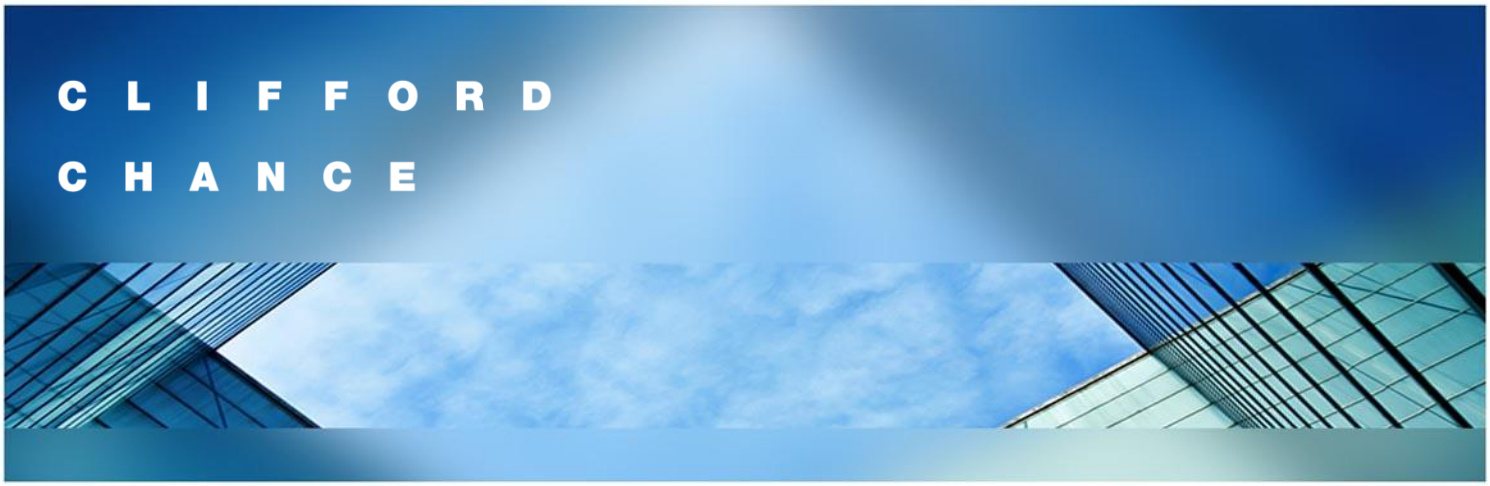

CONGRESS FAILS TO REAUTHORIZE ACPERA, SIGNIFICANTLY INCREASING CIVIL LIABILITY FOR COMPANIES RECEIVING CRIMINAL LENIENCY FOR U.S. ANTITRUST VIOLATIONS

The Antitrust Criminal Penalty Enhancement & Reform Act (ACPERA) expired on June 22, 2020. The law offered the prospect of reduced civil liability for companies that had successfully sought and received leniency from criminal prosecution from the Department of Justice's Antitrust Division. Congress originally passed ACPERA in 2004, at the urging of the Antitrust Division, to encourage companies to self-report their participation in criminal antitrust violations affecting U.S. markets. In recent years, however, ACPERA critics have argued that the law should be reformed because its unclear standards fail to adequately incentivize companies to self-report cartel conduct. Ultimately, despite efforts from both chambers of Congress, legislators could not marshal enough support to renew the law before its June 22 expiration date. Congress may later decide to reauthorize or reform the law, including extending benefits retroactively. But until then, the threat of civil liability of up to three times the total damages caused by the entire conspiracy could discourage companies from promptly self-reporting cartel conduct to the Antitrust Division. The erosion of ACPERA's protections underscores the need for companies to implement and update effective compliance programs to prevent cartel conduct by their employees.[1]

OVERVIEW OF ACPERA

Price-fixing, market allocation, and bid rigging are generally considered to be *per se* violations of Section 1 of the Sherman Act, which the Antitrust Division

