MEMORANDUM

From: AMC Staff

To: Commissioners

Date: July 20, 2006

Re: Supplemental Civil Remedies-Government Discussion Memorandum

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The Commission deferred completion of its deliberations regarding government civil remedy authority on May 8, 2006, to gather additional information about the legal authority for the FTC's monetary remedies policy and whether the DOJ has similar authority. This memorandum, which supplements the previous memorandum on Government Civil Remedies distributed to all Commissioners,[1] addresses the three issues on which the Commission sought additional research from AMC Staff: (1) the legal basis for the FTC's authority to seek monetary equitable relief and whether the DOJ has comparable authority; (2) a summary of the FTC's existing monetary equitable remedies policy; and (3) the instances in which the FTC has sought monetary equitable remedies in competition cases.

I. Legal Authority

None of Section 13(b) of the FTC Act, Section 4 of the Sherman Act, or Section 15 of the Clayton Act explicitly authorize the FTC or DOJ to obtain equitable monetary relief.[2] As discussed in Staff's May 4 memorandum, however, the FTC has obtained such relief in both

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[1] *See* Civil Remedies-Government Discussion Memorandum (May 4, 2006) ("May 4 memorandum").

[2] *See* 15 U.S.C. §§ 4, 25, 53(b).

consumer protection and competition cases, relying on a line of cases beginning with *Porter v. Warner Holding Co.*, in which courts have declined to limit the availability of equitable relief n the absence of a clear statutory direction to do so.[3] The FTC has obtained equitable relief in settling seven district court and four administrative cases.[4]

By their terms, Section 4 of the Sherman Act and Section 15 of the Clayton Act—authorizing the Attorney General to "institute proceedings in equity to prevent and restrain . . . violations"—are essentially identical to Section 13(b) of the FTC Act.[5] Although the Antitrust Division has not sought monetary equitable remedies in any antitrust case,[6] the Division

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3 *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) ("the comprehensiveness of . . . equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command."); *accord Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960) (reaffirming *Porter*'s principle of statutory construction); *see also 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 (11th Cir. 1996) (citing *Porter* to confirm FTC's authority to obtain disgorgement and restitution); *FTC v. Robert J. Febre*, 128 F.3d 530, 537 (7th Cir. 1997) (same). *But see Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 487-488 (1996) (holding that when Congress creates an elaborate enforcement scheme—here 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).

4 *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"); *FTC v. Perrigo Co. and Alpharma, Inc.*, Civ. No. 1:04CV1397 (RMC) (D.D.C. Aug. 12, 2004); *FTC v. Mylan Labs*, Civ. No. 1:98CV03114 (TFH) (D.D.C. Nov. 29, 2000); *FTC v. Hearst Trust*, Civ. No. 1:01CV00734 (D.D.C. Dec. 14, 2001); *Commonwealth Land Title Ins. Co.*, 126 F.T.C. 680 (1998); *FTC v. College of Physicians-Surgeons of Puerto Rico*, Civ. No. 97-2466 HL (D.P.R. Oct. 2, 1997); *FTC v. Mead Johnson & Co.*, Civ. No. 92-1266 (D.D.C. June 11, 1992); *FTC v. American Home Products Corp.*, Civ. No. 92-1367 (D.D.C. June 11, 1992); *FTC v. Joseph Dixon Crucible Co*., Civ. No. C80-700 (N.D. Ohio 1983); *Binney & Smith Inc.*, 96 F.T.C. 625 (1980); *Milton Bradley Co.*, 96 F.T.C. 638 (1980); *American Art Clay Co.*, 96 F.T.C. 809 (1980).

5 15 U.S.C. §§ 4, 25.

