MEMORANDUM

From: AMC Staff[†]

To: All Commissioners

Date: May 4, 2006

Re: Civil Remedies-Government Discussion Memorandum

The Commission agreed to study whether civil remedies available to the Federal Trade Commission ("FTC") and U.S. Justice Department ("DOJ") should be "expanded, restricted, or clarified."[1] It received suggestions to study the issue from, among other commenters, then-Assistant Attorney General R. Hewitt Pate,[2] the ABA's Section of Antitrust Law,[3] and the United States Senate Judiciary Subcommittee on Antitrust, Competition Policy, and Consumer Rights ("Senate Antitrust Subcommittee").[4] The Senate Antitrust Subcommittee, for example, recommended that the Commission study "whether injunctive relief alone is sufficient to punish

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[†] This memorandum is a brief summary prepared by staff of the comments and testimony received by the AMC to assist Commissioners in preparing for deliberations. All Commissioners have been provided with copies of comments and hearing transcripts, which provide the full and complete positions and statements of witnesses and commenters.

[1] *See* Jan. 13, 2005, Meeting Trans. at 89, 94-96, 105; Remedies Study Plan, at 1-2 (May 4, 2005).

[2] Letter from R. Hewitt Pate, Assistant Attorney General, Department of Justice Antitrust Division, to Deborah A. Garza, Chair, Antitrust Modernization Commission, at 2 (Jan. 5, 2005).

[3] Report of the Section of Antitrust Law of the American Bar Association to the Antitrust Modernization Commission, at 6-7 (Sept. 30, 2004) (noting that the question of whether DOJ should have authority to seek civil fines might warrant study).

[4] Letter from Senators Mike DeWine & Herb Kohl, to Deborah A. Garza, Chair, Antitrust Modernization Commission, at 2 (Oct. 1, 2004).

illegal conduct or whether potential remedies ought to be enhanced by authorizing federal agencies to seek monetary penalties."[5]

On May 19, 2005, the Commission requested comment on the following two issues.

1. Should the DOJ and/or the FTC have statutory authority to impose civil fines for substantive antitrust violations? If so, in what circumstances and what types of cases should such fines be available? If DOJ and/or the FTC are given such authority, how, if at all, should it affect the availability of damages awarded to private plaintiffs?

2. Should Congress clarify, expand, or limit the FTC's authority to seek monetary relief under 15 U.S.C. § 53(b)?[6]

The Commission received one comment specifically in response to this request, from the American Antitrust Institute Working Group on Remedies.[7]

On December 1, 2005, the Commission heard testimony from four witnesses: Kevin Arquit, partner at Simpson Thatcher (formerly FTC General Counsel, 1988-89, and FTC Director of Bureau of Competition, 1989-92); John Graubert, FTC Principal Deputy General Counsel; Stephen Calkins, Professor of Law at Wayne State University Law School and Of Counsel to Covington & Burling (formerly FTC General Counsel, 1995-97); and then-FTC Commissioner Thomas Leary (now Of Counsel at Hogan & Hartson).[8] FTC Chairman Deborah Platt Majoras and DOJ Assistant Attorney General Thomas Barnett also addressed the issue in response to questions at the Commission's hearing held on March 21, 2006.

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5 *Id.*

6 70 Fed. Reg. 28,902, 28,903 (May 19, 2005).

7 *See* Comments of the American Antitrust Institute Working Group on Remedies to the Antitrust Modernization Commission, at 12-14 (July 17, 2005) ("AAI Comments").

8 Unless otherwise noted, all citations to "Trans." are to the transcript of the December 1, 2005, Government Civil Remedies hearing.

I. Background

Neither the Federal Trade Commission nor the Department of Justice has statutory authority to impose civil fines for violations of the antitrust laws. ("Civil fines" for this purpose means statutorily authorized monetary penalties for substantive antitrust violations, as compared to penalties for violations of procedural rules and administrative orders, or equitable remedies, such as disgorgement.) Other government agencies are authorized to impose civil fines for violations of the statutes and regulations they enforce.[9] Similarly, the European Union has the authority to impose monetary penalties on violators of its competition laws.[10]

Both DOJ and the FTC can obtain a variety of other monetary penalties, although they are limited in various ways, as described below.