[1] The Antitrust Division's recent policy change that potentially provides companies with credit for compliance programs at the charging and sentencing stages of a criminal antitrust investigation has increased the importance of having an effective antitrust compliance program. For a discussion of this policy change and the elements that the Antitrust Division considers to be part of an effective compliance program, see our briefing here.

can prosecute criminally.[2] To avoid criminal liability, companies can self-report their participation in an anticompetitive scheme under the Antitrust Division's Corporate Leniency Program. Under this Program, the first company to confess involvement in an antitrust crime and meet other conditions—such as providing restitution to injured parties—can receive leniency from criminal penalties for the company (and usually, cooperating employees) for the reported anticompetitive conduct. The Leniency Program has been one of the Division's greatest sources of cartel investigations.

But the Leniency Program does not protect leniency recipients from civil liability. Under the Clayton Act, which authorizes antitrust suits in U.S. federal court by private plaintiffs claiming to have been injured by a cartel, one defendant can be held liable for up to three times the total damages caused by the entire conspiracy, regardless of the extent of that defendant's participation in the conduct. This liability is magnified because U.S. law permits a single plaintiff to sue on behalf of a purported "class" of all similarly situated parties allegedly harmed by the conduct. Moreover, each U.S. state has its own antitrust statutes, many of which permit parallel suits by even broader groups of plaintiffs than can sue under federal law.

The prospect of large, aggregated class damage awards spurs plaintiffs to race to court and file suit as soon as they learn of a criminal investigation. This dynamic can disincentivize companies from self-reporting anticompetitive misconduct under the Leniency Program, for fear of inviting inevitable follow-on civil claims by private plaintiffs.

Congress enacted ACPERA in 2004 to mitigate this disincentive and encourage a greater number of companies to self-report cartel conduct in pursuit of leniency. ACPERA limits a leniency recipient's civil liability, provided the applicant timely and satisfactorily cooperates with civil plaintiffs. The statute does this in two ways. First, ACPERA eliminates a leniency recipient's treble damages. Second, ACPERA eliminates joint and several liability. Companies meeting ACPERA's cooperation requirements are thus liable to civil plaintiffs only for "actual damages" caused by their own individual conduct.

CRITICISMS OF ACPERA

The Antitrust Division has long supported ACPERA, seeing it as a key incentive for encouraging companies to self-report antitrust violations and apply for leniency. But ACPERA's critics have argued that the Act does not fulfill this purpose, identifying three primary issues:

First, to qualify for ACPERA benefits, a leniency recipient must provide civil plaintiffs with timely and satisfactory cooperation.[3] But ACPERA does not provide clear standards for what cooperation is timely and satisfactory. This uncertainty means that companies considering whether to apply for leniency are unable to rely on ACPERA's benefits.

The statute specifies that a company must provide plaintiffs with a "full account" of "all facts known" potentially relating to the case. This includes "all documents" as well as "other items" that are in the company's possession, custody, or control.[4] Beyond this description, however, the law does not

2 15 U.S.C. § 1.

3 *See* ACPERA, § 213(b) & (c), 15 U.S.C. § 1 notes.

4 ACPERA, § 213(b)(1)-(3).

provide guidance regarding what constitutes timely and satisfactory cooperation. The body of case law interpreting ACPERA is similarly limited. Only a handful of courts have discussed whether a company's cooperation has met ACPERA's standard, although only one district court has ever denied a leniency applicant ACPERA cooperation credit.[5]

Second, ACPERA's lack of clear standards may hinder a leniency recipient's ability to defend itself in civil litigation, potentially putting recipients in an even worse position than co-defendants. For example, plaintiffs may seek to argue that a leniency recipient is not sufficiently cooperative for ACPERA credit if that defendant raises reasonable, threshold grounds for dismissal of those plaintiffs' claims. ACPERA, however, requires that a cooperating defendant admit to the *existence* of the conspiracy; it does not require the defendant to waive meritorious defenses, including arguments that plaintiffs lack standing, cannot show causation, and have improperly calculated damages.

