

1

2

3

4 PUBLIC ROUNDTABLE DISCUSSION:

5 ANTITRUST CRIMINAL PENALTY

6 ENHANCEMENT AND REFORM

7 ACT ("ACPERA")

8

9 Transcript as edited by Panelists

10

11 DATE: Thursday, April 11, 2019

12 TIME: 1:00 p.m.

13 LOCATION: Bingaman Auditorium

14 Liberty Square Building

15 450 Fifth Street, NW

16 Washington, D.C. 20001

17 REPORTED BY: Michael Farkas, Notary Public

18

19

20 JOB No. 3288876

21

22

1 A P P E A R A N C E S

2 Introductory Remarks:

3 Makan Delrahim, Assistant Attorney General

4 Richard Powers, Deputy Assistant Attorney General

5

6 Session I

7 Ann O'Brien

8 Hon. Douglas Ginsburg

9 Lindsey Vaala

10 John Taladay

11 John Wood

12 Session II

13 Mark Grundvig

14 Peter Halle

15 Jeffrey Kessler

16 Amy Manning

17 Bruce Simon

18 Bonny Sweeney

19

20

21

22

1 APPEARANCES (cont'd)

2 Session III

3 Jennifer Dixton

4 Scott Hammond

5 Roxann Henry

6 Joe Saveri

7 John Taladay

8 John Terzaken

9

10

11

12

13

14

15

16

17

18

19

20

21

22

1	CONTENTS	
2		PAGE
3	Opening Remarks	5
4	Session I	17
5	Session II	64
6	Session III	120
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		

1 PROCEEDING

2 MS. O'BRIEN: Welcome to the Antitrust
3 Division's Public Roundtable on the Antitrust Criminal
4 Penalty Enhancement and Reform Act, or ACPERA, as
5 we'll call it for the rest of the day. We will
6 begin with introductory remarks from our Assistant
7 Attorney General Makan Delrahim.

8 ASSISTANT ATTORNEY GENERAL DELRAHIM: Thanks,
9 Ann. Good afternoon. I want to welcome all of you
10 here. It's great that so many of our colleagues -- an
11 honor to have Judge Ginsburg back at the Division to
12 help us with this review of the ACPERA. And I want to
13 welcome you. This is the first event we've having
14 since we dedicated this lecture hall to Anne Bingaman,
15 so, this is the Anne K. Bingaman Auditorium and Lecture
16 Hall, and it's great that it's the first one.
17 It's also fitting that we're discussing this
18 important ACPERA legislation here in this room, given
19 that Anne -- her contributions to the Division's
20 leniency program were incredible, and some of you who
21 were here two weeks ago for
22 that, would have heard from her directly about some of

1 what she has done and some of her colleagues.

2 As many of you know, she was the Assistant
3 Attorney General when the Antitrust Division's
4 corporate leniency policy was revised in 1993, and we
5 celebrated the 25th anniversary just this past year in
6 the Great Hall, and in the 25 years since, the
7 leniency policy has played a critical role in the
8 Division's ability to detect, disrupt and deter
9 antitrust crimes.

10 It has resulted in the prosecution of
11 sophisticated international cartels and the collection
12 of billions of dollars in criminal antitrust fines.
13 ACPERA compliments the Division's leniency program by
14 reducing the civil damages exposure of the company
15 granted leniency, if that company provides the civil
16 plaintiffs with timely, satisfactory cooperation.

17 I was fortunate to be the Deputy AAG at the
18 Division at the time when the legislation was going
19 through, and President Bush originally signed it into
20 law in June of 2004, and I take great pride in the
21 passage and ultimately how that shaped up to be.
22 ACPERA not only increased the criminal antitrust

1 penalties, but promised to bolster the leniency program by
2 allowing a company that qualifies for leniency
3 to avoid paying the treble damages in follow-on civil
4 suits.

5 This benefit can be substantial. Under ACPERA,
6 the leniency applicant that satisfies the cooperation
7 requirements is civilly liable only for the actual
8 damages to his own conduct, rather than being liable
9 for the treble damages caused by the entire unlawful
10 conspiracy.

11 While treble damages liability can be an
12 important deterrent for engaging in anti-competitive
13 behavior, such enormous civil exposure can also have
14 the unfortunate consequence of deterring the self-
15 reporting of criminal wrongdoing.

16 Then Chairman Orrin Hatch, who again I had
17 the great privilege of working for on the Senate
18 Judiciary Committee before I came first to the
19 Antitrust Division in 2003, he predicted at the time
20 of ACPERA's passage that its "Increased self-
21 reporting incentive will serve to further destabilize
22 and deter the formation of criminal antitrust

1 conspiracies. In turn, these changes will lead to
2 more open and competitive markets,"

3 Proponents of ACPERA say that the detrebling
4 provisions have promoted self-disclosure and have
5 streamlined civil antitrust litigation, just as
6 Senator Hatch predicted. Some have recently raised
7 concerns that ACPERA is no longer working as it was
8 intended. That's what we're here to explore.

9 In my view, tools such as ACPERA's detrebling
10 provisions that have the potential to incentivize
11 leniency and encourage self-reporting, are of great
12 value because they help to protect consumers from the
13 significant harm a cartel can cause when it infects a
14 particular industry.

15 At Congress' request in 2010, the Government
16 Accountability Office published a report on ACPERA,
17 which I'm sure will be discussed today. In reviewing and commenting
18 on the report, the Division recognized then that
19 increased leniency applications since ACPERA's
20 enactment "provided some circumstantial
21 evidence of the value of both ACPERA's increase in
22 penalties and its detrebling relief to the leniency

1 program."

2 Despite some recent eulogies over the
3 purported death of leniency, the Division's leniency
4 program is still alive and well. In fact, the number
5 of leniency applications the Division received in 2018
6 was on par with our historical averages and there's no
7 sign that we've become a victim of our own success and
8 somehow rooted out collusion entirely. Indeed, the
9 Division is vigorously investigating cartel conduct
10 and closed FY 2018 with 91 pending grand jury
11 investigations, the highest total since 2010.

12 So far this month alone the Division has
13 announced charges and four new investigations. These
14 new investigations relate to anti-competitive conduct
15 in multiple industries taking place in various
16 jurisdictions across the country, including the
17 commercial construction industry in Chicago and New
18 England, and various federal programs around the
19 country.

20 Needless to say, our prosecutors are busy and
21 there's no sign that collusion is on the decline. In
22 fact, the Attorney General on Tuesday lifted the

1 hiring freeze and we intend to hire an additional
2 group of lateral attorneys to join us in our continued
3 efforts.

4 Cartelists are out there, and it's as
5 important as ever that all the detection tools
6 available to our prosecutors are functioning
7 optimally. Though our cases are generated in a number of
8 ways, for the last 25 years, leniency applications have
9 been an important tool in our arsenal for detecting,
10 preventing and prosecuting cartels.

11 Today's roundtable will assist us in
12 continuing examination of ACPERA's role in ensuring
13 that the leniency program is successful. Late Justice
14 Scalia has been quoted numerous times for observing
15 that collusion is, "the supreme evil of
16 antitrust." I could not agree more. Prosecuting
17 cartels remains our highest priority at the Antitrust
18 Division.

19 I have explained that antitrust violations,
20 such as price fixing, bid rigging and market
21 allocation unambiguously disrupt the integrity of the
22 competitive process, harm consumers and reduce faith in

1 the free market system. Our leniency program is
2 designed to facilitate and incentivize self-reporting
3 of collusive behavior, as all of you know. Self-
4 disclosure benefits the first cartel member to report and
5 cooperation from leniency applicants furthers our
6 investigation and helps remove cartels from the free
7 market. ACPERA should encourage such behavior, just as Congress
8 contemplated in 2004, and when it re-authorized it later.

9 We are here today again to discuss the
10 benefits, whether it's incentivizing self-reporting of
11 cartel activity and what, if anything, in ACPERA's
12 current framework can be improved. The Division would
13 like to learn from those with experience litigating
14 and studying ACPERA in order to better understand how
15 it's working to uncover anti-competitive behavior and
16 compensate victims of collusion.

17 I'd like to thank in advance all of the
18 roundtable's participants, particularly the U.S.
19 Chamber of Commerce, the Honorable Judge Ginsburg and
20 the Global Antitrust Institute, the American Bar
21 Association and the Business Industry Advisory
22 Committee of the OECD for sharing their views on this

1 important topic.

2 I'm also grateful to and very interested to
3 hear from our experienced individual panelists,
4 including those who represent the many victims on how
5 ACPERA's operating today.

6 Now I'd like to invite my literally partner
7 in crime, our Deputy Assistant Attorney General for
8 Criminal Enforcement, Richard Powers, to provide some
9 brief remarks. Richard.

10 DEPUTY ASSISTANT ATTORNEY GENERAL POWERS:

11 Thank you, Makan. And thank you to all of our
12 panelists for taking the time to participate in
13 today's roundtable discussion. We have many
14 distinguished practitioners here with us today, and we
15 are excited for what we hope will be a lively and
16 deeply substantive discussion.

17 As we said back in September when we
18 celebrated leniency in 25, it's important for us to
19 constantly think about the ways we can improve the
20 execution of our program. And this includes listening
21 to various constituencies involved in cartel
22 enforcement on all sides, about what they think is

1 working and where we can improve. And today's
2 discussion does just that.

3 Before I turn it over I want to share a
4 thought about our enforcement efforts generally;
5 mention a current issue we are thinking about at the
6 intersection of our leniency program and ACPERA; and
7 conclude with thoughts on the future.

8 So we have a number of tools that help us
9 uncover and prosecute anti-competitive conduct, and
10 there is no question that leniency is one of the most
11 important weapons in our arsenal. It has played a
12 critical role in the detection and prosecution of
13 companies and executives who participated in some of
14 the world's largest cartels. It has also been a model
15 for similar programs around the globe.

16 Leniency, however, is not a standalone tool,
17 but instead must work side by side with other
18 enforcement tools to function properly. For leniency
19 to work there must be a credible threat of detection,
20 to keep the incentive structure properly balanced.
21 For our part we maintain this threat through
22 aggressive, efficient investigations.

1 The cases that Makan mentioned earlier and the
2 record number of open investigations highlight our
3 commitment to the detection side of the equation. But
4 as I said, these tools go hand in hand. Even in
5 situations where we open an investigation and develop
6 evidence on our own, the rewards of leniency are still
7 available under Type B of our program.

8 Indeed, it's often the case that an
9 investigation that is considered a leniency matter,
10 actually came out of our own sort of initial efforts,
11 investigative efforts. And this is why we are
12 focusing on proactive, aggressive investigations and
13 sharpening our investigative abilities, including, for
14 example, deepening our relationship with our
15 investigative partners, including the FBI and some
16 members of the FBI are actually with us here today.

17 Now, a properly functioning leniency program
18 is not a delicate ecosystem. The core must be clear
19 and strong, as ours is, with the application
20 consistent and the risks and incentives, including
21 those provided under ACPERA, properly understood and
22 balanced.

1 Second, one issue that is presently front and
2 center for the Division when it comes to the
3 intersection, ACPERA and our leniency program,
4 involves early-filed, overlapping civil suits. Now,
5 rather than follow-on suits, overlapping private
6 damages actions are being filed earlier and earlier.
7 As a result, we're often confronting the reality that
8 despite ACPERA, ongoing civil litigation may dis-
9 incentivize and distract from criminal cooperation,
10 and defendants may be driven by cabining civil
11 exposure and the flow of discovery to civil litigants,
12 more so than seeking leniency or otherwise resolving
13 criminal liability. And more fundamentally, earlier
14 access to investigative information not only risks
15 complicating and interfering with our investigations,
16 but it also jeopardizes our investigation altogether.

17 In recognition of these risks, the Division
18 has recently been intervening earlier in private damages
19 actions, and moving for broader stays of discovery in order
20 to protect our criminal investigations.

21 Now, that said, restitution for victims, of

1 course, always is the top priority for us, and our
2 hope is that we can make progress in finding the right
3 balance between our enforcement efforts and private
4 litigation.

5 Finally, today's roundtable is a chance to
6 think about the future. The proliferation of leniency
7 programs and the availability of civil damages actions
8 around the world mean our efforts to maintain the
9 proper incentives for leniency in the U.S. will have a
10 cascading effect throughout the world.

11 I touched on the most recent challenges at
12 home in the form of earlier filed, overlapping civil
13 suits, but would like to end by mentioning our
14 initiative to enhance global coordination on leniency
15 matters. Convergence on the law on governing the
16 intersection of leniency and private damages, and
17 cooperation among enforcers would increase the
18 incentives for a company to seek leniency in multiple
19 jurisdictions and decrease the burdens on applicants.

20 It would also remove some of the confusion
21 and complexity for those who are considering applying
22 for leniency and weighing the risks and the benefits.

1 Based on our experience with leniency and
2 ACPERA, the Division is happy to facilitate and lead
3 the conversation on these issues, both at home and
4 abroad.

5 So, with that, I will turn it over to Ann
6 O'Brien, an Assistant Chief in our Competition Policy
7 & Advocacy Section, who will introduce our first set
8 of speakers. Thank you.

9 MS. O'BRIEN: Thank you, Richard. We will
10 begin with some opening statements on behalf of
11 interested stakeholder groups, and we're very lucky to
12 have this group of representatives with us.

13 First, we will hear from the Honorable Douglas
14 Ginsburg on behalf of the Global Antitrust Institute.
15 Judge Ginsburg is ideally suited to speak here today.
16 In addition to being a Judge on the Court of Appeals
17 for the D.C. Circuit, and a former Assistant Attorney
18 General of the Antitrust Division, Judge Ginsburg is a
19 leading scholar of antitrust law. Under his watch the
20 Antitrust Division submitted comments to the newly
21 formed Sentencing Commission, pointing out that
22 antitrust prison sentences on average were far too low

1 for optimal deterrence of cartels.

2 More recently he has highlighted the
3 deterrent value of individual accountability for
4 executives involved in cartels, and we look forward to
5 Judge Ginsburg's insights on ACPERA today.

6 HON GINSBURG: Thank you very
7 much. I'm very pleased to be back at the Division, and when it
8 happens from time to time, it's always a happy
9 occasion.

10 Because there's another
1 session later in the day on the civil de-trebling provisions
2 of ACPERA, I'm going to focus my remarks on the
3 criminal enforcement provisions of the statute, which
4 I know are not up for re-authorization, but which
5 interact directly with the leniency program and all other aspects of the criminal enforcement
6 program.

7 As a reminder, in
8 2004 the ACPERA statute increased the maximum fine
9 for an antitrust violation from \$10 million to \$100
10 million for a corporation, and from \$350,000 to \$1
11 million for an individual. It also de-trebled damages for
12 corporate leniency applicants that provide "satisfactory
13 cooperation" to follow-on civil claimants, and
14 increased the maximum jail term for individuals from
15 three to ten years, which in my view is surely the most
16 effective deterrent.

