgorgement funds. The proposed Rule would continue to permit the Commission or hearing officer to appoint any person, including a Commission employee, as fund administrator. Either the Commission or the hearing officer would be able to remove an administrator.

An administrator who is not a Commission employee must post a bond in an amount approved by the Commission. An administrator who is not a Commission employee may receive a fee for reasonable services, subject to approval by the Commission or the hearing officer. Commission employees may not receive such fees. Fees and expenses from fund administration would be paid first from interest and then, if the interest were insufficient, from corpus. The administrator would give periodic accountings, as ordered, and submit a final accounting prior to his or her discharge and cancellation of any bond.

Current Rule 614(a) would be renumbered Rule 1105(b). The Rule currently provides that a respondent may be required or permitted to administer a plan of disgorgement, subject to terms the Commission or the hearing officer deems appropriate. At this time, the Commission does not propose to extend this provision to Fair Funds although it invites comment on this issue. A Fair Fund would include a civil penalty and might include funds conveyed to the United States pursuant to section 308(b) of the Sarbanes-Oxley Act.

Proposed Rule 1106 would renumber Rule 620 to make clear that no person would be granted the right to intervene or appear in a proceeding to challenge an order of disgorgement, an order creating a Fair Fund, an order approving, modifying, or disapproving a disgorgement plan or a Fair Fund plan,

¹⁵ Section 308(b) of the Sarbanes-Oxley Act provides that the Commission may accept, hold, and utilize gifts of property for a Fair Fund. Gifts of property received pursuant to this section may be deposited only in a Fair Fund.

¹⁶ See e.g., *SEC v. First City Financial Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989) (defendant who violated Exchange Act section 13 required to disgorge although harm was to the market as a whole, not to particular persons).