Plaintiffs may also be tempted to delay settling with defendants seeking ACPERA benefits to pressure the defendants into increasing their cooperation efforts. Instead, plaintiffs may offer better settlement terms for co-defendants, while holding leniency recipients to their ACPERA obligations. In this way, leniency applicants who receive ACPERA benefits may find themselves worse off than co-defendants who are able to reach earlier, more favourable settlements with plaintiffs, especially in light of the fact that private civil litigation can take many years—generally far longer than a criminal investigation lasts.

Third, although ACPERA limits civil liability for qualifying defendants to "actual damages," how to calculate actual damages is not clear. This uncertainty can be exacerbated by overlapping damages claims from different classes of plaintiffs alleging differing theories of antitrust harm. For example, leniency applicants will often face different claims from not only direct purchasers (under federal law), but also indirect purchasers (under some states' laws), and state attorneys general suing on behalf of affected residents.

Together, these criticisms have prompted many practitioners to call for reform of the statute. Recognizing these concerns, the Antitrust Division held a public roundtable in April 2019 to discuss reauthorization of the law and whether reforms were necessary. During the roundtable, plaintiffs' counsel generally opposed modification of the statute, stating that ACPERA was "working, although imperfectly." Defense counsel, on the other hand, advocated for changes such as clearer guidelines on what constituted "satisfactory cooperation" and how to calculate "actual damages." Some also proposed that the statute should specify a timeline for courts to determine early on in civil proceedings when cooperation was "satisfactory" for the purposes of receiving ACPERA credit.

Despite these differing views, the Antitrust Division concluded that participants in the roundtable expressed a general consensus that ACPERA provided benefits to leniency applicants and should be reauthorized. The Antitrust Division did not provide any public recommendations to Congress for reforming ACPERA.

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5 *See In re Aftermarket Auto. Lighting Prods. Antitrust Litig*., No 09-MD- 2007-GW (PJWX), 2013 U.S. Dist. LEXIS 126308 (C.D. Cal. Aug. 26, 2013).

CONCLUSION

ACPERA's sunset date of June 22 has come and gone without legislative action to reauthorize it. Short bills drafted in both chambers of Congress would have indefinitely reauthorized the Act. But in the end, Congress was unable to marshal enough support to timely pass the bills. Why Congress did not vote on ACPERA remains unclear, although one Senator threatened to delay the bill for reasons unrelated to its merits.

ACPERA's expiration has two important implications. First, any company that received conditional leniency from the Antitrust Division prior to June 22 will continue to be eligible for ACPERA's benefits. Second, ACPERA's civil liability limits are now unavailable for leniency applicants that have not yet received conditional leniency from the Antitrust Division. Of course, Congress may act to reauthorize ACPERA at some point.

As a result, the calculus has now changed for companies considering whether to apply for leniency. Would-be leniency applicants can no longer hope to benefit from ACPERA's limitations on civil liability. Congress may later decide to reauthorize and reform ACPERA, even choosing to make ACPERA's benefits retroactive. But the prospects of such action are unclear.

The failure to reauthorize ACPERA could also have knock-on effects for *criminal* cartel liability. The Antitrust Division relies on the Leniency Program as a crucial source of cartel investigations. But as ACPERA itself recognized, the strength of the Leniency Program depends, in many ways, on potential applicants understanding the clear differences in outcomes for leniency recipients and those companies that choose *not* to self-report. Without ACPERA benefits available for leniency recipients, the Division may seek to maintain the difference in outcomes for leniency recipients by targeting non-recipients with even more aggressive criminal penalties.

ACPERA's expiration increases the need for corporations to be aware of the massive potential liability from antitrust violations and to prevent antitrust violations by implementing and updating effective compliance programs.[6]

6 *See* note 1 above.

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