6 *See* Statement of Thomas B. Leary, Before the Antitrust Modernization Commission, Hearing on Federal Civil Remedies for Antitrust Offenses, at 7-8 (Dec. 1, 2005)) (Opining that DOJ also has authority to seek equitable monetary relief, but observing "To my knowledge . . . the DOJ has never sought to use this authority to obtain either disgorgement or restitution, as a civil remedy.").

confirmed to the Commission that it believes it has the authority to seek such relief when it deems it appropriate to do so.[7]

II. FTC Disgorgement Policy

The FTC issued its Policy Statement on Monetary Equitable Remedies in Competition Cases ("FTC Policy Statement" or "the Policy") on August 4, 2003 (a copy appears in Appendix A to this memorandum).[8] The Policy is intended to provide guidance as to when, in its prosecutorial discretion, the FTC will seek such relief.[9] The Policy explains that the FTC will seek monetary equitable remedies only in "exceptional cases."[10] It states that the FTC does not "view monetary disgorgement or restitution as routine remedies for antitrust cases," but that "disgorgement and restitution can play a useful role in some competition cases, complementing more familiar remedies such as divestiture, conduct remedies, private damages, and civil or criminal penalties."[11]

The Policy identifies three factors that will govern the FTC's use of monetary equitable remedies:

(1) the violation was "clear" (*i.e.*, a reasonable party should expect its conduct to be found illegal);

(2) there is a reasonable basis for calculating the amount of disgorgement or remedy, based on the gains or injury from the violation; and

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7 *Cf.* 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 "Respondents mistakenly draw on analogies to private antitrust enforcement . . ., overlooking that this Court has repeatedly stated, in the context of government antitrust enforcement, that Congress's conferral of power 'to prevent and restrain violations,' . . . authorizes a court to fashion appropriate relief that may include, and go beyond, restoring the status quo ante") (*citing Ford Motor Co. v. United States*, 405 U.S. 562, 573 & n.8 (1972)).

8 68 Fed. Reg. 45,820 (Aug. 4. 2003).

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

10 *Id.* at 45,821.

11 *Id*.

(3) use of the remedy would add value because other remedies will either likely fail or provide incomplete relief.[12]

None of the factors is dispositive, however. As the policy explains:

> A strong showing in one area may tip the decision whether to seek monetary remedies. For example, a particularly egregious violation may justify pursuit of these remedies even if there appears to be some likelihood of private actions. Moreover, the pendency of numerous private actions may tilt the balance the other way, even if the violation is clear.[13]

III. FTC Use of Monetary Equitable Remedies

As stated above, the FTC has obtained monetary relief in eleven competition cases since 1980. In the first eight cases, brought between 1980 and 1998, the FTC principally sought restitution for consumer harm caused by antitrust violations. Since 1998, the FTC has used its remedial authority three additional times in cases in which it has sought primarily to disgorge the gains resulting from the anticompetitive conduct. A brief description of each of the cases identified by the FTC in its AMC testimony follows.

Art Supply Cases. The FTC sought monetary equitable remedies in 1980 against four art suppliers that had allegedly engaged in unlawful price discussions, price coordination, and price-fixing.[14] In each of these cases, the consent decree required the defendant to provide restitution to consumers.[15]

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[12] *Id.* at 45,822-23.

[13] *Id.* at 45,821.

[14] *See In the Matter of Binney & Smith Inc.*, 96 F.T.C. 625 (Oct. 1980); *In the Matter of Milton Bradley Company*, 96 F.T.C. 638 (Oct. 1980); *In the Matter of American Art Clay Co.*, 96 F.T.C. 809 (Nov. 1980); *In the Matter of The Joseph Dixon Crucible Co.*, C80-700 (N.D. Ohio 1983) (arising from same investigation but settled at later date).

[15] *See Binney & Smith*, Consent Order, etc. in Regard to Alleged Violation of the Federal Trade Commission Act, Docket C-3045, part IV (Oct. 16, 1980) (requiring defendant Binney & Smith to pay $1 million into an escrow account for consumer restitution); *Milton Bradley* Company, Consent Order, etc. in Regard to Alleged Violation of the Federal Trade Commission Act, Docket C-3046, appendix X (Oct. 16, 1980) (requiring defendant Milton Bradley to pay

Infant Formula Cases. The FTC charged Mead Johnson & Company and American Home Products with price coordination on bids for infant formula made to the federal government.[16] The FTC obtained in-kind restitution, pursuant to a consent decree, in the form of 3.6 million pounds of powdered infant formula to the federal government.[17]

Doctors Boycott. In 1997, the FTC and Puerto Rico's Attorney General filed suit against a Puerto Rican association of doctors for an allegedly unlawful group boycott of non-emergency services.[18] Pursuant to a consent decree, the association paid $300,000 in consumer restitution.[19]