1 Be that as it may, there can be no real
2 doubt that with these enhanced penalties, the leniency the
3 Division offers to qualified applicants
4 is worth more than it was before ACPERA was enacted.

5 As one would expect, the 2011 report of
6 the Government Accountability Office found that Type A
7 leniency applications had doubled in the first six
8 years after ACPERA was enacted, which is a pretty
9 reliable indication that the statute had
10 enabled the Division to prosecute more cartels, at
11 least during that period.

12 A more recent study by Vivek Ghosal
13 and Daniel Sokol attempts to isolate the effects
14 of ACPERA and finds that it led to greater total fines
15 and jail sentences being imposed per cartel in the decade following ACPERA's enactment,
16 compared to the pre-enactment period.

17 Nonetheless, the downward trend in
18 criminal antitrust enforcement statistics over the
19 last several years has caused a number of people

1 to raise questions about whether the statute and
2 the criminal enforcement program more generally
3 continue to be as effective today
4 and, if not, whether and how the program ought to be
5 changed.

6 In recent years the Division's figures on
7 criminal enforcement have fallen to modern lows. The
8 number of criminal cases filed by the Division
9 decreased from 90 in 2011 when the GAO report came out, to 18 in 2018, which is the
10 lowest it has been since 1972. Correspondingly, 27 corporations
11 were charged in 2011, compared to only 5 in 2018.

12 The criminal fines obtained by the Division
13 have fallen from more than \$1 billion per year
14 in 2012 through 2015, to \$172 million last year. These decreases are not going unnoticed.

15 Before reading too much into these
16 numbers, however, one should bear in mind that anti-cartel
17 enforcement is very lumpy. The Division may work for
18 several years to develop a case, resulting in a large
19 number of indictments and large fines being collected
20 in a single year. For all an outside observer can

1 know, a single cartel case brought tomorrow might
2 drastically change the picture drawn by these
3 conventional year-to-year enforcement statistics.
4 A more accurate account of the Division's
5 productivity might be obtained by spreading its case,
6 fine, and jail time statistics out over the entire
7 period of years from the opening of an investigation
8 through conviction and sentencing, in proportion to
9 the resources they consumed each year – similar to amortizing R&D
10 over the period during which it pays off. I suggest
11 the Division try to develop and publish statistics
12 along these lines.
13 Additionally, Makan mentioned the 91 grand juries now working,
14 and I remember there were 130 working when I was here.
15 The number of active grand juries at the end of the year
16 may be another useful statistic for the Division to publish in order better
17 to reflect its productivity.
18 In addition to the apparent decline in cases
19 over these last few years, there has been a change in the kinds of

1 corporate defendants that the Division has charged.
2 Based upon my preliminary research (using
3 publicly traded as an imperfect proxy for large), it appears that large American companies, with
4 the important recent exception of U.S. banks involved in the
5 LIBOR, FX and CDS cartels, are
6 rarely accused of criminal violations, while the
7 number of foreign companies and individuals being indicted has
8 increased dramatically.
9 This development may reflect the greater
10 awareness among large U.S. companies of the
11 substantial penalties they, and particularly their
12 executives, face for antitrust violations in the U.S.
13 Indeed, I have been told by several practitioners here and
14 abroad that it is not uncommon now to find
15 international cartel agreements among non-U.S. companies
16 that specifically carve out the U.S. because of our significant criminal penalties.

1 Because the European Commission has also imposed
2 very large fines on corporations on a scale that more or
3 less parallels what the U.S. agencies do, the
4 motivating distinction for these carve-outs is almost
5 certainly the prospect of executives facing jail time
6 in the U.S., which is not a feature of EU law. EU law does not impose individual sanctions, fines, or
7 jail time and, although
8 a few Member States have statutes that
9 authorize criminal penalties, most have not enforced them; only the UK has actually
10 completed a criminal case.

11 Now, quite apart from the lumpiness of
12 enforcement I mentioned, there are at least three plausible
13 hypotheses worth considering in order to explain why
14 the number of cartel cases has fallen in recent years.

15 First is the increase of antitrust exposure in other

1 jurisdictions. The proliferation of large fines in
2 other jurisdictions may make applying for leniency in
3 any one jurisdiction less attractive than it would
4 otherwise be.

5 The European Commission, for instance, in its
6 Second Leniency Notice in 2002, began to offer
7 immunity for information about ongoing investigations,
8 roughly equivalent to our Type B leniency. The number
9 of cases brought and the average fine per case in
10 Europe began to increase as soon as 2003. By 2018 fines levied in Europe
11 by both the Commission and the Member States
12 accounted for more than half of all cartel fines worldwide. In 2017, CADE in Brazil, which has an
13 active leniency program, fined a single corporation a
14 record \$39 million for participation in a cartel
15 related to Operation Car Wash.
16 In 2014, the Japan Fair Trade Commission fined a single company
17 more than \$90 million. This newly increased

1 exposure to antitrust penalties in multiple
2 jurisdictions may understandably make a company more
3 reluctant than in the past to apply for leniency in a
4 number of jurisdictions, which have diverse
5 qualifications and timing requirements, because a
6 failure to qualify in just one or two may subject it
7 to very large fines.

8 As Professor Caron Beaton-Wells at the University
9 of Melbourne cautioned in 2016, the global spread of
10 leniency policies "makes it difficult, if not
11 impossible," for a corporation to be
12 confident that it is the first leniency application in
13 all relevant jurisdictions.

14 Ironically, because leniency is based upon the
15 "absolute certainty that the first company to reply will receive total
16 immunity from sanctions," the global
17 proliferation of criminal sanctions and leniency
18 policies, or even highly elevated civil sanctions, may have reduced the net incentive
19 to report cartels.

20 A second hypothesis is that technological

1 change may have facilitated more tacit collusion among
2 companies, allowing them to realize the benefits of
3 cartelization or at least of coordinated behavior
4 without having to enter into unlawful agreements.

5 Earlier this year four European economics
6 professors published the results of a simulation
7 demonstrating that, "even relatively simple
8 algorithms systemically learn to [implement] sophisticated
9 collusive strategies." That is, "autonomous pricing algorithms may independently
10 discover that if they had to make the highest possible
11 profit, they should avoid price wars," leading them to collude by trial and error, "without
12 communicating with one another, without being
13 specifically designed or instructed to collude."

14 Because algorithms are more disciplined
15 than are people, a company might rely upon them
16 to do work that previously required negotiating
17 detailed cartel agreements, monitoring the other
18 participants to detect cheating, trusting one's
19 competitors not to betray the cartel in return for
20 leniency, and perhaps even more important, being

1 willing to commit a crime punishable in the U.S. by
2 time in prison.

3 The third hypothesis worth considering is that the decrease in criminal cases simply
4 reflects the success of the Division's criminal
5 enforcement program. I think, Makan, you may be a
6 little too quick to assume there is just as
7 much cartel activity out there as ever; instead, the Division may be
8 the victim of its own success. After all, more severe sanctions – especially
9 here in the U.S. where individuals are liable for fines and imprisonment but in
10 other jurisdictions as well – should be expected to
11 deter the formation of more cartels.

12 The success or
13 failure of ACPERA and the Division's current criminal
14 enforcement program should be judged by determining – as
15 best we can when dealing with the inherently
16 unknowable number of cartels – how various elements of the criminal enforcement program
17 contribute to the Division's ability to detect
18 established cartels and to deter the formation of new
19 cartels.

20 In a 2009 paper, economist Nathan Miller, who teaches at Georgetown, showed that reform of the

1 Division's leniency program in 1993 led to an initial
2 spike in the number of cartels discovered, reflecting better detection (i.e., self-reporting), followed
3 by a dropoff in the number of cartels discovered to a
4 level below the numbers in the pre-lenieny period,
5 reflecting greater deterrence on an ongoing
6 basis.

7 One would expect a successful enforcement of
8 criminal penalties pursuant to ACPERA to follow the
9 same pattern.

10 After all, the same calculus that leads a cartel
11 member to report the cartel and to seek leniency should
12 also apply to its ex ante decision whether to form or
13 join the cartel. The lower rates of detection today
14 are consistent with this hypothesis.

15 As I mentioned earlier, the number of
16 publicly traded – as an imperfect proxy for large – U.S. corporate
17 defendants has also fallen in recent years, most
18 likely, in my view, due to the combination of increased
19 deterrence brought about by greater penalties from ACPERA, and
20 the concomitant increase in efforts to enforce
21 compliance by corporate managers.

1 These internal compliance programs, which cover the FCPA as well as antitrust, are, I think,
2 becoming close to universal among large firms. The
3 result has been a change in the makeup of the
4 defendant population, which now consists
5 overwhelmingly of smaller – i.e., not
6 publicly traded, U.S. companies – and foreign companies
7 of all sizes, along with the individual managers
8 personally involved in the cartels. Foreign companies are more difficult to
9 investigate and their managers are less likely to come
10 to the U.S. to serve time in jail, unless the
11 penalties imposed upon them and their employees
12 are reduced. To the extent that smaller U.S. companies are
13 involved in the cartels, they tend to operate in
14 local markets, affect a lesser volume of commerce,
15 and hence produce smaller penalties. In these
16 respects, defendants now resemble the defendants being
17 charged in the 1980's; those defendants had
18 cartelized local markets for road paving, antique
19 auctions, supplying food stuffs to military bases, and

1 the like. In other words, the
2 advent of the modern leniency program in 1993 and the
3 increase in penalties from ACPERA in 2004 may have had
4 their intended effect to a degree not imagined since
5 Michael Block and Gregory Sidak wrote their 1980
6 article asking "Why Not Hang a Price Fixer Now and
7 Then?" (They had a good reason for not doing that, by
8 the way.)

9 In sum, there are both gratifying and
10 disturbing possible explanations for recent trends in
11 the cartel enforcement statistics. As is often the
12 case when thinking about cartels, more analysis, both
13 theoretical and empirical, is required
14 before it will be possible to make any confident judgment
15 about which one of these explanations, if any,
16 is accurate and, therefore, whether ACPERA and
17 other parts of the criminal enforcement program ought to be
18 modified in some way.

19 I will end by simply reiterating my
20 suspicion that, when we are able to say with confidence what accounts for
21 the drop off in the enforcement statistics, the criminal penalties for individuals will
22 tell much of the story.

23 MS. O'BRIEN: Thank you very much, Judge

1 Ginsburg. Next, we will hear from Lindsey Vaala on
2 behalf of the American Bar Association Antitrust
3 Section. Ms. Vaala is a member of the Antitrust and
4 Litigation Team at Vinson & Elkins in D.C., where she
5 counsels clients on antitrust related issues around
6 the globe, and a key area of her practice is defending
7 multi-national companies in cartel and price-fixing
8 investigations and related civil investigation.

9 Lindsey currently serves as co-chair of the
10 Antitrust Section's Cartel and Criminal Practice
11 Committee. She joins us today as the representative
12 of the Antitrust Section of the American Bar
13 Association and her comments will be on behalf of the
14 Section. Thank you, Lindsey.

15 MS. VAALA: Thank you, Ann. As Ann said, I
16 am here on behalf of the Antitrust Section of the ABA,
17 so, I have to issue a little bit of a disclaimer that
18 the Council of the Section has approved my comments
19 today, but the House of Delegates and the Board of
20 Governors of the broader ABA has not weighed in, so
21 this should not be construed as reflecting the policy
22 of the broader ABA.

1 On behalf of the Section, thank you very much
2 to the Antitrust Division for inviting us to
3 participate today. Some of my comments are going to
4 be a little bit duplicative of what you've already
5 heard, and I apologize in advance for that, but I'm
6 going to try to stay wedded to what I have here,
7 because it's been approved by the Council. There are
8 several Council members in the audience. I don't want
9 them to be on top of me if I get off script, so...

10 Let me start with a little bit of the purpose
11 and the background of ACPERA, which we all know, but
12 also has informed the Section's views today. The
13 Division has unquestionably consistently made cartel
14 enforcement a top priority, and a key tool in carrying
15 out the Division's criminal enforcement mission has
16 been and continues to be the corporate leniency
17 policy, which of course provides the possibility for
18 complete immunity to the first corporation involved in
19 the antitrust conspiracy that reports its conduct to
20 the Division.

21 Under the policy the corporation and its
22 executives will not be criminally charged for the

1 reported violations, provided that they fully
2 cooperate with the Division's investigation and comply
3 with other terms of the policy. The leniency program
4 has helped the Division to uncover cartels, affecting
5 billions of dollars' worth of commerce in the United
6 States, and has led to prosecutions resulting in
7 record fines and jail sentences for culpable
8 employees.

9 The policy also has helped the victims of
10 anti-competitive conduct to identify losses that they
11 may have suffered, for which they can then seek
12 redress through civil litigation.

13 Passed in 2004 ACPERA addressed a significant
14 disincentive to self-reporting and to cooperating with
15 the Division under the leniency policy. Prior to
16 ACPERA's passage companies considering self-reporting
17 faced a likelihood of subsequent civil lawsuits that
18 entailed statutorily-enhanced damage remedies against
19 them. Specifically, follow-on civil litigation posed a
20 threat of significant costs in the form of treble
21 damages, combined with joint and several liability.

22 A company that self-reported to the Division

1 could thus find itself faced with civil exposure of up
2 to three times the total damages caused by the entire
3 conspiracy. ACPERA's signature feature is a
4 limitation on damages for the leniency applicant.

5 Specifically, the Act eliminates the trebling
6 of damages and joint and several liability for sales
7 other than the reporting firm's own sales, thereby
8 removing a key disincentive to self-reporting.

9 In addition, to qualify for the limitation on
10 damages, ACPERA requires a leniency applicant to
11 provide satisfactory cooperation to civil claimants
12 seeking redress and compensation for losses, resulting
13 from the anti-competitive conduct. Section 213(b) of
14 the Act defines the required cooperation to include
15 "providing a full account to the claimant of
16 all facts known to the applicant ... that are potentially
17 relevant to the civil action" and "all documents for
18 other items potentially relevant to the civil action
19 that are in the possession, custody or control of the
20 applicant."

21 The Section is mindful that Assistant
22 Attorney General Delrahim was involved in the 2004

1 passage of ACPERA, and we recognize those efforts.

2 Today's discussion joins a series of
3 roundtables that the Division has hosted over the last
4 couple of years to examine various issues and
5 initiatives impacting the application and enforcement
6 of our nation's antitrust laws. The Section applauds
7 the Division in these efforts and sees them as a
8 helpful tool for expressing and exchanging views, and
9 welcomes the opportunity to participate in today's
10 dialogue.

