

Statement of Commissioner Maureen K. Ohlhausen
Dissenting from the Commission's Decision to Withdraw its Policy Statement
on Monetary Equitable Remedies in Competition Cases
July 31, 2012

I dissent from the majority's decision to withdraw the Commission's 2003 Policy Statement on Monetary Equitable Remedies in Competition Cases ("Policy Statement").¹

The Policy Statement had a strong pedigree. It was issued in 2003 through a 5-0 bipartisan vote.² The Policy Statement subsequently received a unanimous endorsement by the Antitrust Modernization Commission ("AMC"), which concluded in 2007 that "[t]here is no need to clarify, expand, or limit the agencies' authority to seek monetary equitable relief. The [AMC] endorses the Federal Trade Commission's policy governing its use of monetary equitable remedies in competition cases."³ Other well-respected antitrust practitioners, such as former FTC Chairman Pitofsky, also have expressed support for using disgorgement only in exceptional cases.⁴

Rescinding the bipartisan Policy Statement signals that the Commission will be seeking disgorgement in circumstances in which the three-part test heretofore utilized under the Statement is not met, such as where the alleged antitrust violation is not clear or where other remedies would be sufficient to address the violation. I have significant concerns about sending such a signal and seeking disgorgement in such situations.

In withdrawing the Policy Statement, the majority makes the vague assertion that "[i]t has been our experience that the Policy Statement has chilled the pursuit of monetary remedies in the years since the statement's issuance."⁵ I have not been presented with any evidence that the Policy Statement has inappropriately constrained the Commission in the nine years it has been in

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

² Press Release, Fed. Trade Comm'n, FTC Issues Policy Statement on Use of Monetary Remedies in Competition Cases (July 31, 2003), available at <http://www.ftc.gov/opa/2003/07/d disgorgement.shtm>.

³ ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 288 (2007). In fact, four of the AMC Commissioners recommended "that the DOJ adopt a policy similar to the FTC's Policy Statement to articulate the circumstances in which it would exercise its authority to seek equitable monetary remedies." *Id.* n.*.

⁴ See Statement of Chairman Pitofsky and Commissioners Sheila F. Anthony and Mozelle W. Thompson, Hearst Trust, File No. 991-0323, at 1, available at <http://www.ftc.gov/os/2001/04/hearstpitanthom.htm> ("The remedy of disgorgement should be sought by the Commission in competition cases only in exceptional circumstances.").

⁵ Fed. Trade Comm'n, Withdrawal of the Commission's Policy Statement on Monetary Equitable Remedies in Competition Cases, at 2 (July 31, 2012).

effect. This begs the questions why the agency needs to rescind the Policy Statement now and why it should not perhaps be revised rather than rescinded altogether.

The guidance in the Policy Statement will be replaced by this view: “[T]he Commission withdraws the Policy Statement and will rely instead upon existing law, which provides sufficient guidance on the use of monetary equitable remedies.”⁶ This position could be used to justify a decision to refrain from issuing any guidance whatsoever about how this agency will interpret and exercise its statutory authority on any issue. It also runs counter to the goal of transparency, which is an important factor in ensuring ongoing support for the agency’s mission and activities. In essence, we are moving from clear guidance on disgorgement to virtually no guidance on this important policy issue.

Finally, I am troubled by the seeming lack of deliberation that has accompanied the withdrawal of the Policy Statement. Notably, the Commission sought public comment on a draft of the Policy Statement before it was adopted. That public comment process was not pursued in connection with the withdrawal of the statement. I believe there should have been more internal deliberation and likely public input before the Commission withdrew a policy statement that appears to have served this agency well over the past nine years.

⁶ *Id.* at 1.