CIVIL REMEDIES AVAILABLE TO THE FEDERAL TRADE COMMISSION

Comments of John Graubert, Principal Deputy General Counsel,
Federal Trade Commission,[1]

to the Antitrust Modernization Commission
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Thank you for inviting me to join the discussion this morning. My remarks address some of the issues raised in the AMC's Federal Register notice concerning civil remedies in federal government antitrust cases, in particular the Federal Trade Commission's authority to seek equitable monetary relief under 15 U.S.C. § 53(b), often referred to as "Section 13(b)."[2] Such relief, which is granted only by a federal district court, is a longstanding part of the FTC's arsenal of remedies for antitrust violations. The agency has exercised this authority carefully and sparingly. In 2003, the Commission unanimously adopted a Policy Statement describing some of the factors that would enter into its decision whether to seek monetary remedies in competition cases.[3] Given these self-generated gu TCpp

party or to the antitrust enforcement system as a whole, I respectfully submit that no legislative clarification, expansion or limitation of the agency's 13(b) authority is warranted at this time.

1. The Commission's Use of Equitable Monetary Remedies Is Well-Established

The Commission's recourse to equitable disgorgement and restitution remedies in competition cases goes back many years, although it has exercised this authority sparingly. The earliest example I am aware of is from 1969, when the Commission obtained disgorgement and restitution from the Nashua Corp., in settlement of resale price maintenance allegations. Since that time, the Commission has obtained monetary relief in seven district court settlements[4] and four administrative settlements[5] involving allegations of anticompetitive practices. The Commission also has obtained two favorable court decisions on the legal issue of whether a court may order disgorgement and restitution in a competition case.[6]

The ability of federal courts to grant equitable monetary relief at the request of the

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[4] 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); 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).

[5] Commonwealth Land Title Ins. Co., 126 F.T.C. 680 (1998) (alleged collusion and anticompetitive proposed merger); Binney & Smith Inc., 96 F.T.C. 625 (1980) (alleged price-fixing; redress based on potential Section 19 claim; $1 million in consumer redress); Milton Bradley Co., 96 F.T.C. 638 (1980) (same; $200,000 in consumer redress); American Art Clay Co., 96 F.T.C. 809 (1980) (same; $25,000 in consumer redress).

[6] FTC v. Mylan Labs., Inc., 62 F. Supp.2d 25 (D.D.C. 1999); FTC v. Abbott Laboratories, 1992-2 Trade Cas. (CCH) ¶ 69,996 (D.D.C. 1992).

Commission flows from long-standing Supreme Court precedents and has been re-confirmed in a steady stream of case law since the enactment of Section 13(b).[7] The Supreme Court also has stated on numerous occasions that an essential element of the response to an antitrust violation is to deprive the violators of the gains from their unlawful conduct.[8] Accordingly, the Commission has sought such relief when the facts of a particular case indicate that a wrongdoer would otherwise retain some or all of its ill-gotten gain or that consumers would not otherwise be restored to the *status quo ante*, and that a simple cease-and-desist order would be inadequate if not meaningless.

As noted above, the Commission made its approach to monetary remedies more concrete in its 2003 Policy Statement, in which it said that, "as a general matter," the Commission would consider the following three factors in determining whether to seek monetary remedies in competition cases: (1) whether the underlying violation was clear; (2) whether there is a reasonable basis for calculating the amount of a remedial payment, and (3) whether Commission action would add value in light of any other remedies available in the matter, including private

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[7] *See, e.g.*, Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288 (1960); Porter v. Warner Holding Co., 328 U.S. 395 (1946); Federal Trade Commission v. Gem Merchandising Corporation, 87 F.3d 466, 469 (11th Cir. 1996); Federal Trade Commission v. Robert J. Febre, 128 F. 3d 530, 537 (7th Cir. 1997); FTC v. Pantron I Corp., 33 F.3d 1088, 1103 n. 34 (9th Cir. 1994).

This line of authority also supports the critical law enforcement activities of other agencies. *See, e.g.*, SEC v. First City Financial Corp., 890 F.2d 1215, 1230 (D.C. Cir. 1989); SEC v. Manor Nursing Ctrs., Inc., 458 F.2d 1082 (2d Cir. 1972); CFTC v. Hunt, 591 F.2d 1211 (7th Cir.), *cert. denied*, 442 U.S. 921 (1979).

[8] *See, e.g.*, United States v. Grinnell Corp., 384 U.S. 563 (1966); United States v. E. I. Du Pont de Nemours & Co., 366 U.S. 316 (1961); Schine Chain Theatres, Inc. v. United States, 334 U.S. 110, 128 (1948); United States v. Crescent Amusement Co., 323 U.S.173, 189 (1945).

actions or criminal proceedings. The Commission's recourse to monetary remedies is therefore deeply rooted in antitrust jurisprudence, and the Commission has indicated that it approaches the decision to seek monetary remedies thoughtfully and carefully.

2. The Commission's Use of Monetary Remedies is Not "Duplicative"

Various parties from time to time have asserted that the Commission's access to monetary remedies presents a risk of multiple or "duplicative" damage recovery, assuming that lawsuits from private plaintiffs or other government agencies also result in damage awards.[9] It is not apparent, however, that any such "duplicative" recovery has ever in fact occurred. In fact, the available analysis and evidence suggests the contrary. As the Commission observed in note 13 of its Policy Statement, there is a serious question on both a theoretical[10] and empirical level[11] whether existing remedies have subjected any antitrust defendant to excessive, "duplicative" awards.

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Even though there is no evidence of any actual duplicative recoveries, the Commission nevertheless responded to this concern in the third prong of its Policy Statement. The Commission noted it would be sensitive to any prospect of excessive, multiple recovery and would take actions where appropriate to avoid such a possibility. Referring to the long history of SEC practice in this area, the Commission alluded to the possibilities of set-offs and credits in subsequent actions, escrow accounts, and other procedural mechanisms. Experience in the Commission's three most recent cases, *Mylan*, *Hearst/First Data* and *Perrigo/Alpharma*, has confirmed that the Commission's monetary recovery can be coordinated with other proceedings to minimize conflicts and maximize the recovery to consumers.

3. The Commission Acts When It Can Provide Benefit to Consumers

Similarly, our Policy Statement makes clear that the Commission seriously considers whether monetary remedies are called for when 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.

There are, however, situations where reliance on other remedies is likely to be inadequate. A private action might not provide complete relief for a number of reasons: there may be statutes of limitation or standing issues; direct purchasers may not sue (for a variety of possible reasons, including a desire to maintain relationships with suppliers); and indirect purchasers may be precluded from suit. It may be difficult for private parties to prove damages, for example, from

HSR violations. The HSR cases are also examples of conduct in which the advantages a violator reaps from the violation may greatly outweigh the specific penalties prescribed in applicable laws, making disgorgement even more appropriate.

Finally, when the Commission obtains disgorgement or restitution, all of the recovered funds, minus relatively small administrative costs if a settlement administrator is retained, are available for consumers, without a deduction for private counsel's attorneys' fees. The Commission's recent monetary relief cases have been resolved efficiently and relatively quickly compared with their private counterparts. I submit that these cases demonstrate that transaction costs can be reea 3fd(e03 Tees.)Tj-1c