Title Insurance.[20] Commonwealth Land Title sought to form a joint venture with its sole competitor in the Washington, D.C. area, American Title Insurance. It entered into certain preliminary agreements, and, while beginning to integrate operations, raised prices to customers.[21] The joint venture was abandoned after an FTC investigation. Pursuant to a consent

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$200,000 in escrow fund intended for consumer restitution); *American Art Clay*, Consent Order, etc. in Regard to Alleged Violation of the Federal Trade Commission Act, Docket C-3050, part IV (Oct. 16, 1980) (requiring defendant to pay $25,000 into an escrow account for consumer restitution); *In the Matter of The Joseph Dixon Crucible Co.*, C80-700 (N.D. Ohio 1983) (requiring $525,000 in "consumer redress," and an additional $75,000 for the defendant's violation of a pre-existing 1938 FTC order).

16 *FTC v. Mead Johnson & Co*, 92-1266 (D.D.C. June 11, 1992); *FTC v. American Home Prods.*, 92-1367 (D.D.C. June 11, 1992). A third defendant defeated the FTC at trial. *FTC v. Abbott Labs.*, Civ. A. No. 92-1364, 1992 WL 335442, *2 (D.D.C. Oct. 13, 1992), *dismissed on other grounds*, 853 F. Supp. 526 (D.D.C. 1994).

17 FTC Press Release, *FTC Settlements with Two Leading U.S. Infant-Formula Makers in Connection with Bidding Practices Nets 3.6 million Pounds of Powdered Infant Formula as Restitution to the Federal Government* (June 11, 1992).

18 *FTC v. College of Physicians-Surgeons of Puerto Rico*, No. 97-2466 (D.P.R. 1997).

19 FTC Press Release, *Puerto Rican Physicians Agree to Settle FTC Charges* (Oct. 2, 1997).

20 *In the Matter of Commonwealth Land Title Insurance Company*, 126 F.T.C. 680, 688 (Nov. 1998).

21 *Id.*

decree, Commonwealth Land refunded consumers the amount of the overcharge during the interim integration period.[22]

Mylan. Mylan Laboratories, Inc. ("Mylan") manufactured two generic anti-anxiety drugs, lorazepam and clorazepate.[23] Mylan entered into a 10-year exclusive dealing contract with most of the producers of the active ingredients for these drugs and in exchange Mylan agreed to pay them a percentage of its gross profits.[24] Mylan subsequently raised its prices to consumers for the two generic drugs by 1900% to 3200%.[25] The FTC, 32 state attorneys general, and private plaintiffs sued. In 2000, Mylan agreed with the FTC and the 32 state attorneys general to pay $100 million into a fund for distribution to injured consumers and state agencies, which, according to the complaint, represented nearly all of the $120 million in allegedly unlawful profits.[26] In addition, the private plaintiffs settled for $39 million, including attorneys' fees.[27] None of the payments explicitly offset each other.

Hearst. Hearst Corporation ("Hearst") acquired J.B. Laughery, Inc. ("Laughery") after filing an HSR notification with the agencies with respect to which the FTC did not seek additional information.[28] After the acquisition, the FTC learned that, through each company's wholly owned subsidiaries, its acquisition of Laughery created a monopoly in a drug information database market. The FTC alleged that it would have sought information relevant to that

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22 FTC Press Release, *Washington, D.C.-based Title Plant Agrees to Settle FTC Charges* (Aug. 26, 1998).

23 *FTC v. Mylan Laboratories, Inc.*, Amended Complaint ¶ 15, Civ. No. 1:98CV03114 (D.D.C. Nov. 29, 2000).

24 *Id.* at ¶ 23.

25 *Id.* at ¶ 30.

26 FTC Press Release, *FTC Reaches Record Financial Settlement to Settle Charges of Price-fixing in Generic Drug Market* (Nov. 29, 2000) ("FTC Mylan Press Release").

