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# Outlook for Disgorgement Remedies in the Trump Administration

24 February 2017

With the departure of now former Chairwoman Edith Ramirez earlier this month, among the most discussed vacancies in the new administration these days is the post of permanent Chair of the Federal Trade Commission (FTC). According to reports, one leading candidate is Acting Chairman Maureen Ohlhausen, and her selection could also have significant implications for FTC policy areas—particularly with respect to disgorgement remedies in antitrust cases. Specifically, should she become the permanent Chairman, Acting Chairman Ohlhausen's record and recent comments indicate a potential shift away from disgorgement as a remedy in FTC cases.

From the beginning of her tenure as Commissioner, Acting Chairman Ohlhausen has been an outspoken critic of the FTC's pursuit of disgorgement remedies in the vast majority of antitrust cases. In 2012, when the FTC voted to withdraw its Policy Statement on Monetary Remedies in Competition Cases ("Policy Statement"), which had articulated a three-part standard under which the FTC would ordinarily not seek disgorgement absent a clear violation of the antitrust laws, then-Commissioner Ohlhausen issued a statement dissenting from the decision. In that statement, she explained that she had "significant concerns" about sending a signal "that the Commission will be seeking disgorgement in circumstances in which the three-part test...is not met, such as where the alleged antitrust violation is not clear or where other remedies would be sufficient to address the violation."[1]

In the wake of this policy shift, Acting Chairman Ohlhausen has continued her criticism as the FTC sought disgorgement in five cases since 2012[2]—more than it did during the previous nine years during which the Policy Statement was in effect.[3] In addition to concerns regarding transparency, she emphasized that in its pursuit of disgorgement (which can only be obtained in federal court), the FTC "neglect[ed] its special mission to develop the antitrust laws through Part III litigation and

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[1] 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* https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commissioner-maureen-k.ohlhausen/120731ohlhausenstatement.pdf.

[2] *FTC v. Shire ViroPharma Inc.*, No. 1:17-cv-00131-UNA (D.Del. filed Feb. 7, 2017); *FTC v. Endo Pharma*, No. 2:16-cv-1440 (E.D.Pa. Mar. 30, 2016); *FTC v. Cardinal Health*, No. 15-cv-3031 (S.D.N.Y. Apr. 20, 2015); *FTC v. AbbVie, Inc.*, No. 2:14-cv-05151 (E.D.Pa. Sept. 8, 2014); *FTC v. Cephalon, Inc.*, No. 2:08-cv-2141 (E.D.Pa. Nov. 18, 2013).

[3] While the Policy Statement was in effect, the FTC pursued disgorgement in only two cases: *FTC v. Ovation Pharms.*, Inc., Civ. No. 08-6379 (D.Minn. filed Dec. 16, 2008) and *FTC v. Perrigo Co.*, No. 1:04CV01397 (D.D.C. filed Aug. 12, 2004).

other unique tools."[4] Acting Chairman Ohlhausen described, in the specific situation of pay-for-delay cases, that it is an "unfortunate mistake" for the Commission to "look[] past Part III for monetary relief reasons..."[5] Thus, Acting Chairman Ohlhausen indicated a preference to pursue cases in Part III, meaning that disgorgement and other monetary relief would not be a priority for the FTC in such matters.

On the other hand, disgorgement remedies may not disappear entirely under an Ohlhausen-led Commission. She has supported the pursuit of disgorgement in two cases during her tenure, including the 2015 *Cephalon* case and most recently in the case alleging Shire ViroPharma violated the antitrust laws by making "repetitive, serial, and meritless filings to the [U.S. Food and Drug Administration] and courts" to delay the FDA's approval of generic Vancocin Capsules.[6] In the context of *Cephalon*, then-Commissioner Ohlhausen issued a separate statement together with then-Commissioner Joshua Wright explaining they believed disgorgement was appropriate in that case because the allegations met the three-part test under the (then-withdrawn) Policy Statement—namely that the alleged violation was "clear" because "there is reason to believe that Cephalon should have known that it was violating the antitrust laws" and there was also a reasonable basis for calculating the disgorgement amount. Although Acting Chairman Ohlhausen did not issue a statement in connection with the *Shire* complaint, her endorsement of seeking disgorgement against Shire is consistent with the views she expressed in the context of *Cephalon*. Regardless, using the Part III process would avoid disgorgement in such cases altogether.

Against this well-established track record, should she be confirmed as the permanent Chair, Ohlhausen's leadership may drive a significant policy shift on disgorgement, including potentially re-issuing the Policy Statement and a transition away from federal court litigation to Part III administrative activity. While these changes could have significant implications for a wide range of companies, they may have the greatest impact on the pharmaceutical industry, which has been a primary enforcement priority for the FTC for some time now and has also been the target in every case in which the FTC has sought disgorgement since 2012.

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[4] Speech by Maureen K. Ohlhausen, Commissioner, Federal Trade Commission, Dollars, Doctrine, and Damage Control: How Disgorgement Affects the FTC's Antitrust Mission (April 20, 2016), https://www.ftc.gov/system/files/documents/public_statements/945623/160420dollarsdoctrinespeech.pdf.

[5] *Id*.

[6] Complaint, *FTC v. Shire ViroPharma Inc.*, No. 1:17-cv-00131-UNA (D.Del. filed Feb. 7, 2017) at ¶ 143.

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