GARDNER, CARTON & DOUGLAS
321 North Clark Street, Suite 3000
Chicago, IL 60610-4795
(312) 245-8852
Fax: (312) 644-3381
Email: rbusey@gcd.com

AMERICAN BAR ASSOCIATION

Defending Liberty
Pursuing Justice

Section of Antitrust Law
750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5550
Fax: (312) 988-5637
email: antitrust@abanet.org
www.abanet.org/antitrust

March 11, 2002

Via Overnight Courier

Donald S. Clark, Esq.
Secretary
c/o Document Processing Section,
Office of the Secretary
Room 159-H
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Commission's Request for Comment on Remedial Use of Disgorgement

Dear Mr. Secretary:

On behalf of the Section of Antitrust Law of the American Bar Association (the "Section"), I am pleased to submit these comments in response to the request of the Federal Trade Commission ("FTC" or the "Commission") for comments on the use of disgorgement as a remedy for violations of the Hart-Scott-Rodino ("HSR") Act, FTC Act and Clayton Act. These views are being presented only on behalf of the Section of Antitrust Law and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association ("ABA") and should not be construed as representing the position of the ABA.

You have advised that the Commission is not re-examining its statutory authority to seek disgorgement or other monetary relief in competition cases, and these comments accordingly assume that such statutory authority exists. We note our belief, however, that the question of the FTC's authority in this regard is unsettled. The Commission itself is divided on the issue of the propriety of the disgorgement remedy. Section 13(b) of the FTC Act does not expressly authorize the Commission to seek equitable monetary relief, and only one case, *FTC v. Mylan Laboratories, Inc.*, 62 F. Supp. 2d 25 (D.D.C. 1999), has examined whether Section 13(b) vests the FTC with the statutory authority to seek disgorgement in a competition case.[1] It is possible that a different tribunal, presented with

[1] Additionally, one district court has concluded that the Commission may seek restitution under Section 13(b) in a case where the United States was a victim. *FTC v. Abbott Labs*, 1992-2 Trade Cases (CCH) ¶ 69,996 (D.D.C. Oct. 13, 1992).

the same question, could reach a different conclusion regarding the FTC's authority under Section 13(b) than did the *Mylan* court.

With that caveat, we address the questions presented in the Commission's request for comments regarding the remedial use of disgorgement.

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?

The essential feature of equitable relief connected to application of federal statutes is that the equitable relief must effectuate the purpose of the statutory scheme and protect the public interest. *Porter v. Warner Holding Co.,* 328 U.S. 395 (1946). Since the purpose of the antitrust laws is to protect competition, only those violations of the Clayton Act, the HSR Act, the competition provisions of the FTC Act or final orders of the Commission that result in harm to competition should support the disgorgement remedy.

For this reason, the Commission should refrain from seeking disgorgement for a simple violation of the premerger notification requirements under Section 7A of the HSR Act. Section 7A obligates parties contemplating certain transactions to report them to the FTC to enable the agencies to consider whether the transaction may lessen competition. A party's failure to comply with Section 7A has no effect on competition, nor does it necessarily or even likely lead to the consummation of a transaction that, in fact, harms competition. Accordingly, the mere violation of Section 7A should not support an award of disgorgement. *See Commodity Futures Trading Commission v. Sidoti,* 178 F.3d 1132, 1137-38 (11th Cir. 1999) (reversing an award of disgorgement for mere technical violation of registration statute). Similarly, a party's mere violation of an order does not necessarily result in injury to competition, and should not alone warrant disgorgement. We thus believe that resort to disgorgement in connection with an HSR violation or order violation should depend, in the first instance, on whether the underlying transaction or conduct itself violates the antitrust laws.

The availability of civil penalties of up to $11,000 per day for the violation of Section 7A or a final order of the Commission is an additional reason militating against resort to disgorgement. Congress has expressly provided a particular remedy for the violation, suggesting that no additional remedies are appropriately implied. If the Commission believes that the statutory penalty is inadequate to address the violation, it should petition Congress to increase the penalty.

Other antitrust laws enforced by the Commission do require proof of injury to competition. The use of disgorgement as a remedy for their violation should ordinarily be unnecessary, however, in view of the comprehensive statutory scheme enacted by Congress to address antitrust violations. Most important, the availability of a private right of action for damages ordinarily ensures that a defendant will not retain ill-gotten gains from an antitrust violation and thus usually fully satisfies the equitable goal (preventing unjust enrichment) that would cause a court of equity to invoke the remedy of disgorgement.

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?

In the antitrust area, the amount of disgorgement should not exceed the illegitimate profits earned by the defendant attributable to the antitrust injury.