27 *Id.*

28 *FTC v. The Hearst Trust*, Complaint ¶¶ 18-19, Civ. No. 1:01CV00734 (D.D.C. Dec. 14, 2001).

possibility had Hearst not illegally omitted from Hearst's HSR filing several high-level corporate documents prepared to evaluate the Hearst acquisition and its competitive effects.[29] To resolve the matter, in 2001, the FTC and Hearst agreed that Hearst would pay $19 million in disgorgement of its unlawful profits, as well as a $4 million civil penalty for its failure to comply fully with the HSR requirements; private plaintiffs also reached a $26 million settlement.[30] The disgorgement to the FTC (but not the civil fine) explicitly offset the settlement with plaintiffs.[31]

Perrigo. Perrigo and Alpharma both filed applications with the FDA to produce a generic version of children's Motrin.[32] While their applications were pending, a change in the applicable Hatch-Waxman rules granted Alpharma an exclusive 180-day sales period before Perrigo would be able to enter. Perrigo nonetheless sought to enter the market along with Alpharma; the Perrigo and Alpharma ultimately agreed that Alpharma would forgo entry altogether, leaving the generic market to Perrigo, in exchange for "a large upfront payment . . . plus a share of Perrigo's profits."[33] The FTC obtained a consent decree pursuant to which the defendants agreed to disgorge $6.25 million in profits; 50 state attorneys general obtained an additional $1.5 million pursuant to settlement. [34] None of the payments explicitly offset each other.

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29 *Id.* ¶ 28; FTC Press Release, *Hearst Corp. to Disgorge $19 million and Divest Business to Facts and Comparisons to Settle FTC Complaint* (Dec. 14, 2001) ("FTC Hearst Press Release").

30 FTC Hearst Press Release.

31 Statement of Commissioner Orson Swindle Concerning FTC v. Hearst, File No. 991-0323.

32 *FTC v. Perrigo Company,* Complaint ¶ 1, Civil Action No. 1:04CV01397 (RMC) (D.D.C. 2003).

33 *Id.* ¶¶ 27, 29

34 FTC Press Release: *Generic Drug Marketers Settle FTC Charges* (Aug. 12, 2004).

APPENDIX A

68 Fed. Reg. 45,820 (Aug. 4, 2003)

FEDERAL TRADE COMMISSION

Policy Statement on Monetary Equitable Remedies in Competition Cases

AGENCY: Federal Trade Commission (FTC).

ACTION: Notice.

SUMMARY: The Commission has issued a policy statement on the use of disgorgement as a remedy for violations of the Hart-Scott-Rodino (HSR) Act, FTC Act and Clayton Act.

DATE: The Commission approved this policy statement on July 25, 2003.

FOR FURTHER INFORMATION CONTACT: John D. Graubert, Principal Deputy General Counsel, Office of General Counsel, FTC, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580, (202) 326-2186, jgraubert@ftc.gov.

SUPPLEMENTARY INFORMATION:

Policy Statement on Monetary Equitable Remedies in Competition Cases

In recent years the Commission has given considerable thought to the appropriate circumstances in which to seek, as a matter of prosecutorial discretion, monetary equitable remedies (particularly disgorgement or restitution) in competition cases brought pursuant to Section 13(b) of the FTC Act.[1] In December 2001, the Commission issued a notice requesting comment on the issue,[2] and received six comments in response.[3] The agency has also reviewed relevant case law and literature, including a number of sources cited by commentors, as well as discussions in public fora and its own experience. The Commission may use all these resources to inform its decisions whether to seek monetary remedies in particular competition matters on a case-by-case basis. In addition, the Commission sets forth below some general observations on the use of disgorgement or restitution in competition cases.[4]

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1 15 U.S.C. § 53(b).

2 66 Fed. Reg. 67,254 (Dec. 28, 2001); also available on the Commission's website at http://www.ftc.gov/os/2001/12/disgorgefrn.htm.

3 The following filed comments: the Antitrust Section of the American Bar Association, the American Antitrust Institute, the American Enterprise Institute for Public Policy Research, James M. Spears, Stephen A. Stack, and Kenneth G. Starling. These comments are available at http://www.ftc.gov/os/comments/disgorgement/index.htm.

