

[Billing Code: 6750-01P]

FEDERAL TRADE COMMISSION
Remedial Use of Disgorgement

AGENCY: Federal Trade Commission (FTC or Commission).

ACTION: Notice; request for comments.

SUMMARY: The Commission is requesting comments on the use of disgorgement as a remedy for violations of the Hart-Scott-Rodino (HSR) Act, FTC Act and Clayton Act.

DATE: Comments must be received by March 1, 2002.

ADDRESS: Public comments are invited, and may be filed with the Commission in either paper or electronic form. An original and one (1) copy of any comments filed in paper form should be submitted to the Document Processing Section, Office of the Secretary, Room 159-H, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. If a comment contains nonpublic information, it must be filed in paper form, and the first page of the document must be clearly labeled "confidential." Comments that do not contain any nonpublic information may instead be filed in electronic form (in ASCII format, WordPerfect, or Microsoft Word) as part of or as an attachment to email messages directed to the following email box: disgorgementcomment@ftc.gov.

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

SUPPLEMENTARY INFORMATION: The Commission has considerable experience with the use of monetary equitable remedies in consumer protection cases. In contrast, the Commission has considered disgorgement or other forms of monetary equitable relief in fewer competition matters and obtained disgorgement in two recent matters, *FTC v. Mylan Laboratories, et al.* and *FTC v. The Hearst Trust et al.* The Commission accordingly solicits comments on the factors the Commission should consider in applying this remedy and how disgorgement should be calculated. The Commission is not re-examining its statutory authority to seek disgorgement or other monetary equitable relief in competition cases.

Comments may address any or all of the following questions. However, other, related comments are also welcome:

1. Are there particular violations of the Clayton Act, the HSR Act, the competition provisions of the FTC Act, or final orders of the Commission in competition cases where disgorgement would be especially appropriate or, in contrast, less useful? Should the resort to disgorgement depend on whether, in conjunction with an HSR Act violation or order violation, the underlying transaction or conduct constitutes an illegal acquisition under section 7 of the Clayton Act, or constitutes monopolization or attempted monopolization under section 5 of the Federal Trade Commission Act?

2. How should the Commission calculate the amount of disgorgement appropriate for particular law violations under each of the statutes? For example, if the Commission sought disgorgement for violations of the HSR Act, how should disgorgement be calculated when the unlawful gain includes (or consists solely of) tax savings, stock market profits, or other gain not directly related to antitrust injury? Should disgorgement be calculated to remove all profits earned from the acquisition, all profits attributable to antitrust harm, or some other approach? How should the Commission assess benefits obtained in an unlawful acquisition, or other transaction, that do not flow directly from immediate injury to customers, e.g., where the violator reduces its investments in future technology because of a reduction in the competition it faces? Is the approach used to calculate disgorgement in *S.E.C. v. First City Financial Corporation, Ltd.*, 890 F.2d 1215 (D.C. Cir. 1989), appropriate for the Commission's use?

3. What other factors should the Commission consider in determining whether to seek disgorgement? How should the Commission weigh and what is the relevance to the Commission of the following factors in determining whether to seek disgorgement: (i) the impact that seeking such a remedy may have on other aspects of any settlement negotiations, *e.g.*, delay in obtaining divestiture or other structural relief; (ii) the adequacy of other forms of relief (including civil penalties); (iii) the egregiousness of the conduct at issue; (iv) the extent of harm to the market generally or to indirect purchasers who may be unable to pursue a claim; (v) the ability of an affected party to secure relief independently of the Commission, *e.g.*, by private actions; (vi) the advantages or disadvantages of litigation in federal court rather than in an administrative proceeding; and (vii) the possible tradeoff between addressing past harm more thoroughly (through disgorgement) and an interest in obtaining relief quickly (through a conduct or structural remedy) so as to limit the effects of a continuing violation?

4. Should pending or potential private litigation, actions by state attorneys general, or civil or criminal prosecution by the Antitrust Division of the Department of Justice, affect the Commission's decision to seek disgorgement? Is this decision any different from the Commission's decision to seek other equitable relief, *e.g.*, divestiture, in cases where other related private or public litigation exists or is possible? Will Commission disgorgement claims encourage or discourage the decision of private parties or states to bring or continue litigation, or settlement negotiations, in such cases? If so, what would the ultimate effect on consumer welfare be under each such scenario?

5. In light of the fact that disgorgement and restitution have distinct theoretical underpinnings and equitable rationales, are there circumstances in competition cases in which one or the other of these remedies is more appropriate? What are the considerations that should inform such decisions?

6. When and how should disgorgement funds recovered by the Commission be distributed as restitution when there is parallel private litigation? For example, should any recovery of disgorgement or restitution by the Commission affect the calculation of or be used to pay attorney's fees in parallel litigation, and, if so, in what way? In any restitution program, how should direct and indirect purchasers be treated? How should the Commission proceed if its own action and parallel private action are not consolidated before a single judge?

The Commission is also interested in learning about parties' experiences in analogous circumstances involving disgorgement with other federal or state agencies and in other enforcement areas.

By direction of the Commission.

Donald S. Clark
Secretary

DATE: December 19, 2001