Requiring the concept of antitrust injury to circumscribe the disgorgement calculation stems from the principle that the equitable powers of the district court must be exercised in harmony with the statutory scheme. As set out above, the antitrust laws were enacted for the protection of competition, and consistent with that purpose, private plaintiffs seeking treble damages under Section 4 must show more than simply an injury causally linked to a particular transaction; instead plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendant's act unlawful. *Brunswick Corp. v. Pueblo Bowl-O-Mat,* 429 U.S. 477, 489 (1977). In *Cargill, Inc. v. Monfort of Colorado, Inc.,* 479 U.S. 104 (1986), the Supreme Court extended the requirement of antitrust injury to equitable remedies, squarely holding that a private plaintiff seeking an injunction under Section 16 of the Clayton Act must also show a threat of antitrust injury.

For this reason, disgorgement should not be calculated to include tax savings, stock market profits or other gains not directly related to antirust injury. While such gains may be "causally linked" to the violation, they do not reflect gains attributable to antitrust injury ("illegitimate profits") and may not be reached through disgorgement. *See Hawaii v. Standard Oil Co.,* 405 U.S. 251, 263 n. 14 (1972) (Congress did not intend the antitrust laws to provide a remedy for all injuries that might conceivably be traced to an antitrust violation).

Nor should disgorgement be calculated to remove all profits earned from an illegal acquisition. In calculating disgorgement, a court should distinguish between "legitimate" and "illegitimate" profits (depending on whether the profits flow from an injury to competition) earned by a violator, and should not order disgorgement of the former. *CFTC v. Sidoti*, 178 F.3d 1132 (11th Cir. 1999) (reversing in part order to disgorge all profits from 1990 to 1997 when there was no evidence of fraud after 1994). Since all profits earned after an illegal acquisition do not necessarily reflect profits flowing from the illegal aspect of the acquisition, disgorgement of all profits would be excessive and likely constitute a penalty. It is well settled that disgorgement is intended to be remedial and not punitive in nature. *CFTC v. Sidoti,* 178 F.3d 1132 (11th Cir. 1999); *SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978); *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1104 (2d Cir. 1971).

Similarly, disgorgement should not be calculated to include benefits that do not flow directly from an immediate injury to customers, e.g., a firm is more profitable due to less investment in technology. In the first instance, these benefits are highly speculative, both in computation and in terms of effect on competition. In the second place, they are akin to generalized harm to the economy or the market and are not a proper subject of antitrust recovery. *See Hawaii v. Standard Oil Co.,* 405 U.S. 251 (1972). Such generalized harm also means that there are no identifiable victims and no specific persons to whom the disgorged proceeds could be distributed.

Last, the approach used to calculate disgorgement in *SEC v. First City Financial Corporation, Ltd.,* 890 F.2d 1215 (D.C.Cir. 1989) is not appropriate for the Commission's use. In that non-antitrust case, the court correctly recognized that the disgorgement calculation must distinguish between legally and illegally obtained profits. Rather than apply the distinction, however, the court concluded that it could use all of the defendant's profits as a reasonable approximation of the harm and impose the burden upon the defendant to refute the presumption. Such an approach is inappropriate in the antitrust arena because it may lead to disgorgement of gains resulting from efficiencies and therefore punish procompetitive conduct. It would be inimical to the purpose of the antitrust laws to extract gains from a defendant for procompetitive conduct.

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 the 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?

Disgorgement is a traditional equitable remedy that serves the goal of preventing unjust enrichment by requiring a defendant to turn over "ill-gotten" gains. Therefore, as a general principle, the Commission should regard disgorgement as an exceptional remedy that should be used sparingly.

The Commission should carefully consider the adequacy of other forms of relief in determining whether to pursue disgorgement. In most instances, injured consumers are entitled to seek treble damages, costs and attorneys fees for antitrust violations. The Supreme Court recognized in *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 266 (1972), that these remedies give private citizens every incentive to bring treble damage actions and provide no scarcity of members of the Bar to aid prospective plaintiffs in bringing these suits. The Supreme Court's observation was borne out in the *Mylan* and *Hearst* cases where claims by state attorneys general and private treble damages actions promptly followed the Commission's actions. The availability of private remedies means that the Commission's pursuit of disgorgement usually is not needed to remedy an antitrust violation and hence is inappropriate because equitable remedies are only warranted if needed to effect complete relief. Given the likelihood that treble damage recoveries will more than suffice to deprive the defendant of any gains from an antitrust violation, the remedy of disgorgement will ordinarily not be necessary. Only when other available remedies would not be pursued or, if pursued, be incapable of depriving the defendant of ill-gotten gains, would the remedy of disgorgement be appropriate.

