On July 31, 2012, by a 4-1 vote, the FTC withdrew its 2003 Policy Statement on Monetary Equitable Remedies in Competition Cases (the “Policy Statement”), which outlined a framework for determining when the Commission might seek equitable monetary remedies such as disgorgement or restitution. The determination of which cases are appropriate for equitable monetary remedies will now be left to the FTC in its prosecutorial discretion. This is potentially a significant policy shift as it signals that the FTC may be prepared to raise the financial stakes in competition cases that it brings. Especially in challenges to consummated mergers and so-called “reverse payment settlements” or “pay-for-delay” cases in the pharmaceutical industry, the potential financial exposure to companies when the FTC brings an enforcement action could significantly increase.

While the FTC has a number of remedies at its disposal, such as statutory penalties and forward-looking conduct remedies, it also can seek remedies, such as disgorgement and restitution, in federal court under principles of equity. The FTC has said that these equitable remedies can be appropriate to “deprive wrongdoers of unjust enrichment and to restore their victims to the positions they would have occupied but for the illegal behavior.”

The Policy Statement created an analytical framework “to guide the Commission” in determining when to use these tools. The Policy Statement outlined a view that disgorgement and restitution should be used only in “exceptional cases” while “[i]n general, [the FTC would] continue to rely primarily on more familiar prospective remedies” such as divestiture, conduct remedies, private damages, and civil or criminal penalties. It also provided three factors for the Commission to consider: (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.

According to the FTC’s most recent statement on July 31, 2012, the 2003 Policy Statement had “the practical effect of … creat[ing] an overly restrictive view of the Commission’s options for equitable remedies.” The FTC was concerned that some have interpreted the first factor – whether the underlying violation is “clear” – to mean that disgorgement is not appropriate in a case of first impression. According to the FTC, “[w]hether conduct is common or novel, clearly a violation or never
some sort of cash payment or other consideration—a practice labeled by the FTC as “pay for delay.” Both categories of cases may, depending on the scope of the issues, involve extremely large dollar amounts of gain that may be alleged as resulting from the anticompetitive conduct. In the case of some “reverse payment” cases, the alleged damages could involve hundreds of millions of dollars or more.

Clients should be aware of this change in the FTC’s policy, as it may signal more aggressive enforcement is on the horizon, and may potentially involve greater financial risks when the FTC brings an antitrust enforcement action.

4 Id.
5 This factor applied to disgorgement only, not restitution. See id.
6 Id.
7 Id. The FTC also said that the first and third factors “may impose constraints on the Commission beyond the requirements of the law.”
8 Id.
9 Id.
10 Id. at n.6.
11 Id.

12 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), available at http://www.ftc.gov/os/2012/07/120731ohlhausenstatement.pdf. Commissioner Ohlhausen also noted that she has “not been presented with any evidence that the Policy Statement has inappropriately constrained the Commission in the nine years it has been in effect,” and that the FTC is “moving from clear guidance on disgorgement to virtually no guidance on this important policy issue.” Commissioner Ohlhausen also noted that the 2003 Policy Statement was implemented after an opportunity for public comment, which did not occur in rescinding the Statement. Commissioner Ohlhausen believed “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.”