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US DOJ Weighs Reform Options for Antitrust Leniency Law Set to Expire

Plaintiff- and defense-side lawyers propose differing reforms to protect companies that decide to apply for leniency.

On April 11, 2019, the Department of Justice Antitrust Division assembled a roundtable to discuss the efficacy and future of the Antitrust Criminal Penalty Enhancement & Reform Act (ACPERA), which was enacted in 2004 to incentivize companies to apply for leniency. With ACPERA set to expire in 2020, the Antitrust Division convened the roundtable to "hear the views of interested stakeholders regarding ACPERA and its impact on the Division's criminal enforcement efforts."[1] Those views, including reform proposals, are summarized below.

The Antitrust Division proclaims its leniency program to be the "most effective investigative tool" for cracking criminal cartels. The program incentivizes companies to self-report collusive conduct by providing immunity from criminal antitrust liability. But the leniency program does nothing to protect leniency applicants from civil liability in the private lawsuits that nearly always follow criminal investigations. Congress attempted to address this shortcoming in 2004 by enacting ACPERA, with the goal of reducing leniency recipients' potential liability in follow-on private damages lawsuits.

In recent years, the antitrust bar and business community have questioned whether ACPERA serves its intended purpose, with many blaming ACPERA's ineffectiveness for the apparent recent downturn in criminal antitrust enforcement. Several panelists explained that because ACPERA may not provide certainty of avoidance of treble damages and joint and several liability in follow-on civil cases, it is very difficult for businesses considering whether to self-report to fully anticipate the consequences of that decision.

Assistant Attorney General Makan Delrahim and the DOJ's top criminal antitrust enforcer, Deputy Assistant Attorney General Richard Powers, provided the Antitrust Division's views on the topic. Antitrust Division employees then moderated panel discussions with practitioners and stakeholders from both sides of the antitrust bar.

The Antitrust Division's View: The Leniency Program Is Not Broken, but Clarifying ACPERA's Requirements Might Facilitate More Cooperation

Makan Delrahim opened the workshop by reassuring participants that the Antitrust Division's leniency program and criminal enforcement efforts are not on the decline, despite recent statistics indicating otherwise.[2] Delrahim reported that leniency applications in 2018 were "on par with historical averages" and the leniency program is "alive and well." To prove its resolve for prosecuting cartels, Delrahim announced that the Antitrust Division intends to hire a group of attorneys to bolster its criminal enforcement ranks.

Richard Powers echoed Delrahim's comments and reiterated that the Antitrust Division is vigorously pursuing criminal investigations and taking steps to deepen its cooperation with the FBI. However, Powers commented that ACPERA may be interfering with the Antitrust Division's efforts. ACPERA requires leniency recipients to provide civil plaintiffs a "full account" of known facts, produce all potentially relevant documents, and provide access to potential witnesses. Powers explained that when civil plaintiffs file private lawsuits early in the hopes that an ACPERA-cooperator will provide the details they need to craft their claims, the Antitrust Division's investigation is likely to be ongoing, and ACPERA cooperation (and the discovery that it generates) may interfere with the investigation. According to Powers, that dynamic has caused the Antitrust Division to seek to stay discovery when civil cases move too quickly and overlap with ongoing investigations.

Powers also commented on the concern that ACPERA does not sufficiently incentivize companies to self-report. Powers suggested that ACPERA could be more effective if the statute clarified what a leniency recipient must do to receive the statute's benefits and when courts should determine whether those requirements have been met. Participants debated both themes during the workshop.

The Debate: Should ACPERA Be Amended?

Much of the discussion during the roundtable focused on ACPERA's lack of clarity regarding the circumstances under which a company qualifies for ACPERA's benefits.

What Is "Satisfactory Cooperation"?

ACPERA states that a leniency recipient must "provide satisfactory cooperation" to a private claimant, which includes "providing a full account ... of all facts known to the applicant" and producing "all documents or other items potentially relevant to the civil action."[3] However, the statute does not define "satisfactory cooperation," and only one district court to date has considered the question.[4]

Defense bar panelists complained that civil plaintiffs abuse this ambiguity in ACPERA. Most notably, plaintiffs plead conspiracy claims that are far broader than the scope of the Antitrust Division's criminal investigation (and broader than the leniency recipient's admitted conduct), and then threaten to challenge the defendant's ACPERA protection when it does not provide evidence to support those over-broad claims.