11 So, as you may know, in 2004 and in 2009 the
12 Section submitted public comments. For 2004 it was
13 when the legislation was under consideration, and in
14 2009 when Congress was considering whether or not to
15 extend. So, I have a few comments about the Section's
16 comments in '04 and '09.

17 In 2004, the Section supported the adoption of
18 the proposed legislation that became ACPERA, and also
19 offered some suggestions as to how to strengthen
20 certain aspects of the proposed law. In particular,
21 the Section recognized that the detrebling provision
22 of the legislation was a creative step towards

1 enhancing the incentive of firms to come forward to
2 cooperate with the Division, with regard to criminal
3 antitrust activity.

4 The legislation's proposed elimination of
5 trebling and of joint and several liability for sales
6 other than the firm's own, was a very significant
7 reduction in potential liability that the Section
8 believed would directly affect direct purchaser
9 actions, opt out cases, foreign direct purchaser
10 claims and state indirect purchaser claims.

11 The proposed damages limitations were also
12 consisted with the leniency applicant's obligation to
13 pay restitution, since the legislation preserves
14 liability for action damages suffered by consumers as
15 a result of the cooperating firm's sales.

16 In its support of the legislation, the
17 Section focused on three factors. First, the
18 corporate risk created by civil liability is enormous.
19 Potential liabilities with, or even without, criminal
20 fines can be, and in many cases have been, bet-the-
21 company in scope.

22 Second, the prospect of those liabilities

1 could prevent companies from disclosing their
2 involvement with cartel activity through the
3 Division's leniency program, to the ultimate detriment
4 of consumers and the public generally.

5 And third, incentivizing disclosure by
6 reducing exposure through detrebling, but also
7 requiring substantial cooperation by the leniency
8 applicant, could serve the public interest without
9 compromising restitution to the victims.

10 The Sections' most pressing concern with
11 regard to the proposed legislation was that it did not
12 include objective standards for measuring a company's
13 cooperation to determine whether the company's efforts
14 were sufficient to qualify for the damages limitation
15 benefits. In addition, the legislation as proposed
16 prior to adoption offered little guidance on the
17 timing of the decision and whether the leniency
18 applicant would be eligible for detrebling.

19 In the Section's view the lack of a
20 reasonable means for a leniency applicant to determine
21 its eligibility for detrebling in advance of
22 proffering cooperation to civil plaintiffs, had the

1 potential to seriously undermine the intended benefits
2 of the legislation.

3 The Section encouraged Congress to hold
4 hearings and public briefings in order to more
5 concretely define procedural standards for assessing
6 the sufficiency of an applicant's cooperation.

7 And now a few words about the 2009 comments
8 by the Section. So as passed in 2004, ACPERA's
9 damages limitations provision was set to expire under
10 a five-year sunset provision. In 2009, the Section
11 submitted to the House and Senate Committees on the
12 Judiciary comments in support of a five-year extension
13 of these key provisions.

14 A principal factor behind the Section's
15 recommendations was to allow additional time to fully
16 evaluate the benefits of ACPERA and specifically to
17 consider whether the pluses of the damages
18 limitations outweighed any minuses.

19 The Section acknowledged that, even in 2009,
20 there was debate as to the impact and effectiveness of
21 the damages limitations provision. Proponents of the
22 detrebling and actual damages provisions believed that

1 those provisions played a very significant role in a
2 company's decision to seek leniency from the Division,
3 thus, often effectively ending ongoing criminal
4 conduct and making it more likely the victims of the
5 crime would receive compensation.

6 In contrast, and as the Section acknowledged,
7 others believed that the detrebling provision was
8 unnecessary and not a significant factor in a
9 company's decision to seek leniency. Generally
10 critics argued that applicants were motivated to seek
11 leniency by two primary considerations, the threat of
12 prison time for high-level executives involved in the
13 conduct, and the necessity of making amnesty decisions
14 on a global scale.

15 They further argued that amnesty applicants
16 routinely resolved subsequent civil exposure in
17 exchange for cooperation and relatively small
18 settlement amounts, which were based on the company's
19 own sales and not the total sales of the conspiracy.

20 As we know, in 2010 Congress extended ACPERA
21 for another ten years. The Section notes that there
22 is largely a dearth of judicial rulings interpreting

1 ACPERA. One possible reason for this is that the text
2 of ACPERA provides little guidance to courts or to
3 leniency applicants regarding the application of Section
4 213(b) and that section requires a leniency applicant,
5 as I've said earlier, to provide a full account to the
6 claimant of all facts known to the applicant that are
7 potentially relevant to the civil action.

8 The contours of what constitutes a full
9 account are a bit nebulous and I suspect will be a
10 topic of debate in a later panel.

11 Today's roundtable provides a timely
12 opportunity to review whether ACPERA is operating as
13 intended, by serving to induce self-reporting by
14 companies to the Antitrust Division's corporate
15 leniency program. The perception exists among some
16 that leniency applicants have been declining as the
17 costs associated with self-reporting have risen.
18 Although it may also be that the threat of discovery
19 as a result of ACPERA is effectively deterring
20 wrongful conduct, or that this phenomenon is
21 attributable to factors other than ACPERA.

22 The Antitrust Division does not publish

1 statistics on the leniency program. However, the
2 Division's ten-year workload statistics report shows a
3 sharp drop in criminal cases filed by the Division in
4 recent years. Judge Ginsburg already went over some
5 of those statistics, and we note them, as well.

6 We recommend that the roundtable and the
7 Division explore whether this decline represents a
8 failure of ACPERA to incent self-reporting to the
9 leniency program.

10 So ACPERA states that the amount of damages
11 recovered by or on behalf of a claimant from an
12 antitrust leniency applicant, who satisfies certain
13 cooperation requirements, shall not exceed that
14 portion of the actual damages sustained by such
15 claimant, which is attributable to the commerce done
16 by the applicant in the goods or services affected by
17 the violation. That's a mouthful.

18 However, ACPERA provides little guidance to
19 the Courts, plaintiffs and the defense Bar regarding
20 how to define actual damages, and the DOJ has not
21 expressed its views publicly. Uncertainty regarding
22 ACPERA's benefits may undermine its effectiveness. We

1 recommend that the roundtable in further discussions
2 on this topic explore how actual damages should be
3 defined, consistent with Congress' intentions to
4 promote leniency applications.

5 And now my last few comments are regarding
6 the DOJ policy with respect to antitrust and
7 the False Claims Act.

8 In authorizing ACPERA's extension in 2009
9 Congress inserted a requirement that leniency
10 applicants must provide timely cooperation, including
11 a full account of all facts, as well as documents, in
12 the leniency recipient's possession. However,
13 uncertainty exists as to when leniency recipients may
14 realize the benefits of their cooperation. ACPERA's
15 benefits may be greatly reduced if an applicant's
16 eligibility for reduced liability is not determined
17 before litigation through trial.

18 The Section recommends that the Division
19 consider how ACPERA can be implemented and, if
20 necessary, amended, to facilitate settlement
21 agreements at an early stage, consummated without
22 delay, to be co-extensive with the provision of timely

1 and fulsome cooperation by the leniency applicant.

2 At the 2018 ABA Antitrust Section Fall Forum
3 Assistant Attorney General Delrahim announced that the
4 Antitrust Division "will exercise Clayton Act
5 Section 4(a) authority to seek compensation for
6 taxpayers when the Government has been the victim of
7 an antitrust violation." The announcement
8 was made in connection with civil resolutions jointly
9 announced by the Antitrust Division and the Civil
10 Division, involving alleged bid rigging on Korean fuel
11 supply contracts.

12 The Civil Division pursued charges against
13 the cooperating defendants for the alleged bid-rigging
14 scheme under the False Claims Act. AAG Delrahim's
15 remarks at the Fall Forum clarified that ACPERA's
16 detrebling incentive will apply to any Section 4(a)
17 claims brought by the Government and noted that
18 cooperating companies subject to penalties under
19 multiple statutes can gain certainty and finality.
20 However, his remarks did not address whether the
21 detrebling incentive will apply equally to False
22 Claims Act claims, when a leniency recipient reports

1 bid rigging involving Government procurement.

2 The Section recommends exploring how DOJ's
3 pursuit of antitrust and False Claims Act damages from
4 leniency applicants will impact incentives to report
5 conduct to the Antitrust Division's leniency program.
6 We also recommend that the DOJ clarify its policy with
7 regard to whether it will limit Clayton Act 4(a) and
8 False Claims Act recoveries from leniency recipients
9 who cooperate fully with the Antitrust Division and
10 the Civil Division, to actual damages or subject them
11 to joint and several liability.

12 So those are the views of the Section. I
13 understand we are also likely to prepare written
14 comments, which will be due later. Thank you very
15 much for including the Section, and I look forward to
16 the rest of the panels.

17 MS. O'BRIEN: Thank you very much, Lindsey.
18 Next, we'll hear from John Taladay on behalf of the
19 Business and Industry Advisory Committee, BIAC. John
20 Taladay is a partner and chair of the antitrust
21 practice at Baker Botts. John's practice has included
22 international cartel investigations and defense and

1 follow-on action litigation for nearly 30 years. John
2 serves as the chair of the Business and Industry
3 Advisory Committee to the OECD Competition Committee,
4 and will now provide an opening statement on behalf of
5 BIAC and then will participate in his personal
6 capacity as a panelist in the last issue today. Thank
7 you, John.

8 MR. TALADAY: Thank you very much, Ann. I
9 appreciate the opportunity to be here today and
10 present remarks on behalf of BIAC, which is the
11 Business and Industry Advisory Committee to the
12 Organization for Economic Cooperation and Development.
13 That's a lot of initials.

14 But as an advisory body to an international
15 institution, BIAC necessarily takes an international
16 view of competition issues, which also allows a
17 comparative approach to countries' competition laws
18 and policies.

19 First, I should make clear that BIAC has long
20 and consistently supported the view that cartel
21 enforcement should be robust, and that businesses
22 benefit from strong and robust cartel enforcement.

1 This is because cartels often involve direct harm to
2 businesses, because they're often direct victims of
3 cartels, and I think you need look no further than the
4 DOJ's prosecutions to see that businesses are nearly
5 always the direct victims of cartels that are
6 prosecuted by the DOJ.

7 But also, even absent that, cartels deprive
8 legitimate businesses of a fair opportunity to compete
9 and to innovate and to thrive. And so just as a
10 general principle, cartels are bad for business, both
11 those who are committing the offenses and those who
12 are not.

13 Secondly, BIAAC recognizes that effective
14 leniency programs are essential to cartel enforcement.
15 Leniency programs create the incentive for applicants
16 to bring an infringement to the attention of the
17 authorities, and to enable those authorities to
18 materially progress their investigations. And so, in
19 BIAAC's view, a leniency program offers appropriate
20 incentives to applicants and that benefits the
21 enforcement community, potential applicants and
22 consumers and other businesses.

1 Now, one of the central considerations for
2 businesses, and I'll be talking a lot about what we
3 have learned from our members about businesses'
4 incentives and thinking about cartel enforcement. One
5 of the central considerations for business considering
6 leniency is certainty of outcome. This certainly
7 relates not only to the Government investigation
8 itself, but also with respect to all of the
9 implications of seeking leniency, criminal
10 implications, civil, reputational, for the future
11 performance and stability of the business.

12 Indeed, businesses are obligated to think
13 about these things when they're making this
14 determination. And in BIAC's view the risk of private
15 enforcement that companies expose themselves to when
16 applying for leniency, fosters massive uncertainty.
17 It imposes additional burdens on the potential
18 applicants and ultimately deters potential applicants
19 from self-reporting and seeking leniency.

20 This is particularly true in the United
21 States, where treble damage exposure and the ability
22 of plaintiffs to claim damages well outside the period

1 of Government prosecution, can allow for massive and
2 at times disproportionate exposure for those entities.
3 You're buying something and you don't know the bounds
4 of it when you're buying it.

5 In June of 2018 the OECD held a roundtable
6 and it wasn't round either, on leniency, where BIAAC
7 identified the factors that are most likely to deter a
8 company from seeking leniency, and these include first
9 and foremost the likelihood of private damage actions,
10 including the fact that a leniency application is
11 likely to increase the availability of inculpatory
12 evidence relating to the leniency applicant, and may
13 lead to more claims against the leniency applicant
14 relative to its co-conspirators and in more
15 jurisdictions.

16 Secondly, the risk of triggering liability
17 and jurisdictions without effective leniency programs.

18 Third, the risk of liability under other
19 laws, as Lindsey was mentioning, in respect of which
20 there is no potential for leniency, such as securities
21 laws, money laundering, corruption and so forth.

22 And finally, disqualification from Government

1 contracts for bidding on public tenders.

2 BIAC took the view at that roundtable that an
3 effective leniency program will offer appropriate
4 relief in terms of Government antitrust sanctions, as
5 well as procedures to take into account potential
6 follow-on actions and other risks, and that such a
7 program will be most effective if it's transparent as
8 to its scope, its participation and to the ultimate
9 outcomes.

10 The central point is that if jurisdictions
11 don't account for and contain these risks, and make
12 them highly predictable, businesses will be far less
13 likely to come forward and seek leniency.

14 And the protections that are offered must be
15 proportionate. So as the risk of civil enforcement
16 and civil penalties increase, and the financial
17 consequences of civil remedies increase, the level of
18 certainty and relief must also increase in order to
19 create the rate of incentives and to preserve the
20 incentive to self-report.

21 And in that view, the enormous risk and
22 consequences of follow-on damage actions in the United

1 States highlights the tension and the need for
2 proportionate and strong relief from this uncertainty.
3 The Justice Department should take note of
4 the fact that civil consequences of antitrust
5 violations have increased drastically since ACPERA was
6 first introduced. Settlements in civil class actions
7 have knocked out cases in the United States, have hit
8 really startling levels, with follow-on cases
9 routinely producing hundreds of millions of dollars in
10 damages, and those are just for the reported class
11 settlements, because the actions that are brought by
12 opt-outs, including large corporate buyers, are often
13 to the tune of tens or even in the hundreds of
14 millions of dollars in additional payments that are
15 not made public.
16 The dual recovery regime in the United States
17 resulting from Illinois Brick that allows both direct
18 and indirect purchasers to obtain multiple recoveries,
19 creates the threat not only of treble damages but even
20 something that exceeds treble damages. And direct
21 purchaser settlements are often negotiated before opt-
22 outs are known, so that what is being paid to the

1 direct class may not take account of what needs later
2 to be paid to opt-outs who the large purchasers often
3 sweep back in to seek treble damages on their own, for
4 their purchases.

5 Moreover, the U.S. is being joined by other
6 jurisdictions who allow class actions or collective
7 claims, not the least of which is Europe, which means
8 that the need for appropriate jurisdiction limits is
9 becoming all the more urgent a topic for international
10 cooperation, with OECD being especially relevant as
11 this is not an issue which is often within the
12 agency's powers, because otherwise there will be even
13 further multiplication of damages due to foreign
14 cases, as well.