4 This statement sets forth some observations and intentions of the Commission regarding its exercise of discretion in determining whether to seek monetary equitable remedies in competition cases. It does not create any right or obligation, impose any element of proof, or

Disgorgement is an equitable monetary remedy "designed to deprive a wrongdoer of his unjust enrichment and to deter others" from future violations.[5] Depriving the violator of any of the benefits of illegal conduct has long been accepted as an appropriate, indeed necessary, element of antitrust remedies. *See, e.g., United States v. Grinnell Corp*., 384 U.S. 563, 577 (1966); *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110, 128 (1948). Restitution is also an equitable remedy, serving different but often complementary purposes. Restitution is intended to restore the victims of a violation to the position they would have been in without the violation, often by refunding overpayments made as a result of the violation. The Commission has sought and obtained disgorgement or restitution in a number of competition cases over the last few decades,[6] most recently in the *Mylan*[7] and *Hearst*[8] matters. In exercising its prosecutorial discretion in the competition area, however, the Commission has moved cautiously and used its monetary remedial authority there sparingly. The Commission continues to believe that disgorgement and

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adjust the burden of proof or production of evidence on any particular issue, as those standards have been established by the courts. This statement of policy does not apply to consumer protection cases.

5 *SEC v. First City Financial Corp*., 890 F.2d 1215, 1230 (D.C. Cir. 1989).

6 *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, under FTC Act §§ 5(a) and 13(b); stipulated judgment included $300,000 restitution to Puerto Rico); *FTC v. Mead Johnson & Co., Civ*. No. 92-1266 (D.D.C. June 11, 1992) (alleged bid-rigging, under FTC Act §§ 5(a) and 13(b); stipulated judgment included restitution in kind to USDA*); FTC v. American Home Products Corp., Civ. No. 92-1367 (D.D.C. June 11, 1992) (same); FTC v. Joseph Dixon Crucible Co.*, Civ. No. C80-700 (N.D. Ohio 1983) (alleged price-fixing, under Section 5(l) for violation of earlier order; stipulated judgment included $525,000 in consumer redress, plus $75,000 civil penalty); *Commonwealth Land Title Ins. Co*., 126 F.T.C. 680, 688 (1998) (alleged price-fixing; consent order included refund of excess charges); *Binney & Smith Inc*., 96 F.T.C. 625 (1980) (alleged price-fixing; consent order included $1 million in consumer redress); *Milton Bradley Co.*, 96 F.T.C. 638 (1980) (same; consent order included $200,000 in consumer redress); American Art Clay Co., 96 F.T.C. 809 (1980) (same; consent order included $25,000 in consumer redress); see also *FTC v. Abbott Laboratories*, 1992-2 Trade Cas. (CCH) ¶ 69,996 (D.D.C. 1992) (Gesell, J.), dismissed on other grounds, 853 F. Supp. 526 (D.D.C. 1994) (holding that FTC Act § 13(b) permitted the FTC to seek permanent injunction ordering restitution in antitrust case); FTC press release, June 5, 1989, *re: A&P/Waldbaums* (noting position of Commissioner Strenio that Commission should have exercised its "authority to obtain full disgorgement of these ill-gotten gains").

7 *FTC v. Mylan Labs, Inc.*, No.1:98CV03114 (TFH) (D.D.C. Feb. 9, 2001) (alleged monopolization; stipulated judgment included $100 million restitution); *see* Mem. Opinion, 62 F. Supp. 2d 25, 36-37 (D.D.C.), revised and reaffirmed in pertinent part, 99 F. Supp. 2d 1, 4-5 (D.D.C. 1999).

8 *FTC v. The Hearst Trust*, No.1:01CV00734 (TPJ) (D.D.C. Nov. 9, 2001) (alleged anticompetitive acquisition and violation of prePolicy Statement on Monetary Equitable Remedies in Competition Cases merger filing requirements; stipulated judgment included $19 million disgorgement).

restitution can play a useful role in some competition cases, complementing more familiar remedies such as divestiture, conduct remedies, private damages, and civil or criminal penalties. The competition enforcement regime in the United States is multifaceted, and it is important and beneficial that there be a number of flexible tools, as well as a number of potential enforcers, available to address competitive problems in a particular case. Nonetheless, we do not view monetary disgorgement or restitution as routine remedies for antitrust cases. In general, we will continue to rely primarily on more familiar, prospective remedies, and seek disgorgement and restitution in exceptional cases.

As a general matter, the Commission will consider the following three factors in determining whether to seek disgorgement or restitution in a competition case. First, the Commission will ordinarily seek monetary relief only where the underlying violation is clear. Second, there must be a reasonable basis for calculating the amount of a remedial payment. Third, the Commission will consider the value of seeking monetary relief in light of any other remedies available in the matter, including private actions and criminal proceedings. A strong showing in one area may tip the decision whether to seek monetary remedies. For example, a particularly egregious violation may justify pursuit of these remedies even if there appears to be some likelihood of private actions. Moreover, the pendency of numerous private actions may tilt the balance the other way, even if the violation is clear.