A. Federal Trade Commission

Section 5(b) of the FTC Act authorizes the FTC to order companies to "cease and desist" from unfair methods of competition found to violate Section 5 of the FTC Act.[11] The FTC may apply to a district court for the imposition of civil penalties, injunctions, and other equitable relief to remedy violations of its cease and desist orders.[12] Civil penalties are limited to $11,000 per violation.[13]

Section 13(b) of the FTC Act authorizes the FTC to seek a court order enjoining on a preliminary or permanent basis (as appropriate) conduct that "violates any provision of law

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9 *See, e.g.*, 15 U.S.C. §§ 77t, 78u, 78u-1 (civil fine authority for Securities and Exchange Commission); 12 U.S.C. § 1818(i) (fine authority for federal banking agencies); 42 U.S.C. § 7413(d) (authority for EPA to seek administrative fines for violations of Clean Air Act); 40 C.F.R. § 22 (procedures for assessing EPA fines).

10 Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997 05(C340) 1, art. 83(2)(a).

11 15 U.S.C. § 45(b).

12 *Id.* § 45(*l*); *id.* § 53(b).

13 *See* 16 C.F.R. § 1.98 (adjusting $10,000 statutory threshold for inflation).

enforced by the Federal Trade Commission."[14] Numerous courts of appeals and district courts have held that this authority also permits the FTC to seek monetary relief such as disgorgement or restitution.[15] Those rulings have been based on *Porter v. Warner Holding Co.*, in which the Supreme Court held that disgorgement of profits obtained in violation of the Emergency Price Control Act was validly sought pursuant to the Office of Price Administration's authority to obtain equitable relief.[16] The FTC has obtained monetary relief in eleven competition cases under the FTC Act since 1980.[17]

In 2003, the FTC adopted a policy of seeking monetary equitable remedies for violations of the antitrust laws when (1) the "underlying violation is clear," (2) there is a "reasonable basis for calculating the amount of a remedial payment," and (3) the Commission believes action would add value "in light of any other remedies available in the matter."[18] The FTC describes monetary equitable remedies as including both disgorgement and restitution.[19] Disgorgement is defined as "an equitable monetary remedy 'designed to deprive a wrongdoer of his unjust

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14 15 U.S.C. § 53(b) ("Section 13(b)").

15 *See, e.g.*, *FTC v. Mylan Labs., Inc.*, 62 F. Supp. 2d 25, 36-37 (D.D.C. 1999) (recognizing FTC authority to sue for disgorgement and other forms of equitable ancillary relief in competition case); *FTC v. Gem Merchandising Corp*., 87 F.3d 466, 469-70 (11th Cir. 1996); *FTC v. Febre*, 128 F.3d 530, 534, 537 (7th Cir. 1997).

16 *Porter v. Warner Holding Co.*, 328 U.S. 395, 397-98 (1946) ("the comprehensiveness of . . . equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command"); *see also Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291-92 (1960) (reaffirming *Porter*'s principle of statutory construction).

17 *See* Comments of John D. Graubert, Principal Deputy General Counsel, Federal Trade Commission, to the Antitrust Modernization Commission, at 2 nn.4-5 (Dec. 1, 2005) ("Graubert Statement"). The FTC also uses Section 13(b) in consumer protection cases, which is not within the scope of the Commission's study.

18 Federal Trade Commission, *Policy Statement on Monetary Equitable Remedies in Competition Cases* ("FTC Policy Statement"), 68 Fed. Reg. 45,820, 45,821-23 (Aug. 4, 2003).

19 *Id.* at 45,820-21.

enrichment and to deter others' from future violations."[20] Restitution, by comparison, "focuses on the victim, not the violator, and is justified by the need to restore the victim to the status quo ante, not on ex ante deterrence of unlawful conduct by a defendant."[21]

The creation of this policy was prompted by concerns raised by Commissioner Thomas Leary in his partial dissent to the Commission's decision in *FTC v. Mylan Pharmaceuticals, Inc*. Commissioner Leary argued that "it is essential that we somehow communicate our views on the appropriate parameters of the Section 13(b) remedy generally for antitrust cases."[22] Of particular concern for Commissioner Leary was the use of such remedies in cases where the violation was less clear and where private damage remedies were available and being pursued.[23] According to his statement submitted for the AMC hearing, Leary believes that the FTC's Policy Statement "has alleviated [his] original concerns about the use of equitable relief in antitrust cases."[24]

B. Department of Justice

The Department of Justice may seek fines for criminal violations of the antitrust laws,[25] and may seek civil penalties for violations of the Hart-Scott-Rodino Act.[26] The Department of

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[20] *Id.* at 45,821 & n.5 (citing *SEC v. First City Financial Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989)).

[21] *Id.* at 45,821 n.9.