15 And note that these further multipliers can
16 occur when the U.S. allows for full recovery and the
17 often treble damage recovery, indirect damages, but
18 those same damages may constitute recoverable direct
19 damages in a foreign jurisdiction.

20 The point here is not that the total amount
21 of settlement exposure in these cases is unwarranted.
22 It may not be. The point is that a company deciding

1 to seek leniency faces massive uncertainty with
2 respect to the risk of civil actions, and companies
3 and the directors have a fiduciary duty to the
4 shareholders that they have to take into account.
5 Without protection against the massive civil exposure
6 that could result, it might be difficult for a company
7 to seek leniency if the result of doing so is
8 potentially ruinous of civil exposure.

9 And think of it this way, as well. That
10 potential for ruinous civil liability, if it's a
11 likely outcome of seeking leniency, then the criminal
12 penalties that could result that would be avoided by
13 seeking leniency, become meaningless, which also means
14 that the DOJ corporate leniency policy could be
15 rendered meaningless by massive civil exposure,
16 potentially ruinous civil exposure.

17 Now, I'd like to focus a little bit more on
18 that fiduciary duty. For many years the hammer that
19 has drawn companies to seek leniency under the DOJ's
20 policy is the criminal conviction and the threat of
21 imprisonment of its executives. And that is indeed a
22 very effective and crucial deterrent mechanism. But

1 ACPERA is not a deterrent mechanism. ACPERA is a
2 mechanism that takes effect after an offense has been
3 committed to try to bring companies in to report the
4 wrongdoing.

5 But when a company is considering whether to
6 self-report an already existing cartel, the duty of
7 the Board doesn't run to the individuals. It doesn't
8 run to the executives. It runs to the shareholders,
9 and the ethical obligations of company counsel runs to
10 the company, not to the individuals or executives. So
11 that means that technically the threat of imprisonment
12 of executives should not be considered material in a
13 company's decision of whether to seek leniency, except
14 to the extent that it impacts the company's
15 reputation.

16 But if a company is going in for leniency,
17 and as a result of ACPERA has to acknowledge its
18 wrongdoing, it's already facing those implications or
19 harm to reputation. So, what that means is that DOJ's
20 main hammer for deterrence, criminal sanctions for
21 individuals, becomes relatively ineffective when a
22 company is deciding whether to seek leniency. And

1 indeed, without protection against civil exposure, the
2 DOJ's single largest incentive device may not be
3 effective.

4 In conclusion, BIAC is of the view that
5 ACPERA needs to provide even more enhanced protection
6 from civil damage actions and more certainty to
7 entities considering leniency so that cartels can be
8 exposed and stopped. And BIAC takes this view based
9 on the interests of its members as victims of cartels,
10 not as perpetrators. We are mindful of the fact that
11 businesses are very frequently the victims of
12 conspiracies and that like all plaintiffs in civil
13 follow-on cases, stronger ACPERA protection means that
14 they will be able to recover more limited damages from
15 the leniency applicant, if ACPERA is strengthened.

16 But this reduced consequences to leniency
17 applicant is necessary and ultimately benefits
18 consumers and businesses and it's ameliorated by two
19 other factors.

20 First, the business community and consumers
21 will benefit more from uncovering more cartels, even
22 with limited damages as to one cartel member, the

1 leniency applicant, than it will from uncovering fewer
2 cartels with greater damages as to that one cartel
3 member. And I don't think this is speculation because
4 the entire DOJ leniency policy is based on the
5 premises that eliminating criminal consequence for one
6 cartel member entirely is worth it in order to
7 uncover, expose and end cartel behavior. So clearly
8 why is the same not true on the civil side? The
9 current ACPERA statute may not go far enough in light
10 of the massive growth of civil damage exposure to
11 account for this.

12 And secondly, U.S. law is crystal clear that
13 joint and several liability attaches to the other
14 members of the conspiracy against which those damages
15 can be sought, so certainly in policy and principle
16 there is no loss of recovery, and a revised ACPERA
17 statute could create even a stronger basis by
18 explicitly highlighting the joint and several
19 liabilities available and making that more effective
20 even at the stage of settlement negotiations.

21 BIAC appreciates the opportunity to comment.
22 Thank you for inviting us and thank you for holding

1 this roundtable.

2 MS. O'BRIEN: Thank you, John. Finally,
3 we'll hear from John Wood on behalf of the Chamber of
4 Commerce. John Wood is Senior Vice President, Chief
5 Legal Officer and General Counsel of the U.S. Chamber
6 of Commerce. He leads the Chamber's legal operations,
7 representing the organization in legal disputes and
8 overseeing the Office of General Counsel. He joined
9 the Chamber from Hughes, Hubbard & Reed, where he
10 served as a partner. John's previous experience spans
11 all three branches of Government. He served as U.S.
12 Attorney for the Western District of Missouri, Chief
13 of Staff at the U.S. Department of Homeland Security,
14 Deputy Associate Attorney General and Counsel to the
15 Attorney General at the U.S. DOJ, and Deputy Counsel
16 in the White House Office of Management and Budget.

17 He was a staffer for U.S. Senator John C.
18 Danforth. John was a law clerk at the Supreme Court
19 of the United States and the U.S. Court of Appeals for
20 the Fourth Circuit.

21 Thank you, John.

22 MR. WOOD: Thank you very much and good

1 afternoon. I'd like to start by thanking the
2 Department of Justice, the Antitrust Division, for
3 inviting me and the Chamber of Commerce to be part of
4 this discussion today, and I also want to thank the
5 Division for its outstanding work in enforcing the
6 nation's antitrust laws.

7 American businesses become stronger and
8 better when they face robust and fair competition.
9 When a company is engaged in unlawful anti-competitive
10 conduct, we all benefit when it is uncovered and the
11 wrongdoers are brought to justice and the rights of
12 victims are addressed.

13 The U.S. Chamber of Commerce represents the
14 interests of millions of businesses, the vast majority
15 of which thankfully will never have to confront the
16 question about whether to apply for leniency with the
17 Antitrust Division.

18 The Chamber also represents companies that
19 may be victims of antitrust violations. Accordingly,
20 the Chamber supports the fair and effective
21 enforcement of our nation's antitrust laws. ACPERA is
22 an important part of that effort. In particular the

1 Chamber believes that it is important that ACPERA
2 provide substantial and predictable benefits to
3 companies so they will be incentivized to apply for
4 leniency when they uncover unlawful conduct and to
5 later cooperate with plaintiffs to provide recoveries
6 to victims.

7 This is similar to great work that the
8 Department of Justice is doing in other areas, such as
9 the Foreign Corrupt Practices Act, with important
10 enforcement policy changes that encourage voluntary
11 disclosure of cooperation and remediation. We also
12 appreciate the Antitrust Division's corporate leniency
13 policy.

14 While ACPERA has helped further the goals of
15 encouraging disclosure of cooperation and remediation,
16 it has not fully lived up to its intended purposes.
17 American businesses that are faced with making the
18 very difficult decision of whether to self-report face
19 uncertainty regarding the full consequences of that
20 decision. Accordingly, while it's important that
21 Congress act to extend ACPERA's detrebling provisions
22 beyond 2020, we want to encourage the Department of

1 Justice to recommend revisions to make ACPERA's
2 benefits more certain.

3 And by the way, when I refer to the
4 detrebling provision, I'm of course also including in
5 that eliminating the joint and several liability.
6 Many of the concerns that I'll be discussing are
7 similar to some of those that Lindsey and John have
8 discussed already.

9 The first issue that makes ACPERA
10 unpredictable stems from the fact that Courts have
11 rebuffed leniency recipients' efforts to obtain early
12 rulings, confirming that the recipients have satisfied
13 the requirements of the statute. Without the
14 possibility of an early determination of satisfactory
15 cooperation, a leniency recipient has less leverage
16 against high settlement demands from civil plaintiffs.

17 We encourage the Courts to examine the
18 leniency recipients' cooperation earlier in the
19 litigation, which may help resolve the litigation more
20 quickly.

21 Second, there remains significant uncertainty
22 regarding what constitutes satisfactory cooperation

1 under ACPERA. There's been very little guidance from
2 the Courts and Congress about what exactly a leniency
3 recipient must do to secure the benefits of ACPERA's
4 reduction in damages. Providing a full account of
5 relevant facts and documents within the applicant's
6 possession seems straightforward enough, but civil
7 plaintiffs are not constrained in their pleadings by
8 the facts provided to them by the cooperating
9 defendant, and often assert claims that are much
10 broader than the conduct reported.

11 Plaintiffs may claim that the conduct lasted
12 for a longer time period, involved additional
13 companies or involved additional products. A leniency
14 recipient may have no information to offer about those
15 expanded allegations, because they fall outside of the
16 scope of the reported conduct. Does that mean that
17 the company's cooperation is not satisfactory? Does
18 it mean that the company's ACPERA protection is
19 limited to the scope of the conduct that it reports,
20 but that the company will still face joint and several
21 liability and treble damages for claims that may be
22 outside the scope?

1 Companies are rightfully concerned that such
2 uncertainty could be used to extract higher
3 settlements from leniency recipients. The requirement
4 that a leniency recipient provide timely cooperation
5 to civil plaintiffs further complicates the analysis.
6 As with satisfactory cooperation, the statute does not
7 define timely, which provides additional uncertainty.
8 The leniency recipient may receive no benefit from
9 cooperating early if the plaintiffs allege a
10 conspiracy broader than the reported conduct. The
11 leniency recipient named in a civil complaint that
12 alleges a vast overarching conspiracy with little
13 connection to the conduct it reported surely has an
14 interest in moving to dismiss that complaint and
15 narrow the claims against it. Yet, as the litigation
16 progresses with no cooperation, the plaintiffs
17 arguments that the leniency recipient has not provided
18 timely cooperation gain more credence.

19 The Courts considering the timeliness and
20 substance of a leniency recipient's cooperation should
21 take these issues into account, and Congress should
22 act to clarify both what constitutes satisfactory

1 cooperation and what constitutes timely cooperation
2 under ACPERA.

3 Finally, claims by State Attorneys General
4 are increasing. ACPERA explicitly carves out the
5 claims of states and subdivisions of states from the
6 definition of claimant. This means that a leniency
7 recipient may receive no discount for providing
8 cooperation to State Attorneys General, who assert
9 civil claims on behalf of their State. ACPERA does
10 not account for the risk of litigation from State
11 enforcers and any future revisions to the statute
12 should take this risk into account.

13 ACPERA serves a laudable purpose. By
14 incentivizing companies to self-report cartel conduct.
15 The law helps to ensure that American companies are
16 playing on a competitive, fair playing field.
17 American businesses who may themselves be victims of
18 cartel conduct benefit when their suppliers or other
19 companies within their distribution chains investigate
20 and report their own conduct and provide cooperation
21 in follow-on civil litigation. But after 15 years
22 ACPERA has not fully delivered the transparency or

1 predictability required to make it a meaningful

2 incentive for businesses to self-report cartel

3 conduct.

4 We hope that Congress takes action to extend

5 ACPERA's detrebling provisions beyond 2020, but that

6 Congress and the Courts also take steps to make the

7 benefits of ACPERA more predictable.

8 I look forward to discussing today how to

9 make ACPERA a strong component of antitrust

10 enforcement. Thank you.

11 MS. O'BRIEN: Right on time. Very

12 impressive. So, we'll take a brief break until 2:30 to

13 set up for our next panel. Thank you.

14 (Break from 2:15 p.m. until 2:28 p.m.)

15 MR. GRUNDTVIG: So, my name is Mark Grundvig.

16 I'm Assistant Chief here of the Antitrust Division in

17 what's called Criminal II Section, and I'll briefly

18 introduce myself and then I'll introduce my colleagues

19 on the panel, but first let me just generally say a

20 big thanks to those that are joining us for panel two.

21 This is a very experienced and distinguished group of

22 attorneys who have a vast amount of experience in the

1 world of litigating and negotiating cases involving
2 the issues that we're discussing here today, ACPERA.
3 And so they have some great insights to provide to us.

4 I joined the Division in 1997 as an
5 attorney, so I've been here quite some time. And I
6 just thought of this as I was hearing the first
7 speakers, and I can't say that my experience is
8 necessarily indicative of others but I did not work on
9 any cases involving any leniency applicants for my
10 first seven years at the Division. I think I began
11 working on a case involving a leniency applicant for
12 the first time in 2005 and I don't think there has
13 been a day that I've come to work since then where I
14 haven't worked on a case involving at least one case
15 under investigation involving a leniency applicant.
16 So, like I said I don't know that that's indicative of
17 anything, but at least my experience is it has been a
18 huge success and that it has been a great enforcement
19 tool for the Division.

20 So, let me start with Bonny to my right.
21 Bonny Sweeney is a managing partner and co-chair of
22 the antitrust practice at Hausfeld, LLP. During most

1 of her 30 years of practice Bonny has represented
2 claimants in antitrust litigation, including many
3 cases involving defendants seeking leniency under the
4 Antitrust Division' leniency policy. Bonny served as
5 co-lead counsel in In Re: Aftermarket Autolights
6 antitrust litigation, which we'll hear about today, in
7 which the Court denied a leniency applicant's bid for
8 reduced civil damages under ACPERA, finding that the
9 applicant had not provided satisfactory or timely
10 cooperation.

11 Bonny's achievements in antitrust have been
12 recognized by, among others, the Daily Journal
13 Benchmark litigation rankings, Global Competition
14 Review and Law Dragon. Bonny serves in leadership
15 roles in the ABA's Section of Antitrust Law, and is an
16 adjunct professor of law at the University of San
17 Diego School of Law.

18 Then I'll turn to Bruce. Bruce is one of the founders of his firm and has been
19 litigating plaintiff antitrust class actions for most
20 of his 39-year career. He was co-lead counsel in the
21 LCD case, for the direct purchaser class. He worked

1 extensively with the DOJ attorneys, who tried the
2 criminal case, as well as counsel for the leniency
3 applicant in the second end. The LCD case resulted in
4 total settlement of \$473 million for the direct
5 purchaser class, and Bruce tried the case to a
6 successful jury verdict against the only non-settling
7 defendant in 2012.

8 Bruce was also co-lead counsel in the Credit
9 Default Swaps case, which resulted in one of the
10 largest antitrust class action settlements ever, \$1.86
11 billion.

12 More recently Bruce tried the NCAA Grant-in-
13 Aid case with Jeffrey Kessler, also on our panel.
14 That case is considered one of the landmark cases
15 related to antitrust in sports.

16 In 2018 Bruce was named antitrust lawyer of
17 the year by the California Lawyers Association. He
18 has been active in the ABA Antitrust Section for many
19 years, heading up an initiative to bring more
20 plaintiff attorneys into this Section.