Clear Violation

The Commission will ordinarily seek monetary disgorgement only when the violation is clear. A violation is "clear" for this purpose when, based on existing precedent, a reasonable party should expect that the conduct at issue would likely be found to be illegal. ("Clearness" is therefore measured ex ante, as of the time the act occurs, and not ex post with the benefit of hindsight.) In such cases, the use of disgorgement will serve an appropriate deterrence goal. One key purpose of the disgorgement remedy is to remove the incentive to commit violations by demonstrating to the potential violator that unlawful conduct will not be profitable. This purpose can best be served when the violator can determine in advance that its conduct would probably be considered illegal. Disgorgement might arguably serve useful purposes whether or not the violation was clear -- for instance, by providing an example for future violators and restoring the relevant market to its pre-violation status (thereby removing any unfair advantages obtained by the violator). Overall, however, the Commission believes that the value of deterrence is reduced when the violator has no reasonable way of knowing in advance that its conduct is placing it in jeopardy of having to pay back all the potential gains.[9]

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[9] The analysis may be slightly more complicated in cases in which the Commission is seeking restitution rather than disgorgement. Restitution 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. Thus, for example, when significant consumer harm will not (for one reason or another) be redressed through a private action (see discussion of our third factor, below), the Commission might therefore consider seeking restitution even if the conduct at issue does not otherwise meet our definition of a "clear" violation.

The Commission will assess whether a violation is "clear" by means of an objective, not a subjective, standard, i.e., a reasonableness test. "Naked" restraints of trade, such as price-fixing or horizontal market division, are presumptively clear cases. The list of "clear" cases, however, goes beyond traditional per se violations. The *Hearst* and *Mylan* cases are themselves examples of easily condemned conduct that would not necessarily be described as a per se violation: in *Hearst*, merger to monopoly aided by withholding key documents from the FTC;[10] and in *Mylan*, conspiracy to obtain monopoly power through exclusive supply agreements (unsupported by any legitimate business purpose).[11]

Conversely, in the Commission's statement accompanying the issuance of its consent agreement in Abbott Laboratories and Geneva Pharmaceuticals, Inc., File No. 981-0395 (March 16, 2000), the Commission noted that the case represented the first resolution of an antitrust challenge by the government to a private agreement whereby a brand name drug company paid the first generic company that sought FDA approval not to enter the market, and to retain its 180-day period of market exclusivity under the Hatch-Waxman Act. Because the behavior occurred in a complex regulatory context, and because this was the first government antitrust enforcement action in this area, the Commission believed the public interest was satisfied with orders that regulated future conduct by the parties, without further monetary relief. The Commission warned pharmaceutical firms that they "should now be on notice, however, that [such] arrangements . . . can raise serious antitrust issues," and that accordingly "in the future, the Commission will consider its entire range of remedies in connection with enforcement actions against such arrangements, including possibly seeking disgorgement of illegally obtained profits."[12]

Reasonable Basis for Calculation of Remedy

The Commission will not seek a monetary equitable remedy when there is no reasonable basis for calculating the amount of the disgorgement or restitution to be ordered. Thus, the agency

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10 Although there was some disagreement among the Commissioners in *Hearst* on whether seeking disgorgement resulted in the optimal payment from the defendants, there was general agreement that the conduct at issue was egregious. It is axiomatic that a merger of the only significant competitors in a market (absent unusual circumstances such as proof of the "failing firm" criteria of Section 5 of the Horizontal Merger Guidelines) violates the letter of the Clayton and Sherman Acts. See *United States v. Aluminum Co. of America*, 148 F.2d 416, 429 (2d Cir. 1945); Areeda, Hovenkamp & Solow, IV Antitrust Law § 14.12 (2002 ed.). The case is further bolstered when, as in Hearst, such conduct is paired with evidence of specific intent to monopolize. See *United States v. Microsoft Corp*, 253 F.3d 34, 59 (D.C. Cir.), (en banc), *cert. denied*, 534 U.S. 952 (2001); Statement of Chairman Pitofsky and Commissioners Anthony and Thompson (Apr. 2001) (available at http://www.ftc.gov/os/2001/04/hearstpitantthom.htm).