[22] Statement of Commissioner Thomas B. Leary, Dissenting in Part and Concurring in Part, *Federal Trade Commission v. Mylan Pharmaceuticals, Inc., et al.*, FTC File No. X990015 (Nov. 29, 2000) ("Leary *Mylan* dissent").

[23] *Id.*

[24] Statement of Thomas B. Leary Before the Antitrust Modernization Commission, at 8 n.24 (Dec. 1, 2005) ("Leary Statement").

[25] *See, e.g.*, 15 U.S.C. §§ 1-2.

[26] *See* 15 U.S.C. § 18a(g)(1).

Justice may also recover damages on behalf of the government, when it is injured by violations of the antitrust laws.[27]

DOJ has general authority to seek equitable relief in court.[28] Some observers believe that the *Porter* doctrine authorizes DOJ to obtain monetary equitable remedies under Section 4 of the Sherman Act and under Section 15 of the Clayton Act.[29] DOJ itself (via the Solicitor General) has recently advanced an expansive view of the government's authority to obtain equitable remedies under the Sherman Act in a Supreme Court *certiorari* reply brief.[30] As a matter of policy, however, DOJ has not sought to obtain monetary equitable relief in antitrust cases, apparently preferring to use criminal fines where appropriate to obtain the disgorgement of ill-gotten gains and to defer to private litigation.[31]

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27 *See* 15 U.S.C. § 15a.

28 *See* 15 U.S.C. §§ 4, 25 (Attorney General may "institute proceedings in equity to prevent and restrain . . . violations"); *see also* Leary Statement, at 7-8 ("[t]o my knowledge . . . the DOJ has never sought to use this authority to obtain either disgorgement or restitution, as a civil remedy").

29 *See* Leary Statement, at 7-8.

30 *See* Reply Brief for the United States on Petition for a Writ of Certiorari, *United States v. Philip Morris USA, Inc.*, No. 05-92 (filed Sept. 2005), at 4 & n.3 (arguing that RICO provides government with disgorgement remedy and refuting contention that antitrust laws preclude disgorgement) (citing *Ford Motor Co. v. United States*, 405 U.S. 562, 573 & n.8 (1972)).

31 *See* Kenneth G. Starling, *Criminal Antitrust Enforcement*, 57 Antitrust L.J. 157, 157-58 (1988) ("Starling, *Criminal Antitrust Enforcement*") (Starling was at the time a Deputy Assistant Attorney General in the Antitrust Division.).

II. Discussion

A. Should the DOJ and/or the FTC have statutory authority to impose civil fines for substantive antitrust violations? If so, in what circumstances and what types of cases should such fines be available? If DOJ and/or the FTC are given such authority, how, if at all, should it affect the availability of damages awarded to private plaintiffs?

1. *Should the DOJ and/or the FTC have statutory authority to impose civil fines for substantive antitrust violations?*

One witness argued that Congress should grant DOJ and the FTC authority to seek civil fines for antitrust offenses.[32] Civil fines would provide antitrust enforcers at DOJ with a middle option to the currently "bi-modal" enforcement system, which gives DOJ a choice between a prospective injunction (which offers no deterrent effect) and seeking criminal penalties.[33] In addition, although DOJ and the FTC may have the ability to obtain disgorgement and restitution under *Porter*, statutory authorization would clarify their right to do so. Authority for fines could also prove beneficial where the anticompetitive conduct ceases before it results in gains that could be disgorged or harm for which restitution would be appropriate.[34] Another commentator has suggested that the authority to assess civil fines may be useful where structural remedies are not available or are impractical.[35] Finally, a system of civil fines would align the U.S. system of

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[32] *See* Statement of Stephen Calkins on Civil Monetary Remedies Available to the Federal Government, at 1, 27-30 (Nov. 30, 2005) ("Calkins Statement"); *see also* March 21, 2006, Trans. at 58-59 (Majoras) (open to possibility in certain circumstances).

[33] Trans. 14-16 (Calkins); Calkins Statement, at 27-28 (stating that from 2000 to 2004, each year there was an average of 44.6 criminal cases, compared to 2.4 civil non-merger cases).

[34] Calkins Statement, at 28-29.