21 And to my immediate left is Amy Manning. Amy
22 is Global Chair of the McGuire Woods Antitrust Trade

1 and Commercial Litigation Department and has served on
2 the firm's Executive Committee and is managing partner
3 in its Chicago Office.

4 Amy has been recognized by the National Law
5 Journal as an antitrust trailblazer and was named one
6 of the most influential women lawyers in Chicago. She
7 has represented clients, including amnesty applicants
8 in both criminal and civil antitrust cases, and
9 numerous industries including auto parts, generic
10 drugs, capacitors, resisters, LCD, freight forwarding,
11 real estate, press systems, polyurethane, staffing and
12 ocean shipping, among many other matters. She has
13 also represented companies as plaintiffs in competitor
14 versus competitor antitrust cases.

15 She currently serves on the Council of the
16 ABA Antitrust Section and is co-vice chair
17 of the ABA 2020 International Cartel Workshop.

18 To Amy's left is Jeffrey Kessler. Jeffrey is
19 co-Executive Chairman of Winston & Strawn and co-Chair
20 of the firm's antitrust practice. He has been lead
21 counsel in some of the most complex antitrust cases in
22 the country, including major jury trials and has

1 represented a number of U.S. and international
2 companies in criminal and civil investigations, in
3 which ACPERA issues have been prominent.
4 Jeffrey successfully defended Matsushita and
5 JBC against claims of a worldwide conspiracy in the
6 landmark U.S. Supreme Court case Zenith versus
7 Matsushita, and he is regarded as a leading
8 commentator on international antitrust law. He has
9 been involved in numerous NDJ's over the last ten
10 years that have involved companion Government criminal
11 investigations, including six different auto parts
12 investigations for six different companies.

13 And then finally, the end of our table here,
14 is Peter Halle. Peter is an Antitrust Division
15 alumni, in practice for 45 years. He joined the
16 Division under the Honors Program a few years before
17 me in 1973 as a trial attorney. During his eight
18 years in the Division he investigated and litigated
19 both civil and criminal cases. He was a member of the
20 original staff of the AT&T case and was lead attorney
21 in the Marine Construction Industry antitrust price
22 fixing prosecution that netted the first maximum

1 penalties after the Sherman Act became a felony.

2 After Peter ended his DOJ career in 1981 as
3 an Assistant Chief of the Trial Section, he practiced
4 at Morgan Lewis, where he was an antitrust partner.
5 During his years at Morgan Lewis he was involved in
6 the vitamins, air cargo and air passenger and the
7 Aftermarket Automotive Lighting Products antitrust
8 litigation, amongst several other cases. He
9 represented ACPERA applicants before the Division, and
10 in civil cases and he is currently a visiting
11 professor of law at the University of Miami School of
12 Law, where he teaches consumer protection and presents
13 an annual criminal law lecture.

14 So, as you can see, we have a very
15 distinguished panel and I'm excited to have them. I'm
16 going to kick it off by asking Amy if she could start
17 us off today by just providing her comments on the
18 purpose and the impact of ACPERA in her practice, as
19 well as any initial thought she might have on some
20 topics that we've heard a little bit about so far
21 today, but we'll hear more about as we go on, and
22 that's being satisfactory and timely cooperation.

1 Ms. MANNING: So, as I understand it, my task
2 is to kind of set the stage for what I think is going
3 to be a very spirited debate. I have debated these
4 issues with a couple of our other panelists a number
5 of times, and I think it will be fun to hear the
6 different perspectives, and I will even say in our
7 prep, I found my perspective shifting a little bit,
8 which we'll talk about.

9 But I'm going to give sort of a timeline of
10 what's happened with ACPERA, what is out there in the
11 case law regarding what satisfactory cooperation
12 means, and I will tell you, there's very little. I
13 wrote an article in 2012 on ACPERA, and I've been
14 following the case law all along, and in some respects
15 it can be kind of surprising, but maybe not, because a
16 lot of ACPERA really I think plays out in settlement
17 discussions and early cooperation and early
18 settlements with the leniency applicant.

19 But let's sort of go through a timeline, so
20 it starts in 2004. Pre-2004 we've heard a lot of good
21 commentary on the fact that Boards were looking at a
22 leniency application but had to balance that against

1 the potentially -- I think somebody referred to it as
2 ruinous civil liability. ACPERA comes into play. It
3 is now -- it gives a satisfactory cooperation
4 definition. It's pretty general and doesn't give you
5 a lot of guidance.

6 In a period from 2004 to 2009, and then 2010,
7 when it was extended, first extended in 2009. During
8 that period there's really only one case, In re:
9 Sulfuric Acid, and it's really not that great insight
10 into ACPERA, because what the Court was looking at
11 there was a cooperation agreement that the parties had
12 entered into, so it was really whether the defendant
13 was actually living within that cooperation agreement.

14 And there the Court said that the amnesty
15 applicant or leniency applicant did not have to live
16 on the plaintiff's timeline.

17 The only other thing that was really
18 happening in that period is there was a lot of
19 commentary on what satisfactory cooperation meant.
20 There's an article by Michael Hausfeld, where he goes
21 through and says you should provide insight on the
22 complaint, you should be providing more information

1 than what you gave to the Department of Justice, you
2 should be providing broader cooperation than any
3 corporation that's going on with any other foreign
4 regulator.

5 I remember going to the spring meeting in
6 this period and somebody on the plaintiff's Bar said
7 you need to waive privilege. They were taking a
8 pretty aggressive stance, which is normal. You would
9 expect that; right?

10 So, then we have the amendments in 2010, after
11 the extension in 2009. And in those amendments now
12 there's a timeliness aspect that is added to the
13 statute, but that timeliness, it also is fairly
14 general, right. It doesn't say a lot about what
15 timeliness means.

16 And the other thing that happens is there's a
17 GAO study that is commissioned. And in that study
18 they say that there really isn't a uniform definition
19 for what satisfactory cooperation is. They also say
20 that while leniency applications are not up very much,
21 they are up in Type A, which makes a lot of sense and
22 goes back to the fiduciary duty that John Taladay was

1 talking about.

2 It's a lot easier to convince a Board that
3 you should go in for a leniency application, if you
4 already know that the Government is doing something.
5 And oftentimes that starts to be known amongst the
6 industry. It's a whole different thing when there is
7 no indication that the government knows anything and
8 you're trying to convince a Board that it makes sense
9 to go in. Now you've reduced the civil liability
10 through ACPERA, and that decision becomes a little bit
11 easier.

12 So what else happens from the period of 2010
13 until the present? There's just a few cases and if
14 you want to see any of them or read them, they're all
15 cited in this article, which I continue to update and
16 I'm about to update again.

17 But there's a couple things that come up.
18 The first is the extent of the disclosure. Is it
19 sufficient? What has happened where the Court is
20 testing that? I'm not going to spend too much time on
21 Autolights because I know Bonny is going to spend a
22 lot of time on it, but in that case, if you read it

1 from a defense perspective, it looks like they
2 provided a whole lot of cooperation, including nine
3 attorney proffers, depositions in the U.S. and Taiwan.
4 I look at it and say that was pretty good cooperation.
5 The Court said no. But I think the Court was mad at
6 the leniency applicant, because there had been a
7 difference in what was in the civil case as to when
8 the conspiracy started versus what they had told the
9 DOJ, and it was too late for the plaintiffs to amend
10 their complaint and so I think that was probably a big
11 part of it.

12 Another thing was the timeliness of
13 cooperation. You have In Re: Sulfuric Acid, which it
14 said you're not at the beck and call of the plaintiffs.
15 You had Autolights, where the Court said look, you
16 should have given cooperation in time for them to
17 amend their complaint.

18 Satisfaction of the plaintiffs is another
19 factor that the Courts have taken into account. In
20 some Courts they said we're going to give that some
21 pretty dispositive consideration, if the plaintiffs
22 are happy with the cooperation, but in In Re:

1 Polyurethane the Court said well, we'll take that into
2 consideration but we think we have to do our own
3 independent assessment of satisfactory cooperation.

4 And then early on there were discussions of
5 whether the cooperation was consistent with the
6 obligations under the leniency program, and then the
7 January, 2017 FAQ's made that clear that the
8 Government viewed that you need to comply with all of
9 the DOJ requirements in order to qualify for any of
10 the benefits of ACPERA.

11 The other thing that comes up in the Courts
12 is when to assess satisfactory cooperation. Some
13 Courts have looked at it and said we're not going to
14 do that until we get to damages in the very end of the
15 case. Some Courts have done it at the summary
16 judgment phase and some have done it on a motion of
17 the parties.

18 So as evidenced by this summary, there's not
19 a lot of clarity out there, and I think we're going to
20 spend some time talking about whether that
21 clarity needs to be enhanced.

22 MR. GRUNDTVIG: Thank you, Amy. Bonny, what

1 are your views on the goals of ACPERA and then
2 particularly maybe drawing on your experiences in the
3 Aftermarket Automotive litigation? What would you...

4 MS. SWEENEY: Sure. Well, there's been a lot
5 of discussion already today about the principal goal
6 of ACPERA being to reduce the company's disincentive
7 to come forward and be a leniency applicant.

8 Well, that's not the only goal of ACPERA. If
9 you review the legislative history of that statute, it
10 was very clear that the sponsors, and there were many
11 co-sponsors. It was bi-partisan supported legislation
12 -- wanted to increase compensation to victims of price
13 fixing. I mean, as has already been said today, price
14 fixing is viewed as the supreme evil of antitrust, and
15 the Congress that drafted that statute had that in
16 mind.

17 There's comments from former Chairman Hatch.
18 He says, "ACPERA was intended to increase the total
19 compensation to victims of antitrust conspiracies."
20 And it was intended to do that first by providing the
21 information to the victims early on, and also to
22 reduce the cost of litigation, and this is something

1 that has been recognized also by the Department of
2 Justice in its remarks about the statute in the past.

3 And so, keeping those twin goals in mind, not
4 just the increasing incentives goal, but also
5 increasing compensation for the victims, we get to
6 Aftermarket Autolights, and as everyone has probably
7 heard, there's very little case law. Aftermarket
8 Autolights is really the only case that has talked
9 about the substantive requirement to the statute.

10 I was one of the lawyers for the plaintiffs
11 in that case, and in fact there was a fair amount of
12 cooperation by the leniency applicant. However, there
13 were some serious problems with that cooperation.
14 The Aftermarket Autolights Court addressed three
15 issues that I think are relevant to our discussion
16 today.

17 First of all, was the cooperation
18 satisfactory? Was it timely? And another issue which
19 has been discussed so far is when is the determination
20 made?

21 So, starting with when you make the
22 determination about whether the cooperation has been

1 satisfactory, there had been cases suggesting you have
2 to wait till the end of the case. Well, the Court in
3 Aftermarket Autolights took a very sensible position.
4 It really depends on the facts of the case and the
5 procedural posture of that case.

6 In that case, the Court made the determination
7 around the time of summary judgment, and some might
8 say well, that's too early, you don't know until the
9 end of trial. But, in fact, by that point the number
10 of defendants had been reduced from three to one.
11 There was one defendant. It was the leniency
12 applicant. We were about to go to trial. So, it seems
13 silly to think that that leniency applicant was going
14 to be the sole defendant and provide cooperation to
15 plaintiffs. What more cooperation could be provided?
16 So that was very commonsense.

17 And then the Court addressed the timeliness
18 of the leniency applicant's cooperation. And, in
19 fact, the leniency applicant had made one early
20 proffer, fairly early in the litigation. There were a
21 number of stays at the request of the Department of
22 Justice. But there was an attorney proffer during the

1 stay that was imposed by the Court at the request of
2 DOJ.

3 But then there was a substantial lull in the
4 cooperation that was provided and in the follow-up to
5 that initial proffer, and during that time period the
6 other defendants responded to discovery. In the
7 course of discovery we obtained a lot of very detailed
8 information about the conspiracy. We were able to put
9 together a very detailed timeline about the
10 conspiracy. And so, once the leniency applicant again
11 began making cooperation, we already knew a lot of the
12 story.

13 But even more importantly, I think what had
14 an impact on the Judge, and Amy said, and I think
15 people view this as being the motivating factor behind
16 the Judge's decision, he was mad at the applicant for
17 not disclosing to plaintiffs, to the civil plaintiffs,
18 the same information that it had disclosed to the DOJ,
19 and that's true. There was -- we learned through
20 witness memoranda in the companion criminal case that
21 the conspiracy had actually started two years before
22 it had previously been acknowledged.

1 So, the leniency applicant in its initial
2 proffer and in subsequent follow-up proffers, withheld
3 that information. They said in their defense, they
4 said well, we didn't know if this was true, we were
5 still following up, and the Court said well, you were
6 sufficiently confident in that information that you
7 provided it to the Government, why didn't you provide
8 it to the civil plaintiffs?

9 So, I think this creates a very easy to
10 understand bright-line rule. At a minimum, of course,
11 the cooperation -- what you provide to the civil
12 plaintiff should be just the same or just as complete
13 as what you provide to the Government.

14 And also, one of the requirements of the
15 statute that we haven't yet talked about today, when
16 it's talking about the requirements for satisfactory
17 cooperation, is the leniency applicant has to respond
18 completely and truthfully, without making any attempt
19 either falsely to protect or falsely to implicate any
20 person, and without intentionally withholding any
21 potentially relevant information?

22 So, I don't agree that there is very little

1 guidance in the statute. I think the statute is quite
2 specific in many respects and it asks litigants and
3 the Court to make the kind of common sense, fact-based
4 decisions that are made in every single case.

5 MR. GRUNDTVIG: So, Peter, you were also
6 involved in the...

7 MR. HALLE: I certainly was.

8 MR. GRUNDTVIG: I'm suspecting a slightly
9 different perspective. What are your thoughts on
10 that?

11 MR. HALLE: I do have a somewhat different
12 perspective but I think you all will be pleased to
13 find out, including Bonny, that I share a lot of her
14 views, of what happened in that case and what lesson
15 is learned.

16 So, let me start by saying that from my experience in
17 Autolights, and a number of other cases involving ACPERA
18 claimants, I don't think ACPERA is broken at all. It just needs some
19 improvement. It ought to be renewed for another ten
20 years. I hope it will be. I think it's been a
21 benefit to both plaintiffs and to defendants

1 obviously, and to the Antitrust Division's

2 leniency program.

3 Unlike the Sherman Act and most other
4 antitrust legislation, ACPERA has a sunset provision,
5 and so that provision invites thoughtful review and
6 discussion of the kind that we've having today, and it
7 invites rethinking what can be done better. And the
8 last time this happened in 2009 and 2010, I guess it
9 took an extra year of thinking and discussion then,
10 the statute was revised in important ways,
11 specifically, in ways that are the topic of the
12 discussion today, talking about timing, talking about
13 stays, talking about protective orders.