11 According to the Commission's complaint in *Mylan*, the parties' exclusive arrangements covered 90% of the supply of the ingredient necessary to produce one of the drugs at issue, and 100% with respect to a second drug. The Commissioners all characterized the conduct alleged as "egregious," with one Commissioner observing that the facts alleged described "a clear cut antitrust violation." Statement of Commissioner Thomas B. Leary, Dissenting in Part and Concurring in Part (available at http://www.ftc.gov/os/2000/11/mylanlearystatement.htm).

12 *See* http://www.ftc.gov/opa/2000/03/hoechst.htm.

does not expect to seek disgorgement unless it can suggest to a court a reasonable means of calculating the gains or benefits from a violation, nor to seek restitution unless it can offer a reasonable gauge of the amount of injury from a violation. Nonetheless, a reasonable basis for calculation does not require undue precision. *See, e.g., FTC v. Febre*, 128 F.3d 530, 535 (7th Cir. 1997); see also *SEC v. Bilzerian*, 29 F.3d 689 (D.C. Cir. 1994); *SEC v. First City Financial Corporation, Ltd.*, 890 F.2d 1215 (D.C. Cir. 1989).

Value Added by the Commission's Monetary Remedy

The Commission will consider monetary remedies when it anticipates that other remedies are likely to fail to accomplish fully the purposes of the antitrust laws or when such a monetary remedy may provide important additional benefits. When other remedies are brought to bear and are likely to result in complete relief, a Commission action for monetary equitable relief might well be an unnecessary and unwise expenditure of limited agency resources.[13]

Thus, for example, a case may be particularly appropriate for disgorgement when private actions likely will not remove the total unjust enrichment from a violation. If statutes of limitation for, or market disincentives to, private damage actions are likely to leave a violator with some or all of the fruits of its violation, we may seek disgorgement to prevent the violator from benefiting from the violation. Similarly, when practical or legal difficulties are likely to preclude compensation for those injured by a violation who in equity should be made whole, we may seek restitution for them.[14] Such situations can arise, for example, when significant aggregate consumer injury

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[13] Several commentors suggested that the mere availability of treble damage actions or other avenues of relief will ordinarily render disgorgement unnecessary, implying that ultimately such other actions will have extracted the full amount of unjust enrichment from violators and will provide adequate deterrence against future violations. On the current state of the record we cannot share this confidence. We have not been directed to empirical evidence indicating that existing remedies routinely achieve these goals, let alone evidence that antitrust defendants have been subjected to excessive, "duplicative" damage awards. In fact it appears that the issue has been the subject of considerable debate. See, e.g., Richard Posner, Antitrust Law 47 (2d ed. 2001); John Lopatka & William Page, *Who Suffered Antitrust Injury in the Microsoft Case?*, 69 Geo. Wash. L. Rev. 829 (2001); Robert Lande, *Are Antitrust "Treble" Damages Really Single Damages?*, 54 Ohio St. L.J. 115 (1993); Steven Salop & Lawrence White, *Economic Analysis of Private Antitrust Litigation*, 74 Geo. L.J. 1001, 1033-39 (1986); Walter Erickson, *The Profitability of Violating the Antitrust Laws: Dissolution and Treble Damages in Private Antitrust*, 5:4 Antitrust L. & Econ. Rev. 101 (1972); Alfred Parker, *Treble Damage Action - A Financial Deterrent to Antitrust Violations?*, 16 Antitrust Bull. 483 (1971); compare Joseph Gallo et al., *Department of Justice Antitrust Enforcement, 1955-1997: An Empirical Study*, 17 Rev. Indus. Org. 75, 125-27 (2000). The Commission will therefore need to continue to evaluate this issue on a case-by-case basis.

[14] For example, *Hearst* presented the somewhat unusual case of a consummated merger that had passed through the HSR review process. Absent FTC action, private plaintiffs would have faced the possibly discouraging prospect of not only having to prove a violation of Section 7 of the Clayton Act or Section 2 of the Sherman Act, but also, as a practical matter, needing to show

results from relatively small individual injuries not justifying the cost of a private lawsuit, or when direct purchasers do not sue (for a variety of possible reasons) and indirect purchasers are precluded from suit under Section 4 of the Clayton Act.