We also note that disgorgement is a remedy that might be subject to abuse. The threat to seek a disgorgement remedy will greatly increase the Commission's bargaining power in settlement negotiations with a defendant. The uncertain nature of the remedy and its calculation make it difficult for a defendant to predict the size or effect of a disgorgement remedy, and the extent to which it might result in duplicative liabilities for a defendant and double recoveries for private plaintiffs. The defendant will also realize that, should it litigate, it may be deprived of a right to a jury and may have little meaningful review of a court order of disgorgement, since reviewing courts ordinarily give district courts wide latitude in fashioning equitable orders. These factors may induce a defendant to settle with the Commission on terms demanded by the Commission.

Should the Commission pursue disgorgement in court, it will introduce enormous complexity and delay into the proceeding. An undertaking to calculate the defendant's ill-gotten gains, and the corresponding need to distinguish between "legitimate" and "illegitimate" gains (depending upon whether the gains flow from an injury to competition

or from some procompetitive efficiency) will be complex. Similarly difficult will be the need to devise a plan to allocate and then distribute the disgorged proceeds among multiple and inconsistent claimants. The size of these tasks will likely impair the Commission's interest in swift adjudication of the matter, and delay obtaining divestiture or other structural relief. Procedural complications would also be likely. Given the overlapping nature of the disgorgement remedy of the Commission and the damage remedy available to private plaintiffs, it is possible that private plaintiffs may seek to intervene in the Commission's action or that existing private suits pending in federal court will be consolidated. Were the claims not resolved in a single forum, difficult questions of collateral estoppel, res judicata and the possibility of inconsistency and duplication of relief would arise.

We do not believe that the extent of the harm to the market generally or to indirect purchasers who may be unable to pursue a claim should be considered by the Commission. As set out above, generalized harm to the market is not the proper subject of an antitrust recovery and there are no identifiable victims to whom disgorged proceeds could be distributed. Consideration of harm to indirect purchasers may also be unwarranted because the policy considerations set out in *Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977), weigh against recovery by indirect purchasers in a federal forum.

Illinois Brick refused to authorize indirect purchasers to recover federal damages for three reasons. First, allowing indirect purchasers to recover the amount of the overcharge passed on to them would create the risk of subjecting defendants to multiple liability. Second, it would be too complicated to trace the amount of the overcharge that the direct purchasers passed on to indirect purchasers. Third, allowing direct purchasers to sue to recover the entire amount of the overcharge would be the best way to encourage the vigorous private enforcement of the antitrust laws. All three of the policies should be considered by the Commission in deciding whether to seek to distribute disgorgement proceeds to indirect purchasers.

Pursuit of a disgorgement remedy risks multiple liability without regard to whether disgorgement proceeds are paid to indirect purchasers. The problem of multiple liability is compounded where the Commission seeks to distribute federal disgorgement proceeds to indirect purchasers because under federal antitrust law, direct purchasers are entitled to recover treble the amount of the entire overcharge. The Commission's effort to distribute federal disgorgement proceeds to indirect purchasers also implicates *Illinois Brick's* concern that it would be too complicated to trace the amount of the overcharge that the direct purchasers passed on to indirect purchasers. In addition, the Commission would need to address the difficulties associated with distributing proceeds to indirect claimants. Finally, disgorgement actions by the Commission to compensate indirect purchasers could also undermine the incentives for direct purchasers to bring suit. This is particularly true if

the courts hold that any disgorgement, even to indirect purchasers, limits the Clayton Act Section 4 remedy available to direct purchasers.

4. Should pending or potential private litigation, actions by state attorneys general, or civil or criminal prosecutions by the Antitrust Division of the Department of Justice, affect the Commission's decision to seek disgorgement? Is the 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?

Pending or potential private litigation, actions by state attorneys general, or civil or criminal prosecution by the Antitrust Division should be the key factor affecting the Commission's decision to seek disgorgement. As set out above, the existence of these alternative enforcement measures and the strong likelihood that they will more than suffice to deprive a defendant of any ill-gotten gains render unnecessary in most cases any resort by the Commission to equitable monetary remedies.[2]

Pursuit of disgorgement in the face of the private treble damage remedy raises the additional specter that the defendant will be subject to multiple liabilities for the same injury. In most instances, the amount of consumers' damages and the amount of the defendant's illegitimate profits to be disgorged will overlap, and an award of both measures could compel the defendant to pay twice or more for the same injury. Avoidance of duplicative liabilities and recoveries is an important theme in the antitrust laws (and a tenet of the general law of remedies). *See CFTC v. Noble Wealth Data Information Services, Inc.*, 90 F.Supp.2d 676, 693 (D.Md. 2000); *SEC v. Better Life of America, Inc.*, 995 F.Supp. 167, 179 (D.D.C. 1998). This figured prominently in the Supreme Court's decision to deny the state of Hawaii the right to sue for damages for an injury to its