14 I will leave it to Judge Ginsburg on the one
15 hand, and GAO on the other hand, to figure out whether
16 or not the statute is achieving its important goal of
17 encouraging more leniency applications. I think the
18 data is not robust enough to tell one way or the
19 other, and so one must fall back on one's own common
20 sense and experience. I think there is
21 a problem with the lack of certainty.
22 It is my perception, and as

1 counsel in a number of cases, that ACPERA is an added
2 psychological inducement for entities that are
3 perhaps, you know, a little bit unsure as to whether they should self-report.
4 It's an added inducement to tip them in favor of self-
5 reporting instead of taking the risk that somebody else will
6 report their illegal activity. So, I think
7 ACPERA, as a commonsense matter, is doing what it was
8 intended to do.

9 The lack of certainty that one will earn the
10 benefits is an impediment but I think it's not as big
11 an impediment as some would say. Perhaps others have
12 different experiences and actually have seen
13 situations in which that impediment was so great that
14 an entity decided not to self-report.

15 So, I'm in favor of renewal and improvement,
16 and that improvement would be to have some additional
17 standards for a Court to follow in the application of ACPERA
18 in a way that is more predictable.

19 But even with the clear standard, there's
20 always going to be some uncertainty.
21 The lack of certainty is clearly illustrated by the

1 Aftermarket Automotive Lights case.

2 The way I think about it, an ACPERA claimant
3 must dance for its supper. A federal judge is the
4 final arbitrator of what or -- whether or not the
5 claimant has qualified for ACPERA but the statute does
6 not indicate where the goal line is and how long a
7 claimant has to move forward to cross that goal line.

8 Moreover, there can be many twists and turns
9 along the way in the form of stays and protective
10 orders and the like. Often the issues of compliance
11 with ACPERA will not require a judicial finding because the claimant
12 settles early and contracts in the Settlement
13 Agreement to cooperate to obtain the ACPERA
14 Benefits. But, that does not always happen. The
15 Autolights case is a prime example.

16 It may not surprise anybody who has litigated
17 one of these cases to find out that Court's do not
18 generally consider leniency applicants to be white
19 knights. The ACPERA claimants are antitrust offenders
20 and are treated as such by the Courts. In my
21 experience the Courts do not cut leniency applicants
22 any slack and, of course, this case, as Bonny has set

1 forth, is a prime example.

2 Single damages is a worthy prize, but again,
3 as a practical matter, most class actions are settled
4 for single damages. Therefore,
5 the value of the ACPERA benefit – without better certainty – is
6 diminished. What a claimant
7 may end up getting is what it would get anyway
8 if it was the first defendant to settle, and offered
9 valuable cooperation in the Civil suit.

10 ACPERA, therefore, may be somewhat of a
11 detriment to leniency applicants, but I'm not going to
12 argue that it is, because I've already said that I
13 believe the statute is persuasive
14 in helping people cross the leniency
15 threshold.

16 There is profound disagreement in any of
17 these cases with what are single damages and how they
18 are to be measured, and so as others have said in
19 prior panel, that is something I think that would be
20 nice, if possible, to address in the renewal of the
21 legislation.

22 There is no statutory standard for
23 calculation of single damages and I think that is

1 often an impediment to settlement.

2 Parallel proceedings complicate the ACPERA

3 claimant's cooperation. The ACPERA claimant must navigate a really

4 fine and difficult line. It's like Scylla and

5 Charybdis in The Odyssey. Between the Division on the

6 one hand needing the claimant's attention and cooperation at the same time

7 as the civil cases crank up with the civil plaintiffs'

8 attorneys chopping at the bit for full

9 cooperation and attention too.

10 So, here's one point. Where stays of the

11 civil case are sought by the Division, those cases

12 should clearly address the restrictions, if any,

13 imposed on ACPERA claimant's ability to cooperate. I

14 think it important and one of the learning points of

15 this Aftermarkets case is that the Judge really should

16 be involved right from the beginning of the case in

17 terms of cooperation, and what is expected and when it

18 should occur.

19 The ACPERA statute itself in the last

20 renewal, Section 213(d), was added, because it is normal

1 for Courts to enter stays and grant
2 protective orders at the start and throughout the civil case
3 that will impact the timing of cooperation with the civil plaintiffs.

4 So, it's something there already, and one can
5 either take advantage of it in a sensible way, or the
6 statute can be approved to provide clear guidance to
7 both the Division and to the applicants as to a
8 process for being sure that these stays and protective
9 orders are not used against the claimant in
10 the future, where after years of litigation the Judge
11 is suddenly presented with what may look like slow
12 cooperation, but indeed some of the slowness may be
13 the result of stays and protective orders, which are
14 not entirely clear, and Judges are often very, very
15 ready to address this kind of ambiguity by saying
16 well, you should have come back and asked or whatever,
17 and made it clear, but by then it's ancient history.

18 So, I suggest that the Division seeks to
19 delay cooperation, it should so inform the Court and
20 it ought not to be the claimant's burden to seek that
21 protective order. One of the things I think
22 was successfully done Aftermarket Autolights case,

1 was that the claimant never sought a delay of any
2 kind in the litigation.
3 The ACPERA applicant does not want to look
4 like the foot dragger, but sometimes the dragging is a
5 result of other issues that should be addressed at the
6 outset. Indeed, one of the lessons learned,
7 is that the ACPERA statute should be
8 addressed in the initial Rule 16 conference, and the
9 Justice Department should be part of that addressing.
10 Whether or not the Division intervenes early to seek a stay, it
11 should be involved in the Rule 16 Conference if it needs
12 the full attention of the ACPERA Applicant to complete its ongoing
13 Grand Jury investigation of the other defendants in the Civil Action
14 Using Rule 16 and pretrial orders preserves
15 the flexibility that some fear would be lost if there
16 were more definiteness in the ACPERA statute itself.

17 And so let's turn to Autolights. The --

18 MR. GRUNDTVIG: Pete?

19 MR. HALLE: Yeah.

20 MR. GRUNDTVIG: Let me jump in there, because

1 I think we're going to go back to more on that case.

2 So, you raised some of the challenges and issues and we

3 heard from others.

4 MR. HALLE: Okay.

5 MR. GRUNDTVIG: But maybe I'll throw it to

6 Bruce to ask simply, is ACPERA working?

7 MR. SIMON: Well, first I want to say

8 something that I've never said on a panel, and I've

9 always heard the DOJ folks say, I am on the ABA

10 Antitrust Section Council, and I am not speaking for

11 the Council. The views I'm expressing are my own

12 today.

13 I want to talk about uncertainty for a

14 minute. I mean, there is uncertainty in every aspect

15 of the law. Uncertainty is what makes balance and

16 negotiation. Uncertainty happens every day. I mean,

17 I like to pride myself in being a trial attorney, and

18 a lot of you out there are.

19 How certain are you of the outcome every time

20 you walk in? How certain are you of the outcome of

21 what a witness is going to say, even when that witness

22 has given you their proffer?

1 So, I don't see uncertainty as being this kind
2 of like hobgoblin out there that is something we can't
3 deal with it. We deal with it all the time. And, in
4 fact, I think uncertainty breeds the ability of good
5 counsel who trust each other to be able to negotiate
6 the cooperation, and we only have a handful of cases
7 and only one case where the protections have been
8 withdrawn, which is testimony to the fact that in 95
9 percent of the cases or more, we actually work it out.
10 So, I don't believe uncertainty is a bad word.

11 To answer your question directly, if it ain't
12 broke, don't fix it, and it's not broken.

13 I also think, you know, perfection can be the
14 enemy of the good, and I think that's what we're
15 looking at here. We have a system which is working.
16 Is it perfect? No. If we try to make it perfect, I
17 am very concerned that we will disrupt the equilibrium
18 that has happened in the last 15 years, and people
19 will go from a system where they know what the deal is
20 to a system where they don't know what the deal is.
21 And that to me creates chaos and that to me is bad for
22 antitrust enforcement, both from a private plaintiff's

1 perspective and a public perspective.

2 I think it's called the rule of unintended
3 consequences. I can give you multiple examples of
4 statutes which were intended to do something. They
5 were fixed supposedly and they ended up having the
6 reverse results. The PSLRA is one example of it.
7 CAFA is another example of it.

8 So, we have something that's working.
9 Tinkering with it, although it sounds
10 superficially appealing, could have dire consequences
11 and I would like to ask everybody to think about that.

12 I just want to say one thing too about the
13 cases we bring. Everybody who pretty much has spoken
14 so far has said the plaintiffs' follow-on cases. My
15 firm, and I know Bonny's firm and I know Joe Saveri's
16 firm, who will be speaking later, we all do cases that
17 are not follow-on cases. Personally, I've done about
18 three. I'll give you an example of one right now that's pending, the poultry case,
19 where there is no DOJ investigation and we're doing
20 the whole thing ourselves. Another example is the
21 potash case, where we actually had a letter from the

1 FTC essentially exonerating the arrangements that were
2 made between the potash manufacturers. And another is
3 the Credit Default Swaps case, where the investigation
4 went away very early in the case and was of no
5 consideration in the negotiations of the settlement or
6 how we did the case.

7 So, this whole idea that we're out there just
8 parlaying, you know, Government investigations for our
9 own pocketbooks is wrong. We take extreme risk in
10 cases. We spend huge amount in cost for these cases,
11 and until somebody changes the law or somebody changes
12 the DOJ policy, public and private enforcement create
13 a synergy which allows us to go after antitrust
14 violators in the most productive and aggressive way.
15 And that's where we need to start.

16 So, I don't think anybody has changed the law.
17 Some of the suggestions that have been thrown out,
18 especially at the ABA Spring Meeting, to the effect
19 that maybe we should not have the amnesty applicant
20 pay any damages or there should be a rebuttable
21 presumption, which is John Taladay's suggestion, is
22 nothing short of antitrust tort reform. Let's just

1 call it what it is because that's what it is. It will
2 chill public and private enforcement, if we go that
3 direction. I have some comments about the
4 rebuttal presumption, if we get to it later.
5 So, the other thing is, you know, somehow
6 this is being cast as if it's the plaintiffs' fault.
7 The argument goes something like this. We're being
8 too aggressive in our cooperation provisions and the
9 threat is out there that you possibly will, if you are
10 an amnesty applicant, have to pay more than you should
11 have to pay.

12 And then thrown out there are all these
13 statistics about the fact that DOJ investigations,
14 amnesty applications, fines are going down. I think
15 you already saw today in the room that there is a
16 difference of opinion about that. My view is that DOJ
17 is actively and aggressively investigating all kinds
18 of antitrust violations.

19 One thing that has to be taken into
20 consideration is the size of the cases. You could
21 have 20 small cases that don't add up to one Auto
22 Parts case. And that needs to be taken into

1 consideration in any type of statistical analysis that
2 we're going to make any decisions changing ACPERA.

3 And the other thing I'd like to say is, and
4 not to pick on John, but I'm going to pick on him. He
5 wrote an article where he put out the rebuttal
6 presumption, you know, idea, but one of the things he
7 said in his article also is it is impossible to know
8 whether this reduction in DOJ cases and fines is tied
9 to ACPERA's failure to provide certainty to potential
10 leniency applicants regarding civil penalties. That
11 is a fact. We don't know. We are speculating. There
12 could be multiple causes for why this is happening.

13 The other point I want to make is I don't
14 think there's anybody who could say that
15 ACPERA hasn't been a gigantic success. And I am one
16 of those people who says it has been. Maybe people
17 don't like it, you know, maybe some people represent
18 companies that come back to the well three, four, five
19 times, to apply for leniency or get in trouble that
20 many times, maybe they don't like it, but the fact of
21 the matter is what we're trying to accomplish is
22 enforcement of the antitrust laws, and it is being

1 successful in that way.

2 So, I would basically get back to where I

3 started, is that if it ain't broke, don't fix it.

4 MR. GRUNDTVIG: All right. Jeff. He says if

5 it ain't broke, don't fix it. Do you agree or do you

6 think there are some areas that need attention?

7 MR. KESSLER: So, at the risk of--

8 MR. SIMON: -- pissing off your co-counsel?

9 MR. KESSLER: -- disagreeing with my co-counsel

10 in a number of cases -- I'm going to both disagree and

11 agree with him. And try to approach it from a

12 slightly different perspective because my view is that

13 it's not that it's broken, but like the VHS recorder,

14 it still works but it's outdated, and I agree with him

15 that ACPERA has been a great success. It was a

16 tremendous innovation in this country, which countries

17 around the world have emulated. I think it's been

18 extraordinarily positive, but the environment has

19 changed, just like it changed for the VHS recorder,

20 and what I fear is that it's not going to be the same

21 success for the next ten years, if it's renewed

22 exactly as it is right now. Now, why is that? What

1 has changed? What are we looking at?

2 Well, the first thing is the rest of the
3 world. I'm not as worried about the uncertainty
4 issues. I do think it would help to have more
5 certainty. I am worried that the reduction of the
6 single damages and the joint and several liability is
7 now much less of an incentive than it was previously
8 in ACPERA, because of other changes in the world
9 around us.

10 One thing is because of the explosion of both
11 governments who will bring their own prosecutions for
12 the same conduct, and because of the advent of
13 private liability in multiple jurisdictions. From the
14 standpoint of that Board looking at what are the
15 benefits of ACPERA, it just is now a lot less
16 on a global basis. There is many more countries to
17 worry about. There's much more liability to worry
18 about. That's one piece of it.

19 The second piece of it is the pattern that's
20 developed is that you may go in ACPERA on a very
21 specific agreement and conspiracy, but the private cases you
22 get are typically far, far broader in scope. So, it

1 makes it very hard from a corporate board standpoint
2 to figure out what, in fact, is going to be your
3 potential liability. So, you think you're going in on
4 a four-year agreement involving certain types of
5 customers, and then your private cases are about a 15-
6 year agreement involving all sorts of other products
7 and customers you didn't think were part of it.

8 All of this again undermines what is the
9 benefit of the calculation that you're doing. And I
10 particularly worry about this because unlike in the
11 auto parts world, which in some ways auto parts
12 I think covered up this problem to some
13 degree for the last five, six years, because the risk
14 of detection in auto parts was so high, because of the
15 nature of that industry, that it was a tremendous
16 incentive. I can tell you, I've been there. There was a great incentive
17 for companies to turn themselves in because you were
18 looking at an 80 percent, 90 percent detection factor,
19 once auto parts rolled out.

20 When you're now looking at other industries
21 that have nothing to do with auto parts, do not come
22 out of the string of electronics products cases, so

1 things where there's a high possibility, it will never
2 be detected, and that's what the government needs to
3 worry about. You need a different type of incentive
4 in my view.