Disgorgement can also be particularly valuable when the advantages a violator reaps from the violation greatly outweigh the specific penalties prescribed in applicable laws, and thereby overwhelm the significant disincentive to violating the law that such penalties otherwise provide.[15] The paramount purpose of disgorgement is to make sure that wrongdoers do not profit from their wrongdoing. *E.g., SEC v. First City Financial Corp., supra; SEC v. Tome,* 833 F.2d 1086 (2d Cir. 1987), *cert. denied*, 486 U.S. 1014-15 (1988); *see also FTC v. Gem Merchandising Corp.,* 87 F.3d 466, 470 (11th Cir. 1996).

The Commission is sensitive to the interest in avoiding duplicative recoveries by injured persons or "excessive" multiple payments by defendants for the same injury. Thus, although a particular illegal practice may give rise both to monetary equitable remedies and to damages under the antitrust laws, when an injured person obtains damages sufficient to erase an injury, we do not believe that equity warrants restitution to that person. We will take pains to ensure that injured persons who recover losses through private damage actions under the Clayton Act not recover doubly for the same losses via FTC-obtained restitution. Similarly, in cases involving both disgorgement and restitution, we would apply any available disgorged funds toward restitution and credit any funds paid for restitution against the amount of disgorgement.

We do not, however, consider it appropriate to offset a civil penalty assessment against disgorgement or restitution. As noted above, disgorgement is an equitable remedy whose purpose is simply to remove the unjust gain of the violator. Penalties are intended to punish the violator and reflect a different, additional calculation of the amount that will serve society's interest in optimal deterrence, retribution, and perhaps other interests. A penalty award would have no punitive effect if it were simply offset against these equitable remedies. It is not the Commission's intent, therefore, to allow its monetary relief proceedings to dilute the effectiveness of a civil penalty.

When the same conduct gives rise to two different causes of action, moreover, the imposition of remedies for each cause of action does not necessarily mean the resulting sanctions are "excessive.*" See, e.g., California v. ARC America Corp.,* 490 U.S. 93 (1989); *Loeb Industries, Inc. v. Sumitomo Corp.,* 306 F.3d 469, 492 (7th Cir. 2002), *cert. denied*, 123 S. Ct. 2247 (2003); *In Re Lorazepam & Clorazepate Antitrust Litigation*, MDL Dkt. No. 1290 (D.D.C.) (denial of motion to dismiss, July 2, 2001) Mem. Order at 15-16.

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a violation of the Hart-Scott-Rodino premerger notification rules to explain why the FTC took no action with respect to the merger.

[15] Such a discrepancy could also be addressed by the Department of Justice in a criminal action seeking, among other remedies, the significant penalties under the alternative fines provisions of the Sentencing Reform Act. 18 U.S.C. § 3571(d). When DOJ has initiated a criminal prosecution, however, under existing institutional arrangements the Commission ordinarily will defer to DOJ and not bring a separate action for monetary relief.

Ultimately, we believe that courts considering equitable remedies have sufficient flexibility to craft orders to avoid unjust results.[16]

We have not yet encountered any such complications. As a procedural matter, in the Commission's two recent cases in which disgorgement was approved, claims administration procedures were being developed in parallel state and private litigation. To simplify the process and avoid any appearance of duplicative payments, in each of those cases the funds recovered by the Commission were combined with other recoveries and a single claims administration process handled the administration of all the funds. In future cases, the Commission could also consider the suggestion of several commentors to set up an escrow fund, to seek appointment of a special master or claims administrator to determine the appropriate allocation of funds collected, or to seek to coordinate parallel actions.

By direction of the Commission.

Donald S. Clark
Secretary

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[16] Courts routinely allow "set-offs" and credits, for example, to avoid duplicative payments. *See, e.g., SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1475 (2d Cir. 1996), *cert. denied*, 522 U.S. 812 (1997); *SEC v. Penn Cent. Co.*, 425 F. Supp. 593, 599 (E.D. Pa. 1976); *see also SEC v. Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1307 (2d Cir.) (establishing escrow fund to prevent "double liability"), *cert denied*, 404 U.S. 1005 (1971).