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CONGRESS REAUTHORIZES ACPERA, RESTORING REDUCED CIVIL LIABILITY FOR COMPANIES RECEIVING CRIMINAL LENIENCY FOR U.S. ANTITRUST VIOLATIONS

On June 23, we reported that Congress had not reauthorized the Antitrust Criminal Penalty Enhancement & Reform Act (ACPERA), which offered the prospect of reduced civil liability for companies that successfully sought and received leniency from criminal prosecution from the Department of Justice's Antitrust Division. In our June 23 publication, we also identified the risks that companies face without ACPERA's benefits, analyzed the main criticisms concerning ACPERA's effectiveness, and gave our view that preserving ACPERA in its current form would be superior to letting it expire. On October 1, ACPERA was extended permanently in its original form, applying retroactively to any markers or agreements entered into in the brief period when ACPERA was expired.

ACPERA's reauthorization means that companies that decide to self-report possible cartel conduct can again potentially receive ACPERA's benefits of reduced civil liability. Congress, however, left ACPERA unchanged, not addressing any of its often-cited shortcomings. By permanently reauthorizing the bill without changes, Congress has missed its best opportunity to address ACPERA's flaws. Instead, the uncertainty surrounding key aspects of ACPERA will continue to be addressed piecemeal, through episodic review by courts at the late stages of follow-on civil damages claims for antitrust violations. This situation means that businesses will need to continue to weigh the decision to self-report cartel conduct in a world where many have expressed concern about the uncertainty and rising costs of seeking leniency.

Here, we take the opportunity of ACPERA's reauthorization to discuss its benefits and why some critics argue that it fails to sufficiently encourage self-reporting. Of course, companies looking to mitigate antitrust risks should look to prevention first

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and foremost, focusing their efforts on implementing or updating their antitrust compliance programs to effectively 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 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, there is joint and several liability. The Clayton Act further provides for treble damages. This means that 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 potential 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. Plaintiffs' lawyers can collect as much as 30% of any amounts recovered and so are highly incentivized to bring cases. This dynamic of high civil damages awards 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 under Section 1 of the Sherman Act (or any similar state law), 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.

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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.

2 15 U.S.C. § 1.

CRITICISMS OF ACPERA

Congress originally passed ACPERA in 2004 at the urging of the Antitrust Division. The Antitrust Division sees ACPERA 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 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 favorable 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

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

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.

CONCLUSION

ACPERA now has no sunset provision, meaning its benefits will be indefinitely available to leniency recipients. The law also extended ACPERA's benefits retroactively to any company who received a marker or entered into an antitrust leniency agreement while the law was expired. And going forward, ACPERA's limits on civil liability will again be available for current applicants who have not yet received conditional leniency from the Antitrust Division, as well as future applicants.

The Antitrust Division expressed approval that Congress reauthorized the statute and repealed its sunset provision, stating that ACPERA’s provisions and incentive structure have been "importan[t] in the fight to safeguard our free markets and protect American consumers from collusion."[6] But the reauthorization is a missed opportunity for Congress to clarify ACPERA's standards and consider whether ACPERA adequately incentivizes companies to self-report cartel conduct. ACPERA is certainly no substitute for a corporation's best defense against allegations of anticompetitive behavior: implementing and updating an effective antitrust compliance program.[7]

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[6] U.S. Dep't of Justice, Department Of Justice Applauds President Trump’s Authorization Of The Antitrust Criminal Penalty Enhancement And Reform Permanent Extension Act (Oct. 1, 2020), https://www.justice.gov/opa/pr/department-justice-applauds-president-trump-s-authorization-antitrust-criminal-penalty.

[7] *See* note 1 above.

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