5 So, what would I do? And I would not endorse
6 the complete immunity, you'll be happy to know, Bruce,
7 and I wouldn't endorse the --

8 MR. SIMON: I've been working on him.

9 MR. KESSLER: I wouldn't endorse rebuttable
10 presumptions. I have a different kind of an approach.
11 What I think we should seriously look at, and this is
12 just for the successful ACPERA applicant who fully
13 cooperates otherwise, is whether or not we shouldn't
14 for that applicant use restitution as the remedy, and
15 there would always be restitution. Have it
16 administered by largely the Government, and
17 determine like they do in other areas of criminal
18 enforcement, that okay, these are the damages you have
19 incurred and you must pay them into a fund, and you're
20 still required, by the way, to cooperate with my
21 friends, Bruce and Joe and others, on the plaintiffs'
22 side against everybody else who is there, and that

1 becomes the ticket to get to the restitution remedy.

2 And the restitution would be under formulas that would be known, so

3 you could actually calculate, this is what my damage

4 exposure is going to be and it's proper. It would thus solve the

5 "what is the actual damage" issue that I heard raised.

6 It solves the scope issue, because you have some

7 belief that you're going to go in and you're going to

8 get a restitution based on the scope of what you're

9 revealing and the Government accepts this full

10 cooperation of what's there, so it solves that, and

11 maybe it serves as an inspiration, just like ACPERA

12 did for other countries to follow suit, so we've

13 invented a new form of protection here.

14 I think that would lead to more ACPERA

15 applicants. I think it would lead to more countries

16 uncovering cartel behavior that would not otherwise be

17 detected at all in the future, so it will be good for

18 the plaintiffs because there will be more cases to pursue

19 against the other companies that are being revealed by

20 this, and it will be better for the economy because

21 you'll have less cartel conduct that doesn't get

22 caught.

1 So, it's a radical change, like everything we
2 do today, as I learn from my grandchildren and others.
3 You have to break the mold. We can't think like the way we have thought
4 for the last 15 years or the last 50 years, you need
5 to think a little bit out of the box. I think this
6 would be something that would increase detection,
7 increase companies turning themselves in for leniency, and in the end solve a lot of
8 these other problems, with a full cooperation
9 obligation.

10 And, in fact, I don't care if the cooperation
11 obligation is broader, as long as everybody knows what
12 it is, because if you've done the crime, you know, you
13 should do the time, you know, so you should fully
14 cooperate in that regard, but if you could define what
15 the obligation is, and I think that should be in the
16 statute, and that would help everyone too, go out and
17 advocate that cooperation should be A, B, C, D and E,
18 but at least we'll know what it is, and that becomes
19 the ticket to restitution. So that's my radical idea
20 for the day, and I hope it at least gets a discussion
21 going about --

22 MR. SIMON: Can we at the risk of going off

1 script just talk about that for 30 seconds, because --

2 MR. GRUNDVIG: Sure, let's kick it back.

3 MR. SIMON: I think, Jeffrey, you better be

4 careful what you ask for. I've spent 39 years doing

5 class actions, antitrust and others. If you think

6 it's so easy to administer a settlement fund to get

7 the money out to people to deal with allocation

8 issues, professional objectors, people who are

9 purportedly not represented by you that you've left

10 out, it can be a nightmare. And I think what you'll

11 do is end up -- it's basically going to be an

12 interpleader. You're going to interplead your money

13 somehow and let everybody carve it up. I mean, the

14 private plaintiffs' Bar does what they do best. The

15 DOJ does what they do best.

16 They at this point have not sought

17 restitution or a restitutionary fund. They have

18 stakeholders who are different than who the private

19 plaintiffs' Bar represent. We have State AG's out

20 there who have something to say about this too and

21 have a claim to the funds. DOJ has a different burden

22 of proof. But I think it would be a nightmare and I

1 just don't see how it would work.

2 MR. HALLE: A word on restitution, I've thought
3 about this too. I don't object to what you're
4 suggesting but I'm very concerned that the DOJ doesn't
5 have the resources and unless the resources are added,
6 more money, to have a restitution section, I would be
7 against that because I think the DOJ needs to be out
8 there investigating and prosecuting.

9 MR. KESSLER: I agree with you. I think you
10 have to give resources to the DOJ, and you even could
11 pay for it, you know, no new taxes, you could pay for
12 it out of the fund because there would be no
13 attorneys' fees associated with the restitution...

14 MR. SIMON: So now we get to the rub.
15 There's the rub.

16 MR. KESSLER: No, because in effect the DOJ
17 could take that portion, if you will, to pay for the
18 administration and have people to be able to divide it
19 up and distribute it. I agree with Bruce. He says it
20 would require a lot of work to figure out who is
21 right, but I believe the process for doing it would so
22 benefit by the certainty to the applicant, and that of

1 more cartels being revealed, that it would be worth
2 the administrative cost and probably better than the
3 courts, and we do do this, by the way, in other areas
4 of criminal law. This is like sort of alien for
5 antitrust lawyers, but it is not uncommon for other
6 parts of the U.S. legal system to require that
7 restitution be done and they come up with rough
8 justice, and it gets paid out that way. That's what
9 the whole Crime Victims Act is about.

10 MR. GRUNDVIG: Let me jump in here.

11 MR. SIMON: One case, DRAM. Just look at
12 DRAM, the indirect purchaser case, ten years to figure
13 out the allocation with a very experienced Special
14 Master.

15 MR. GRUNDVIG: So, I'll jump in here and that
16 was a lively and good discussion on that, and I'll
17 also point out at this point, my views are not the
18 views of the Antitrust Division, but I will just point
19 out under the sentencing guidelines, there's obviously
20 a proxy that actually alleviates some of the burden
21 from the Antitrust Division as to calculating specific
22 damages, whether we get more resources. I'm always in

1 favor of that but we'll leave that for another day.

2 So, two of the topics, and I know the next
3 panel will get into the specifics of satisfactory
4 cooperation and timeliness of cooperation, but I
5 thought it would be worth at least addressing briefly
6 on this panel this idea of whether greater certainty
7 is needed. So, of course, there have been some of the
8 cases, Sulfuric Acid has suggested that ACPERA
9 claimants are not necessarily at the beck and call of
10 plaintiffs, while Aftermarket Autolights, perhaps went
11 a slightly different direction.

12 Maybe I'll throw it first to you, Peter.
13 What's your thought on whether greater certainty is
14 feasible and whether that would be a net positive, and
15 then we can hear some views of other.

16 MR. HALLE: Perfect. Perfect. I think that
17 the certainty issue has to do with what standard should a
18 Court use to decide whether or not there has been
19 full cooperation? My answer is based exclusively
20 on the public record in Autolights, not on any
21 information I may that was subject
22 to protective order or client confidence.

1 And, so going back to Judge Wu's decision, I think
2 he employed the standard that should be employed.

3 Bonny told you the story. Essentially just
4 before trial and I must agree with Bonny that that is
5 the right time to decide these things. Nobody should
6 go to trial, either the plaintiff or the defendant,
7 wondering whether the trial will be about single damages, or treble
8 damages and joint and several liability.

9 I think that before a trial, if indeed the
10 ACPERA entity, claimant, is still in the case at that
11 point, that there should be a determination to go
12 along with summary judgment or anything, but it should
13 be before trial. By then everybody knows what the
14 cooperation has been and one should be able to judge
15 whether it's fulsome.

16 What is the appropriate standard for judging the
17 fulsomeness of cooperation? I think
18 Judge Wu laid it out.
19 The ACPERA Statute is nebulous on this issue.
20 Words in need of a legal standard.

1 The standard Judge Wu used was whether the
2 plaintiff was prejudiced in some way by the alleged lack of
3 timely cooperation by the ACPERA claimant? The Judge was told that
4 there was harm and the specific harm that the Judge
5 was told was that the plaintiff had been unable to
6 timely amend its complaint with respect to the conspiracy
7 period.

8 The Civil Complaint alleged a conspiracy period
9 starting in 2004, but the specific relevant
10 evidence that Bonny alluded to – that plaintiffs' claimed was not timely received – indicated
11 there was a meeting earlier in 1999. If the conspiracy
12 started in 1999, but the complaint said 2004, and Plaintiffs did not know about
13 the earlier start until it was too late to amend the complaint, that's a
14 problem.

15 As the public record shows, the Judge
16 decided that constituted prejudice. It was that
17 specific harm he focused on in his opinion and
18 order.

1 MS. MANNING: Can I say something about

2 certainty and --

3 MR. HALLE: May I just finish this point

4 because it's an important point. The public record in

5 the case shows that the Department of Justice issued

6 an Information in 2011, I think, and we're talking

7 about an ACPERA hearing in 2013, and in that Information,

8 the Division laid out that the conspiracy alleged started in April of 2000.

9 Thus, the plaintiffs had relevant information two years earlier, and in time to amend the Complaint.

10 Bonny has already said that the plaintiffs has a timeline

11 that they had already made.

12 While I think the Judge was actually right in terms of

13 the standard that he set forth, the notion that there

14 was actually any harm from the specific points that

15 drew him to conclude there was harm, is not supported

16 by the public record and certainly by what we've heard

17 today.

18 MR. GRUNDTVIG: Amy, what are your thoughts on

19 that?

20 MS. MANNING: So, I've been thinking a lot

21 about this. I've been thinking about it since our

22 conversation yesterday in preparation for this panel

23 about certainty and transparency in the amnesty

1 program and in ACPERA, and I started practicing law
2 right when the leniency program was getting started,
3 so I watched it develop. And it's a delicate trust.
4 There is a delicate trust on both sides. There's a
5 delicate trust with the Government, when you bring a
6 client in to apply for leniency. There's a delicate
7 trust with the plaintiff's lawyers when you are the
8 leniency applicant.

9 And the more you can create certainty around
10 that, the easier it is for the defense lawyer to
11 counsel their clients on exactly what is going to
12 happen, and as soon as you start having uncertainty,
13 that makes that discussion harder.

14 I also as a side note think that both
15 leniency and ACPERA are really important in driving
16 compliance programs, because I have made presentations
17 to Boards saying you need to do a really robust
18 antitrust compliance program, because if we find
19 something, there's stuff we can do. And again, the
20 more clarity there is, the better.

21 Even when the 2017 FAQ's came out, I thought
22 a little bit of uncertainty was injected into the

1 program that made people kind of nervous.

2 Now, does that mean you have to legislate
3 every single thing that you do for cooperation? No,
4 because you need to have it loose enough that you can
5 deal with the different timelines that happen in
6 different Government investigations versus the
7 plaintiffs' cases, so you have to keep it somewhat
8 loose, but I think right now it's maybe a little bit
9 too lose, and we don't have a lot of guidance from the
10 case law, so a little bit of clarity, but not
11 ridiculous, and that's where you influenced me, Bruce,
12 in our conversation, is maybe...

13 MR. SIMON: I've had a successful day
14 already.

15 MR. GRUNDVIG: Yeah, Bonny, what are your
16 thoughts on whether – we heard from Bruce that
17 clarity is not needed. Is there a way to achieve more
18 clarity or is that just unnecessary?

19 MS. SWEENEY: Well, I think this discussion
20 illuminates that it's difficult to legislate the
21 additional factors that should be laid out in a
22 statute, to which leniency applicants can aspire. I

1 think as Peter discussed in the Aftermarket Autolights
2 case, it was a strange confluence of facts that led
3 the Judge to his decision, and in fact, the harm was
4 that we had passed the deadline for amending our
5 complaint. We couldn't expand the conspiracy to be
6 coterminous with the actual conspiracy.

7 So, in that case, how would you legislate that?
8 What kinds of criteria would you put in the statute,
9 and let me give another example. So, I've been in
10 another case where there's a leniency applicant, and
11 there one of the plaintiffs in the case pleaded a
12 conspiracy broader than -- it was already a guilty
13 plea by the time this complaint was filed -- pleaded a
14 conspiracy broader than the guilty plea and said
15 directly in its complaint alleged that well, there's
16 no ACPERA benefit for this period of the conspiracy,
17 because it's not covered by ACPERA.

18 Now, so the leniency applicant could have
19 challenged that in a motion. I mean, so there's all
20 these complaints about lack of clarity from the
21 statute, lack of case law, but the few motions that
22 have been filed have principally been filed from the

1 plaintiffs, from the claimants, not by the leniency
2 applicant, so if there is this genuine difficulty in
3 understanding the statute or if it's believed that the
4 plaintiffs are overreaching, there are remedies for
5 that that exist today, and I think it's just
6 impractical to try to legislate the different facts,
7 the different kinds of cooperation that should be
8 provided.

9 MR. HALLE: So, what I would -- you asked what
10 would you put, Bonny. I actually liked what you said
11 at the beginning when you said that you should provide
12 everything you've given to the Department of Justice.

13 MS. SWEENEY: As a minimum.

14 MR. HALLE: Well, okay. Well, you're saying
15 minimum. I'm saying that if that were the standard,
16 you would know exactly what you gave to the Department
17 of Justice. It was the basis for the DOJ finding that
18 your cooperation was sufficient.
19 If it wasn't enough, the Division wouldn't give you the
20 amnesty status to begin with, plus by the way, giving
21 the Division access to witnesses, documents and things like that. I'm
22 not talking just about the scope. I'm not saying Civil Plaintiffs

1 don't also get the witnesses and everything else, but

2 at least then you would have an understanding.

3 That doesn't resolve the timing uncertainty

4 issue, which I think can be complicated, by stays

5 and different investigations. I agree

6 completely there should be sufficient cooperation that

7 the Civil plaintiffs have time to use the cooperation provided

8 in their case. That's what

9 the Autolights case was about. The Plaintiffs claimed they were prejudiced

10 by the timing. I do think if there was some increased way

11 to define that that is the scope,

12 then at least you'd understand exactly what

13 we did with the DOJ, and that was enough, so I'm going

14 to turn all that over regarding these products to the

15 plaintiffs. That would give you some certainty, at

16 least in my --

17 MR. GRUNDVIG: Bruce has something he'd like

18 to --

19 MR. SIMON: So, I think cooperation to

20 paraphrase a Supreme Court Justice, is a little bit

21 like pornography. I can't define it but I know it

22 when I see it. And I have gotten gold-plated

1 cooperation, where by a second in, by the way, in a
2 case, where the proffer was absolutely outstanding.
3 Binders of material, summaries of what the testimony
4 would be, a timeline of everything, what they knew
5 about the other defendants. And a willingness to
6 cooperate throughout the case.

7 Why is that important? Because we're here,
8 you know, speaking to a lot of folks from DOJ. To me
9 it was important because it allowed me to navigate the
10 cooperation and present the evidence in a way that
11 didn't interfere with the DOJ investigation, because I
12 knew which witnesses were going to be their witnesses
13 at the criminal trial. I knew which witnesses they
14 thought, you know, might be risky and we knew how far
15 we could push or couldn't push with a witness, and get
16 that out of them.

17 So, cooperation isn't just like to help the
18 plaintiffs. Cooperation also allows us to navigate
19 this process so we interfere as little as possible
20 with DOJ.