[35] *See* J. Gregory Sidak, *Antitrust Divestiture in Network Industries*, 68 U. Chi. L. Rev. 1, 97-99 (2001) (arguing that "an innovative use of a monetary remedy should have been actively considered rather than dismissed out of hand" in the government's case against Microsoft Corporation, and that such remedies should be carefully examined in network industry cases).

remedies more closely with foreign legal systems, many of which authorize the imposition of civil fines.[36]

Other commenters and witnesses, however, have advised that neither FTC nor DOJ should have authority to seek civil fines.[37] They contend that the creation of new fine authority is unnecessary for two reasons: first, because DOJ and the FTC currently have authority to seek broad injunctive orders; second, because the recovery of treble damages and costs by private plaintiffs in civil litigation (which has not been a major feature of enforcement outside the United States in jurisdictions that authorize the imposition of penalties) already provides both deterrence and direct compensation to the victims of antitrust violations.[38]

Neither the FTC nor DOJ specifically advocated the adoption of additional statutory authority for the imposition of civil fines, although Chairman Majoras left the door open to considering such authority for use in limited circumstances.[39]

Assistant Attorney General Barnett counseled against recommending the enactment of additional civil fine authority for DOJ.[40] He advised that adding civil fine authority could blur the distinction between civil violations and criminal violations. As a result, it might make

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36 *See* Calkins Statement, at 28-29.

37 *See, e.g.*, Trans. at 59-60 (Arquit); Trans. at 57-58 (Leary); *see also* AAI Comments, at 12-13 (stating that "the addition of civil fines would be a complicated and unnecessary undertaking").

38 *See* Trans. at 59-61 (Arquit). Moreover, if any fine reduced the damages available to private litigants, all value would be lost. AAI Comments, at 12-13. Others believe that the best form of deterrence for serious antitrust violations is incarceration—not civil fines, which typically punish shareholders instead of the individuals who violated the law. *See* Trans. 63-65 (Leary).

39 *See* March 21, 2006, Trans. at 58-59 (Majoras).

40 *Id.* at 57-58 (Barnett).

obtaining incarceration for criminal offenses more difficult because courts might view criminal violations as less narrowly circumscribed.[41]

Chairman Majoras testified that "there may be some circumscribed instances where we could use such authority." She cited as an example the situation where a conduct remedy might lead to a worse result than allowing the conduct to continue.[42] However, she had not fully considered the question.[43]

2. *If so, in what circumstances and what types of cases should such fines be available?*

The Commission did not receive comments or testimony specifically addressing what types of cases or in what circumstances statutory civil fines should be available. As discussed above, however, those persons who advocated such civil fine authority suggested it would be appropriate in the following circumstances:

- In the case of DOJ, where criminal penalties were not appropriate, for example, because the conduct in question was not "hard core" cartel-like behavior;
- In the case of either DOJ or the FTC, where prospective injunctive relief and private litigation would have insufficient deterrent effect.[44]

The types of circumstances in which civil fine authority might be appropriate are also described in the FTC's policy on equitable monetary relief and are discussed in subsection II.B.2. of this memorandum.

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41 *Id.*

42 *Id.* at 58-59 (Majoras).

43 *Id.*

44 *See* Calkins Statement, at 28-29.

3. *If DOJ and/or the FTC are given such authority, how, if at all, should it affect the availability of damages awarded to private plaintiffs?*

Witnesses and commenters before the AMC did not propose any specific designs for a civil fines system. One witness who did not favor the creation of new civil fine authority nevertheless suggested that if such authority were enacted, fines paid should *not* have any effect on private damage awards because the purpose of such fines would be to fill gaps in (rather than to replace) private enforcement.[45] Another witness who did advocate for the enactment of new civil fine authority proposed that such fines should be held in escrow until the conclusion of civil litigation and refunded to the defendant to the extent that amounts were paid out in damages, in order to avoid duplicative penalties.[46]

B. Should Congress clarify, expand, or limit the FTC's authority to seek monetary relief under 15 U.S.C. § 53(b)?

The Commission's hearing witnesses focused extensively on both the merits of the FTC's policy regarding monetary equitable relief and whether the FTC actually has the authority under existing law to seek such relief. Arguments regarding whether Section 13(b) of the FTC Act[47] authorizes the FTC to obtain equitable monetary relief are discussed first, followed by a discussion of merits of the FTC's policy.

1. *Current Authority in Section 13(b)*

a. Section 13(b) already provides sufficient authority

Most commenters believe that Section 13(b) already provides sufficient authority for the current FTC Policy, and therefore that no statutory change to Section 13(b) is needed or

45 *See* AAI Comments at 13.