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[2] The Antitrust Division long ago reached that conclusion in criminal proceedings. Under the Sentencing Guidelines, the Division has the power to seek restitution from a criminal defendant, but virtually never pursues restitution. U.S.S.G. §§ 5E1.1(a)(2), 8B1.1(a)(2). As explained in the *Antitrust Division Manual*, the reasons are: (1) the "availability of treble damages to victims," (2) "the complexity of antitrust cases and the resulting difficulty of making any accurate estimate of damages," and (3) "the per se nature of antitrust criminal violations, which relieves the prosecution from having to introduce evidence of harm" (just as the Commission need not prove the exact quantum of damages in a § 13(b) action seeking only injunctive relief). *Antitrust Division Manual* (3d ed. 1998), Ch. 4 § F(7).

economy attributable to a violation of the antitrust laws, *Hawaii v. Standard Oil,* 405 U.S. 251 (1972), and in the determination to grant or deny standing to particular antitrust plaintiffs, *Cargill, Inc. v. Monfort of Colorado, Inc.,* 479 U.S. 104, 111 n.6 (1986). Unless some procedural mechanism is available to the Commission to ensure that a disgorgement award does not simply duplicate existing or future damage awards or penalties paid by the defendant, the remedy would be improper as working a forfeiture or imposing a penalty. The Commission might avoid the problem of multiple recovery by employing an escrow fund, out of which private judgments against the defendants would be paid. However, use of that arrangement suggests that the Commission's pursuit of disgorgement would be unnecessary, add no real value, and serve primarily to impose transaction costs on the parties and taxpayers. These are important questions for the Commission to consider in deciding whether to commit limited Commission resources to perform activities that the private bar can be expected to undertake.

Finally, we believe that the Commission's decision to pursue disgorgement may discourage private parties or states from pursuing damage actions. By identifying the misconduct and developing evidence and legal precedent, the Commission's decision to pursue an injunction would likely encourage follow-on private litigation. The decision to seek disgorgement, by contrast, could frustrate private actions in two ways. A disgorgement order will reach the defendant's ill-gotten gains, and the distribution of these proceeds will partially compensate private plaintiffs. This recovery, even if less than a trebled award, may deter consumers from pursuing separate litigation. Moreover, to the extent that the work done by the Commission in pursuing the disgorgement action is used by the courts to reduce the size of the plaintiff's attorney's fees, fewer plaintiffs attorneys may be willing to undertake private treble damages cases on behalf of consumers.

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?

Neither equitable remedy is ordinarily appropriate in view of the other remedies available for antitrust violations. Restitution approximates a single damage recovery and would offer no benefit over a plaintiff's right to pursue treble damages.[3] The Commission's pursuit of restitution would thus be contrary to the principle that equity is usually available only when there is no adequate remedy at law. Disgorgement could be justified if the treble damage recovery or imposition of other penalties were insufficient to deprive a defendant of his ill-gotten gains. However, there are few factual circumstances in which

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[3] This is one of the reasons that the Antitrust Division has given for its practice of rarely seeking restitution in criminal antitrust prosecutions. *Antitrust Division Manual* (3d ed. 1998), Ch. 4 § F(7) (discussing the "availability of treble damages to victims").

that conclusion would hold true, for example, if follow-on litigation appeared unlikely because total damages are small.

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 indirect and direct purchasers be treated? How should the Commission proceed if its own action and parallel private action are not consolidated before a single judge?

If the Commission's disgorgement action and parallel private litigation are consolidated before the same judge, the court could adjust the various claims of the private plaintiffs to the disgorgement proceeds and allocate them accordingly. By contrast, if all of the claimants are not before the same court, the Commission should deposit the disgorgement funds into an escrow account out of which judgments against the defendant to private plaintiffs should be paid. Such a mechanism is essential to avoid duplicative recoveries against the defendant for the same injury. In the event that the Commission were unable to locate victims suffering antitrust injury by reason of the defendant's conduct, any excess disgorgement proceeds should be paid to the United States Treasury. *See FTC v. Gem Merchandising Corp.*, 87 F.3d 466, 470 (11th Cir. 1996). Such funds should not be paid to the Commission, to avoid the appearance of improper incentives to pursue the disgorgement remedy.

For the reasons set out above, we do not believe that indirect purchasers should be paid any of the disgorgement funds.

Thank you for affording us the opportunity to present these comments on the Commission's use of the disgorgement remedy. We would support continuing efforts by the Commission to elaborate upon the particular reasons it believes disgorgement might be appropriate in particular cases. We are available to discuss these comments and other options with the Commission and to assist as appropriate.

Sincerely,

Roxane C. Busey

Roxane C. Busey
Chair, Section of Antitrust Law
2001-2002