

INSIGHTS

## FTC Signals Potential for Greater Use of Monetary Remedies in Competition Cases

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The Federal Trade Commission (FTC) has withdrawn its Policy Statement on Monetary Remedies in Competition Cases (Policy Statement) by a 4-1 vote. The Policy Statement, issued in 2003, outlined an analytical framework to guide FTC determination of appropriate circumstances for the use of monetary equitable remedies, including disgorgement of profits from anticompetitive conduct and restitution to victims of such conduct.

The Policy Statement called for disgorgement and restitution only in "exceptional cases," and provided three factors for the FTC to consider in determining whether monetary penalties were appropriate in competition cases: (1) whether the underlying violation is clear; (2) whether there is a reasonable basis to calculate the remedial payment; and (3) whether remedies in other civil or criminal litigation are likely to accomplish fully the purposes of the antitrust laws.<sup>1</sup>

In a [Statement of the Commission](#) issued by the four-member majority, the FTC took issue with two of these three factors. As to the first factor, it said that clarity of the violation is not an element considered by courts in disgorgement requests and that even novel conduct can be anticompetitive and an appropriate candidate for disgorgement. Regarding the third factor, the FTC acknowledged that the existence of alternative plaintiffs that may seek monetary relief is a relevant consideration, but determined that it is not dispositive. Moreover, it would impose an "undue burden" to require the FTC to demonstrate the insufficiency of other actions to secure monetary equitable remedies.

The FTC concluded that while the issues discussed in the Policy Statement will continue to inform its future decisions to some extent, it will rely upon existing case law to guide its use of disgorgement and restitution remedies and will exercise responsibly its prosecutorial discretion. This drew sharp criticism from Commissioner Maureen Ohlhausen, noting in her [dissenting statement](#) that "[i]n essence, we are moving from clear guidance on disgorgement to virtually no guidance on this important policy issue."

The FTC's withdrawal of the Policy Statement signals the agency's intent to pursue monetary remedies more frequently in antitrust cases. A number of comments in the Statement of the Commission lend credence to this prediction. The FTC notes that "competition cases may often be appropriate candidates for monetary equitable relief" and explains that the Policy Statement "chilled the pursuit of monetary remedies" at a time when "legal thinking has begun to encourage greater seeking of disgorgement."

The FTC's decision to revoke the Policy Statement follows on the heels of a recent Department of Justice Antitrust Division (DOJ) case involving disgorgement. In 2010 and 2011, the DOJ entered into settlements with KeySpan Corporation (KeySpan) and Morgan Stanley Capital Group Inc. (Morgan Stanley) pursuant to which KeySpan and Morgan Stanley agreed to pay \$12 million and \$4.8 million, respectively, in disgorgement of profits arising out of an allegedly illegal swap agreement that allowed KeySpan to manipulate energy prices in the New York City electric generating capacity market. See [February 17, 2011 Update](#). Prior to that action, the DOJ had not previously pursued disgorgement as a remedy for a Sherman Act antitrust violation.

These actions continue a recent trend of the federal antitrust agencies affording themselves greater flexibility in antitrust enforcement. In 2009, the DOJ withdrew a report on unlawful single-firm conduct (also known as monopolization) that had been issued in 2008 during the Bush Administration, on the basis that it raised too many hurdles to government antitrust enforcement. In 2010, the DOJ and the FTC jointly issued new Horizontal Merger Guidelines setting out a more open-ended approach to antitrust review of proposed mergers and acquisitions than the previous 1992 guidelines. Indeed, there appears to have been an uptick in litigated merger challenges since the 2010 guidelines were issued. We may see a similar increase in the antitrust agencies' pursuit of disgorgement and restitution remedies.

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<sup>1</sup> Fed. Trade Comm'n, Policy Statement on Monetary Equitable Remedies in Competition Cases, 68 Fed. Reg. 45,820 at 45,821 (Aug. 4, 2003).