46 Calkins Statement, at 29; Trans. at 55-56 (Calkins).

47 15 U.S.C. § 53(b).

appropriate (presuming that the FTC's policy overall has merit).[48] Two district courts have expressly found that a court may order disgorgement and restitution in a competition case brought by the FTC: *FTC v. Mylan Labs., Inc.*, 62 F. Supp. 2d 25 (D.D.C. 1999), and *FTC v. Abbott Labs,* 1992-2 Trade Cas. (CCH) ¶ 69,996 (D.D.C. 1992).[49] Several courts of appeal have affirmed the FTC's authority to obtain such relief in consumer protection cases, also under Section 13(b).[50] The ability of federal courts to grant equitable monetary relief at the request of the FTC flows from long-standing Supreme Court precedent, which also supports the law enforcement activities of other agencies such as the Securities and Exchange Commission.[51] According to FTC Principal Deputy General Counsel Graubert, the Supreme Court has made clear that the response to an antitrust violation would be incomplete if the violators were not deprived of the gains from their unlawful conduct.[52]

According to Graubert and former FTC General Counsel Stephen Calkins, Congress has approved of the FTC's assertion of statutory authority to pursue monetary equitable remedies, and it is "settled law."[53] Although the original legislative history on Section 13(b) is thin, Congress modified (and strengthened) other aspects of Section 13(b) in 1994.[54] At that time, Congress was aware that the FTC was asserting Section 13(b) to obtain monetary equitable relief

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48 *See, e.g.*, Graubert Statement, at 2-3; Calkins Statement, at 11; Leary Statement, at 7.

49 *See* Graubert Statement, at 2 & n.6.

50 *See, e.g.*, *FTC v. Munoz*, 17 Fed. Appx. 624 (9th Cir. 2001) (unpublished opinion); *FTC v. Febre*, 128 F.3d 530 (7th Cir. 1997); *see also* Graubert Statement, at 3 n.7 (collecting cases).

51 Graubert Statement, at 2-3 & n.7. See discussion regarding *Porter v. Warner Holdings*, above at subsection I.A.

52 Graubert Statement, at 3 & n.8 (citing, *inter alia*, *United States v. Grinnell Corp.*, 384 U.S. 563 (1966)).

53 Calkins Statement, at 11; Trans. at 27-30 (Graubert); *see also* Leary Statement, at 7 (question "seems settled").

54 Trans. at 32-33 (Graubert); *see* Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, § 10, 108 Stat. 1691 (amending the service of process requirements and venue provisions).

and did not show any disapproval of such usage, but instead provided the FTC with even greater authority.[55] These commenters believe any remaining question about that authority is best left to the courts for resolution.[56]

One witness further argued that it would be difficult to distinguish the FTC's authority to seek monetary relief under Section 13(b) depending on whether the enforcement action sounded in consumer protection or antitrust.[57] By its terms, Section 13(b) does not distinguish the remedies available to the FTC depending on the substantive provision under which an action is brought.[58] The FTC Act bars "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce."[59] Accordingly, any restriction applicable to antitrust cases only would have to specify that Section 13(b) does not authorize monetary remedies for "unfair methods of competition."[60] According to Calkins, doing that could jeopardize the FTC's ability to obtain monetary relief in a consumer protection case challenging conduct as an unfair method of competition, rather than as an unfair or deceptive act or practice.[61]

b. Section 13(b) does not currently authorize such relief

Some persons have opined that Section 13(b) does not authorize the FTC to seek monetary equitable relief in antitrust cases. According to former FTC General Counsel Kevin

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55 Trans. at 32-33 (Graubert). The legislative history of the 1994 revisions to Section 13(b) does not include any discussion of the FTC's authority to seek monetary equitable remedies, however. *See, e.g.*, S. Rep. 103-130, at 15-16, *as reprinted in* 1994 U.S.C.C.A.N. 1776.

56 *See* Calkins Statement, at 1; Graubert Statement, at 1-2; Trans. at 33-35 (Leary).

57 *See* Calkins Statement, at 14 (stating that competition and consumer protection law are 'two wings of the same house' and are therefore sometimes difficult to distinguish).

58 *See* 15 U.S.C. § 53(b).

59 15 U.S.C. § 45(b).

60 *See* Calkins Statement, at 14.