Many defense bar panelists recommended amending ACPERA to specify that a leniency recipient satisfies the "cooperation" requirement when it provides a civil plaintiff the same information it provided to the Antitrust Division. However, plaintiffs' bar panelists objected that this recommendation would unduly constrain their cases, particularly where the plaintiffs purport to have conducted a more probing investigation than the Antitrust Division.

What Is "Timely Cooperation"?

The panelists also debated the meaning of the requirement that a leniency applicant provide "timely cooperation," which is similarly not defined in the text of the statute.

Panelists from the plaintiffs' bar advocated for early cooperation by the leniency recipient before a consolidated amended complaint has been filed. Although that suggestion raised many objections, several defense bar panelists were willing to accept that cooperation before the motion-to-dismiss stage may be appropriate. Still others stated that cooperation should not be required until after a court has ruled on the viability of a complaint. Of course, all of these options have the potential to conflict with Powers' concern that the early filing of civil suits and ACPERA-induced discovery have the potential to interfere with ongoing criminal investigations.

When Is Enough, Enough?

Finally, the panelists debated at what point a court should decide whether an applicant is entitled to the benefits of ACPERA. A leniency recipient only receives ACPERA protection if the court determines that the defendant has provided satisfactory cooperation.[5] Several defense bar panelists strongly advocated that this determination must occur before trial if ACPERA is to provide any real benefits to leniency recipients. Plaintiffs' bar panelists suggested that defendants could address this concern on a case-by-case basis by filing a motion with the court seeking an early determination, rather than by amending the text of ACPERA itself.

A More Aggressive Take: To Be Effective, ACPERA Must Be Radically Amended

Several defense bar panelists expressed the view that ACPERA is flawed in ways that cannot be fixed by merely "tweaking" the existing statutory text. Defense-side recommendations for more sweeping reforms included:

- Eliminating ACPERA altogether and instead requiring a leniency recipient to pay restitution into a fund that would be administered by the Antitrust Division, so that the leniency recipient is not subjected to civil liability in private follow-on litigation
- Enacting statutes to reduce leniency recipients' potential exposure for related civil claims, such as those brought under the False Claims Act
- Eliminating the possibility of follow-on civil suits brought by indirect purchasers and state attorneys general against leniency recipients
- Seeking greater reciprocity or convergence of leniency benefits internationally

Plaintiffs' bar panelists generally eschewed recommendations to implement such sweeping changes, arguing that courts are best situated to resolve any statutory ambiguities and that the more aggressive proposals could have the reverse effect of chilling both public and private enforcement of the antitrust laws. One plaintiff-side speaker suggested that ACPERA could be strengthened by offering "bounties" to encourage whistleblowing.

As the debate and these reform proposals make clear, ACPERA has fallen short of accomplishing the goals Congress aimed to achieve when the statute was enacted in 2004. Though an outcome that includes reduced civil damages exposure would be attractive to any company that is considering whether

to apply for leniency, in practice ACPERA does not sufficiently offer that protection. The objective for the next iteration of ACPERA, if any, should be to address the statute's ambiguities and provide certainty and predictability to prospective leniency recipients. All stakeholders will benefit from a statute that does far more to protect companies that decide to self-report, as Congress initially intended.

The panel concluded with the Antitrust Division inviting written comments regarding the efficacy of ACPERA to be submitted by May 31, 2019. Companies wishing to opine on ACPERA reform are encouraged to contact any of the authors of this *Client Alert*. In the meantime, we plan to closely follow developments in this important area.

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Endnotes

1 Press Release, Department of Justice, Department of Justice to Hold Roundtable on the Antitrust Criminal Penalty Enhancement & Reform Act (Apr. 1, 2019), https://www.justice.gov/opa/pr/department-justice-hold-roundtable-antitrust-criminal-penalty-enhancement-reform-act.

2 Department of Justice, Criminal Enforcement Trends Charts Through Fiscal year 2018 (updated Jan. 28, 2019), https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts.

3 ACPERA, 15 U.S.C. § 1, note, at § 213(b).

4 *See In re Aftermarket Auto. Lighting Prods. Antitrust Litig*., No. 09-MDL-2007, 2013 WL 4536569 (C.D. Cal. Aug. 26, 2013).

5 ACPERA, 15 U.S.C. § 1, note, at § 213(b).