61 *Id.*

Arquit, for example, recent Supreme Court and D.C. Circuit cases cast doubt on the FTC's authority to obtain such relief.[62] First, he cited *Meghrig v. KFC Western, Inc.*, in which the Court held that when Congress creates an elaborate enforcement scheme (in that case, the Resource Conservation and Recovery Act), it is inappropriate to assume that Congress also intended to confer the full scope of equitable power, including disgorgement and restitution.[63] Second, Arquit pointed to *United States v. Philip Morris USA, Inc.*, in which the D.C. Circuit held that authority to "prevent and restrain" violations under RICO does not confer authority to seek disgorgement.[64] As a result, there is a real risk that a future court will find that that the FTC lacks the authority to seek monetary equitable relief in antitrust cases.[65] Furthermore, such a policy could endanger the FTC's continued ability to obtain equitable monetary relief in consumer protection cases.[66]

2. *Evaluation of FTC's existing policy*

Supporters of the FTC's monetary equitable remedies policy argue that it adds enforcement value by:

- increasing deterrence;
- enhancing compensation to victims of anticompetitive conduct; and
- creating a more efficient mechanism for both compensation and deterrence.

They advocate for the FTC's continued use of monetary equitable remedies.

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62 *See* Written Testimony of Kevin Arquit Before the Antitrust Modernization Commission, at 13 n.24 (Dec. 1, 2005) ("Arquit Statement").

63 516 U.S. 479, 487-88 (1996).

64 396 F.3d 1190, 1199-1200 (D.C. Cir. 2005).

65 Trans. at 27 (Arquit). Graubert testified that Arquit's arguments have been rejected in other cases. Trans. at 31 (Graubert) (citing *United States v. Lane Labs*, 427 F.3d 219, 231-33 (3d Cir. 2005), which specifically rejected arguments similar to those made by Arquit regarding the implications of *Meghrig* and *Philip Morris*); *see also United States v. Rx Depot, Inc.*, 438 F.3d 1052, 1055-60 (10th Cir. 2006) (same).

66 Arquit Statement, at 13.

Opponents of the policy challenge each of those asserted benefits. Furthermore, they claim that the FTC's policy:

- provides limited guidance regarding the circumstances in which relief will be sought;
- creates needless duplication; and
- extends relief beyond that provided by the antitrust laws.

They contend that the FTC should never seek to recover monetary equitable remedies.

These arguments are developed below.

Clarity and transparency

Some commenters argue that the first two criteria of the FTC Policy are superfluous because when those two criteria (clear violation and reasonable basis for calculation) are met, private litigation is already likely to be successful and to compensate victims.[67] In those circumstances, an additional government remedy is unlikely to be useful.[68] In addition, these commenters assert that the FTC's current policy provides insufficient guidance to the public or to the Commission itself as to when it will seek monetary equitable remedies.[69]

Those who support current FTC policy respond that the FTC has used its Section 13(b) authority responsibly and that the policy itself is very limited.[70] In fact, the FTC has used this authority in only a handful of competition cases.[71] Furthermore, they assert that the FTC has provided the business community with substantial guidance concerning the circumstances in

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67 Arquit Statement, at 10.

68 *Id*. at 10-11.

69 *Id.* at 6-7.

70 Calkins Statement, at 16-17, 30; *see also* Leary Statement, at 8 (noting that the "current caution" displayed by the FTC in equitable relief, but stating that it would be helpful if the AMC recommended in its report that the FTC should continue to use 13(b) sparingly).

71 Calkins Statement, at 17; *see* FTC Policy Statement, 68 Fed. Reg. 45,820, 45,821 n.6-8 (Aug. 4, 2003) (providing a list of 11 cases where the FTC sought monetary equitable remedies).

which the FTC may seek remedies. They also contend that critics of the policy have failed to show any detrimental effects resulting from the FTC's current policy.[72]

Deterrence and compensation

Proponents of the FTC's monetary equitable remedies policy contend that it adds value to the existing set of civil remedies by increasing deterrence and providing greater compensation to victims of anticompetitive activity.[73] In particular, they contend that private and state suits for damages might not always be brought.[74] Follow-on litigation also may not provide sufficient deterrence or compensation, they argue, due to procedural problems or standing issues that prevent recovery.[75] Specifically, circumstances in which remedies may not be sufficient for either deterrence or compensation include: (1) when plaintiffs face statute of limitations bars; (2) when direct purchasers choose not to sue (perhaps because they want to maintain relationships with suppliers); (3) when indirect purchasers are precluded from suit by *Illinois Brick* and have no state cause of action; and (4) when proving the extent of damages caused is difficult.[76]

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72 Graubert Statement, at 6.

73 *See, e.g.*, Graubert Statement, at 5; Calkins Statement, at 2.

74 *See* Calkins Statement, at 7-8; *see also* Trans. at 76-82 (Calkins) (stating that private suits would have been unlikely if the FTC had proceeded with an administrative action instead of using 13(b)).

75 *See* Trans. at 12 (Graubert). Calkins called this the "bi-modal" problem in antitrust enforcement—either there is too little deterrence when companies are merely enjoined (a slap on the wrist), or they are sentenced to prison, if the Antitrust Division decides to challenge the conduct criminally. *See* Calkins Statement, at 8-10. Monetary equitable remedies or civil fines potentially fill the gap between the two extremes that are currently available to antitrust enforcers. *Id*.

76 Graubert Statement, at 5; *see* Calkins Statement, at 15; *see also* Letter from James M. Spears, Attorney, Ropes & Gray, to Donald S. Clark, Secretary, Federal Trade Commission, at 16 (Mar. 29, 2002) (supporting limited use of disgorgement).

Others take the view that FTC civil remedy power adds little to value to the current scheme of public and private antitrust enforcement.[77] In their view, the FTC should not pursue monetary remedies without a strong showing that the current system is not working.[78] The main risk of including government monetary remedies in the existing remedial system is that it potentially results in award duplication and possible over-deterrence.[79]

Critics of the FTC policy also argue that the FTC it is difficult to identify those situations in which the FTC will actually add value by seeking monetary equitable relief. They note that even in the exemplar cases cited in the FTC Policy Statement, such as *Mylan* and *Hearst*, both private plaintiffs and states stepped in soon after the FTC settlement.[80] In *Hearst*, for example the FTC obtained $19 million in disgorgement, while private plaintiffs obtained a $26 million settlement; because the "class plaintiffs ultimately recovered more than the disgorgement amount, and because disgorged funds were properly used to compensate the class plaintiffs, the disgorgement remedy was entirely unnecessary."[81] In both matters, critics claim the FTC did not establish that its pursuit of disgorgement added value to the existing scheme of private

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77 Arquit Statement, at 12-13. However, Calkins suggested that private monetary remedies do not always work seamlessly with government injunctions, as some assert. Although the FTC has challenged numerous instances of physician price fixing—14 in 2002-03—no private damages suits have been brought. Calkins Statement, at 7-8 (estimating 10% of all U.S. doctors are subject to an order not to engage in illegal price coordination); *see also* Thomas L. Greaney, *Chicago's Procrustean Bed: Applying Antitrust Law in Health Care*, 71 Antitrust L.J. 857, 892 n.149 (2004). Notably, however, the FTC has generally not sought monetary remedies in any of these cases. Calkins Statement, at 7-8. *But see FTC v. College of Physicians-Surgeons of Puerto Rico,* Civ. No. 97-2466 HL (D.P.R. Oct. 2, 1997) (alleged price-fixing and boycott by physicians; stipulated judgment included $300,000 restitution to Puerto Rico).

78 Arquit Statement, at 3, 5.

79 *Id*. at 4-5.

80 *Id.* at 8-10.

81 Letter from Stephen A. Stack, Jr. to Office of the Secretary, Federal Trade Commission, at 9 (Mar. 26, 2002) ("Stack Letter").

enforcement remedies.[82] In response, proponents of the FTC's policy counter that the fact that there were private and state suits in *Mylan* and *Hearst* does not prove that these suits necessarily would have been brought if the FTC had not proceeded under 13(b).[83]

Efficiency

Supporters of the FTC's monetary equitable remedies policy argue that it is more efficient and better for the victims of antitrust violations because it reduces attorneys' fees and therefore ensures that a greater portion of payment by the defendant or defendants is used to compensate victims.[84] When the FTC obtains disgorgement or restitution, all of the recovered funds (less relatively small administrative costs if a settlement administrator is retained) are available for consumers without a deduction for private counsel's attorneys' fees.[85] Others expressed a concern that this reduction in attorneys' fees will discourage private litigation.[86]

Duplication and logistical problems

Critics of the FTC's policy contend that it creates the possibility of duplicative payments, resulting in over-deterrence and disincentives for efficient conduct.[87] The potential for award duplication results from the ability of victims to recover both through private direct and indirect

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82 Arquit Statement, at 8; *see also* Starling, *Criminal Antitrust Enforcement*, 57 Antitrust L.J. at 158 (then-DAAG criticizing FTC's potential use of Section 13(b) on ground that "[i]t is really doubtful that the federal government has any advantage over private plaintiffs or state attorneys general in managing class action suits").

83 Trans. at 77-79 (Calkins).

84 Trans. at 82 (Calkins).

85 Trans. at 12 (Graubert).

86 Letter from Roxane C. Busey, Chair, ABA Section of Antitrust Law, to Donald S. Clark, Secretary, Federal Trade Commission, at 8 (Mar. 11, 2002) ("Busey Letter"). One response to this critique is that the FTC actions provide a benefit to the people who were injured by having their attorneys' fees reduced—especially when the FTC has done all of the work, as it had in *Hearst*. Trans. at 82 (Calkins).

87 Arquit Statement, at 4-5.

purchaser actions as well as through restitution.[88] Attempts to address or avoid the duplicative-payment problem create significant logistical problems and fail to avoid duplication of effort.[89] In particular, private actions can arise long after an equity court has determined how restitution or disgorgement funds should be allocated; any attempts to prevent duplicative recoveries and payments are thus particularly complicated.[90]

Others contend that these arguments overstate the problem. For example, the FTC's participation in proceedings where it seeks monetary remedies may serve to facilitate global settlements.[91] In that way, transaction costs can be reduced when the government obtains a quick and meaningful recovery.[92] They contend that logistical problems have not arisen, and that the likelihood that they would is small due to statutes of limitations and other incentives that encourage the prompt filing of cases and the time that it takes for the FTC to complete its own investigations.[93] They cite to the experience in *Mylan*, *Hearst/First Data*, and *Perrigo/Alphapharma* as an example of how well an FTC action to obtain monetary equitable relief can be coordinated with other proceedings to minimize conflicts and maximize recovery to consumers.[94] Finally, the FTC contends there is no evidence of any actual duplicative recoveries,[95] and that its policy expressly addresses concerns about duplicative recoveries by providing that the FTC will "take pains to ensure that injured persons who recover losses through

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88 *Id*.; *see also* David Balto, *Returning to the Elman Vision of the Federal Trade Commission: Reassessing the Approach to the FTC Remedies*, 72 Antitrust L.J. 1113, 1120-24 (2005); Busey Letter, at 6-7.

89 Arquit Statement, at 4.

90 *Id*. at 10.

91 Calkins Statement, at 21.

92 Graubert Statement, at 6; *see also* Trans. at 76-77 (Graubert).

93 Calkins Statement, at 21.

94 Graubert Statement, at 5.

95 *Id.*

private damage actions under the Clayton Act not recover doubly for the same losses via FTC-obtained restitution."[96]

Expansion of relief beyond that allowed by antitrust law

Some commenters contend that it is inappropriate for the FTC to provide a remedy where statutes and judicial decisions bar recovery. For example, *Illinois Brick* and the antitrust injury doctrine both potentially limit recovery.[97] Similarly, statutes of limitations reflect legislative judgment regarding the time frame for recovery, so that harmed parties who fall outside of those limits should not be allowed to recover indirectly through an FTC remedial action.[98] In either case, they argue, the FTC is improperly assuming the power to fill "gaps" in the antitrust remedies created by Congress or the courts.[99]

In response, others have asserted that the FTC policy properly leaves open the possibility for indirect purchasers to recover damages in situations where they would otherwise be barred from such recovery (*e.g.*, due to a lack of *Illinois Brick*-repealer legislation in their state).[100] Furthermore, so long as the defendant has not completely disgorged ill-gotten gains, there is no reason not to try to continue to make injured individuals whole.[101] Therefore, as long as the

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96 FTC Policy Statement, 68 Fed. Reg. 45,820, 45,823 (Aug. 4, 2003). Others argue that duplicative payments are not a problem at all and that disgorgement should be used to increase the overall level of deterrence by increasing the total amount of funds paid by antitrust violators. *See* Letter from Robert H. Lande, Senior Research Scholar, American Antitrust Institute, to Donald S. Clark, Secretary, Federal Trade Commission (Mar. 29, 2002).

97 Trans. at 64-66 (Arquit); *see also* Busey Letter at 6-7; Stack Letter at 5, 7-9; Ivy Johnson, *Restitution on Behalf of Indirect Purchasers: Opening the Backdoor to* Illinois Brick, 57 Wash. & Lee L. Rev. 1005 (2000).

98 Trans. at 64-66 (Arquit).

99 *Id*.; *see also* Leary *Mylan* dissent, § 6.

100 *See* Calkins Statement, at 20 & n.59.

101 *Id*. This contention relies on a reading of *Illinois Brick* as intended to avoid undue complexity rather than to protect defendants and deny compensation for indirect purchasers. *Id.*

disgorgement action is relatively straightforward, there would be no reason not to compensate indirect purchasers, who could otherwise not recover.[102]

[102] *Id*.