21 MR. HALLE: Let me just add, if I may, to
22 that. Going back to something I mentioned earlier,

1 213(d) could be amended to provide the kind of
2 flexibility that Bruce wants. And that would be to
3 say something like the Federal Judge should at the
4 outset of the case inquire as to ACPERA and set up as
5 part of the pretrial schedule deadlines for pretrial
6 cooperation. And that -- and it would take into
7 account the DOJ's interests and everything else. And
8 so you could have something that was tailored in each
9 case, just like a pretrial order is typically tailored
10 in each case, that directly accounts for the
11 uncertainty, not all of it, but a lot of the
12 uncertainty in the timing of ACPERA cooperation.

13 MR. GRUNDVIG: Okay. So, we have burned
14 through our time. I think I've got two minutes, so
15 I'm going to throw it out and see if there's anybody
16 that has a burning question that they would like to
17 ask of someone on the panel? Not seeing any hands.

18 MR. SIMON: Can we do two minutes of just
19 closing remarks?

20 MR. GRUNDVIG: We had a final question that
21 what would you suggest to improve the ACPERA process,
22 because we're considering reauthorization, or Congress

1 is considering it. You have 30 seconds each. We'll
2 start down here with Bonny.

3 MS. SWEENEY: Well, like Bruce, I don't think
4 the statute is broken. I don't think it needs to be
5 fixed. I think that the problems that have been
6 identified by some of the participants can be
7 addressed within the litigation context, and I also
8 think that the restitution proposal that Jeffrey made
9 would be enormously expensive. I think as Bruce
10 pointed out, we on the plaintiffs' side have been
11 doing this for a long time and it is -- we spent a lot
12 of money on economists and claims administrators and
13 it's not the easy task that is described, and I don't
14 think it would save any money for the victims of the
15 criminal conduct.

16 MR. SIMON: I don't think it should be
17 tinkered with either, but I'll give you three radical
18 ways to strengthen it since Jeffrey threw out the
19 restitution.

20 One, the cooperation should happen before the
21 motion to dismiss opposition is filed. Maybe even
22 before a consolidated amended complaint has to be

1 filed, and there should be a time put in. If we're
2 going to put any time in, it should be sooner, not
3 later.

4 Two, on this whole thing the plaintiffs
5 allege broader conspiracies and the amnesty applicant
6 goes in with or that other defendants plead to, well,
7 if you want to limit it that way, then all the damages
8 that related to the broader conspiracy that we prove
9 should be trebled for the amnesty applicant.

10 And lastly, give individual employees at
11 companies an antitrust bounty, like in a qui tam
12 action, and let them come in and blow the whistle on
13 their companies, and then let the company try to beat
14 them in and whoever gets in first is going to be the
15 cooperating witness. If the employee comes in and
16 blows the whistle and cooperates, and then the company
17 comes in for an amnesty application, deny it.

18 MS. MANNING: I'm going to be super fast. I
19 think ACPERA is working but it could be tweaked.
20 Jeff's proposal scares me a little bit because I think
21 that's away from clarity and is going to, you know,
22 sort of throw open the doors and nobody is going to

1 know what's going to happen.

2 On Bruce's cooperation point on the
3 complaint, maybe if there was early cooperation we
4 would have unnecessary timing motions, because then
5 the complaint would start and we would all start from
6 the same conspiracy.

7 MR. KESSLER: I'm not going to repeat my
8 spiel for restitution but I will address that I agree
9 with one of Bruce's suggestions, but as I want
10 certainty, if the statute said provide it before the
11 consolidated and amended complaint, and we all knew
12 what it was, I actually think that would improve the
13 process, as long as we knew that was the time that
14 would satisfy it, so I could endorse that.

15 I also think there should be a determination
16 by the Court, for example, prior to trial.
17 Because no one should go to trial not knowing whether ACPERA benefits apply.
18 You would still have to produce the witnesses
19 but that's easy to address. The court could say ACPERA applies subject to the
20 witnesses showing up, but by that point all the
21 cooperation should be over, except for producing the
22 witnesses.

1 So, I think we can put pieces of certainty
2 into the process, and I'd love to form a committee of
3 Bruce and Joe and others and figure out how to do the
4 restitution right, Bonny, in a way that would actually
5 work for the plaintiffs' Bar and work for the
6 defendants, because I do fear, and I hope I'm wrong,
7 that there is going to be a significant decrease in the number of cartels getting discovered.
8 I think we're about to experience a significant decrease in effective
9 enforcement if no changes are made.
10 It could be a significant long-term decrease in amnesty applicants.
11 I fear it. It's not what I'm counseling, but it's
12 what I am seeing in the business community. If we
13 do not make the necessary changes, it's not going to be good for
14 anybody if amnesty applicants and enforcement suffer as a result.
15 So...

16 MR. HALLE: A word on restitution. I think
17 the potential answer to your suggestion is to first of
18 all keep the plaintiffs' Bar involved, they're experienced in
19 restitution, as Bruce has told us and as we all know.
20 And I think what should be done is that
21 there should be a bench trial on restitution if plaintiffs are not able to reach a settlement
22 with the cooperating ACPERA claimant.
23 Both sides would put on their experts in the trial
24 and the trial judge would decide adequate restitution in the

1 ACPERA process. And that would simplify it and take
2 it out of the Justice Department's hands.

3 Moreover, I think that we should also
4 remember that you cannot get a final leniency letter
5 from the Justice Department without having provided
6 restitution. It's one of
7 the qualifications. An ACPERA claimant has to demonstrate
8 that restitution has been made to its victims.
9 Restitution is a requirement of Leniency, and therefore
10 of ACPERA.

11 MR. GRUNDTVIG: Almost 30 seconds each. Very
12 good. Thanks to our lively panel.

13 (Break from 3:35 p.m. until 3:48 p.m.)

14 MS. DIXTON: Take your seats. Thank you,
15 everyone. We're going to get started with panel
16 three. We'll get to continue the discussion and talk
17 more about ACPERA, what's working and what can be
18 improved. My name is Jennifer Dixton, and I'm in the
19 Competition Policy & Advocacy Section here in the
20 Division, and I've also been a trial attorney in the
21 Chicago Office.

1 And I'd like to introduce our experienced
2 panel, so we can continue our discussion from the last
3 panel. Let me start by introducing Mr. Taladay, who
4 spoke -- I can just briefly say we thank him for
5 coming back again to speak on this panel.

6 And then to his right is Mr. Joe Saveri. Mr.
7 Saveri has had over 30 years of civil litigation
8 experience, including handling antitrust cases
9 involving numerous industries' litigation. He served
10 in leadership roles in a variety of antitrust cases,
11 including cartel cases, distribution and other Section
12 1 cases, Section 2 cases, reverse payment drug cases,
13 poach cases, cases involving sports and sports
14 leagues, and in 2012 he founded the Joseph Saveri Law
15 Firm, and he currently serves as lead counsel for the
16 direct purchase plaintiff class in the capacitors
17 case in addition to a number of other cases.

18 And I'll turn to my left, to my immediate
19 left is John Terzaken. He's a partner at Simpson
20 Thatcher and Bartlett. He represents clients and
21 Government investigations and civil antitrust
22 litigation and white-collar crime. He has had

1 extensive experience navigating clients through the
2 leniency program, and the ACPERA process, and I also
3 know T.J. from his time here at the Division. He was
4 the Director of Criminal Enforcement for the Division
5 previously.

6 And immediately to his left is Scott Hammond.
7 Scott Hammond is a co-Chair of Gibson, Dunn &
8 Crutcher's antitrust and competition practice group.
9 Scott's practice focuses on the representation of
10 companies and executives subject to investigations by
11 the DOJ, the Antitrust Division, and the world's other
12 major competition enforcers. Before joining Gibson
13 Dunn, he also served at the Division. He was a
14 prosecutor for 25 years. Also, a boss of mine, he was
15 the Director of Criminal Enforcement, and then, of
16 course, the Deputy Assistant Attorney General for
17 Criminal Enforcement.

18 And we have Roxann Henry at the end. Roxann
19 is senior of counsel at Morrison & Forrester Law Firm,
20 and she's a former Chair of the ABA Antitrust Section.
21 She has long defended companies and individuals,
22 foreign and domestic, in cartel investigations,

1 including as lead counsel in civil follow-on
2 litigation and criminal jury trials, and she's
3 represented leniency applicants as well as defendants
4 without leniency, and has also represented corporate
5 clients with cartel damage claims.

6 So, we thank all of our distinguished
7 panelists for being here today. And we're going to
8 explore whether ACPERA is, in fact, working as it was
9 intended. And I think it was mentioned here today,
10 Senator Hatch, who predicted the benefits of ACPERA,
11 would be that the total compensation to victims and
12 antitrust conspiracies increase because of
13 the requirement that amnesty applicants cooperate; and
14 another aspect of ACPERA was that increased self-
15 reporting will serve to further destabilize and deter
16 the formation of criminal antitrust conspiracies. As
17 we learned, there's two sides to the debate. Some
18 people feel that ACPERA is, in fact, working very well
19 and others feel that it could be improved and revised.

20 So, I'd like to start with Joe. From the
21 plaintiffs' perspective, would you like to tell us
22 your views? We've heard some already today, on

1 whether ACPERA is serving its purpose.

2 MR. SAVERI: So, thank you. Let me start with

3 I think what my top line conclusion is, which is I

4 think ACPERA is generally working. I think that it is

5 accomplishing its general principles. I think it is

6 permitting and allowing additional detection of

7 conspiracies. I think that there is little evidence

8 of decline in leniency applications.

9 I think to the extent there is data out

10 there, it indicates that the number of cartel actions

11 is going up. So, I think at a very general level it is

12 working.

13 I think one of the things though that I would

14 say is that I think in the discussions we have to be

15 clear that one of the key stakeholders in this are the

16 victims of the conspiracy. I think it is one of the

17 key parts of ACPERA, that victims do receive redress

18 for their injuries. We've talked about restitution.

19 I think everybody recognizes it's important. I think

20 that more broadly the interest of justice requires

21 victims to obtain redress for their injuries. And, in

22 fact, I think Congress explicitly recognized this in

1 the statutory scheme.

2 And, of course, this goes back to some
3 fundamental principles underlying the antitrust law.
4 These long predate ACPERA. They're at the origins of
5 the antitrust law, and that includes providing redress
6 to those injured by price fixing conspiracies. The
7 treble damage and joint and several liability that the
8 statute has had in place for years are important to
9 that.

10 I think the other part of this is that
11 private enforcement of the antitrust laws is crucial
12 to a vigorous enforcement of the antitrust laws in the
13 United States.

14 So, in this discussion it's important to me
15 representing victims of conspiracies, that we don't
16 lose track of that. I think the other provision that
17 is important to recognize is one of the key provisions
18 of the statute was to reduce cost to private
19 plaintiffs. And so that's an important factor to also
20 consider, and I think in some ways that's one of the
21 ways in which the statute isn't living up to its
22 promise, especially when cooperation isn't timely or

1 is not complete.

2 What that does is put a burden on the private
3 plaintiffs. And that includes a burden of cost and a
4 burden of time. And so I think that's something we
5 should focus on.

6 MS. DIXTON: Thank you. And I'd like to move
7 to Scott, who was Criminal Director when ACPERA was
8 passed and the Deputy when it was reauthorized, and I
9 wanted to ask what your view is now that you're in
10 private practice, representing leniency applicants.
11 Is ACPERA working in your experience?

12 MR. HAMMOND: Well, to the extent it was
13 designed to incentivize companies to seek leniency,
14 it's not working. It's not working as intended. And
15 I'm thinking maybe that's the reason why people are
16 starting to call it ASPERA.

17 People can have different views but the
18 Antitrust Defense Bar and the business community are
19 the clients of the leniency program. So, you only have
20 to ask them in terms of is it incentivizing self-
21 reporting. We heard the views earlier today of the
22 business community, that it is not. And it certainly

1 has been my experience, and I think it's a widely-held
2 view, that it simply isn't, because in more cases than
3 not, companies who self-report conduct end up being in
4 worse positions in civil litigation for doing so.

5 I think we're going to talk about some of the
6 reasons why that's the case. But it's violating the
7 Golden Rule of leniency applications, which is if you
8 come in, you won't be worse off than companies that
9 haven't admitted to the conduct, that haven't reported
10 the conduct, and are not cooperating.

11 It's too often the case that that's exactly
12 the position that leniency applicants are put into in
13 civil litigation, because of the way the ACPERA works
14 in practice, not on paper, but in practice.

15 Let me just comment on one other thing, which
16 is the importance of certainty. I had 20 years of
17 experience managing the Antitrust Division's leniency
18 program. I mention that
19 because this isn't a view that I have now taken since
20 I've come into private practice. You go back and look
21 at all the speeches in terms of the Antitrust
22 Division's administration of the program, the speech

1 on what the cornerstones of leniency programs are that
2 have been adopted around the world, and you will see
3 the principal cornerstone -- there are three, but is
4 transparency and predictability.

5 Uncertainty is a killer in the leniency
6 program, and to the extent that private damage
7 exposure is a major cost and consideration, and
8 companies cannot -- not only can't predict what the
9 exposure is, but can't predict whether or not ACPERA
10 will be a benefit. It is disincentivizing leniency
11 applications.

12 MS. DIXTON: Thank you, Scott, for those
13 remarks. Roxann, you've been on I think both sides
14 representing both plaintiffs in civil actions, and
15 then also on the defense side, and what are your views
16 on ACPERA? Is it working from your perspective?

17 MS. HENRY: So, let me make a few quick
18 points. First of all, don't blame any mechanical
19 minutia issues on the functioning of ACPERA, on the
20 diminution of leniency disclosures or self-reporting.
21 That makes no sense.

22 But second, ACPERA does go to the heart of

1 the decision making, in the sense of the
2 balance of what is the criminal
3 penalty that you're going to take away, versus what
4 else is still on the table. And that "what else is
5 still on the table," has dramatically increased.

6 I think Jeffrey mentioned it. It was
7 mentioned in the first panel by Judge Ginsburg.
8 There's just a lot more left on the table. And
9 that balance is where you have to look when you are
10 looking at what is the incentive for disclosure.

11 Thirdly, I want to pick up on a point that
12 Bruce made, which is there is a difference here
13 between a follow-on civil case and a case which the
14 plaintiffs are bringing on their own. Maybe you define
15 a follow-on case as the case where there is an amnesty
16 candidate. I haven't had a chance to talk to Bruce
17 yet, but you take your poultry case. Would you trade
18 detrebling for having a criminal conviction that you
19 could play off against in that case?

20 If you could incentivize somebody to come
21 forward and be the leniency candidate, what would you
22 trade to get that? There's a lot of focus there that

1 can be done that's a bigger focus than just looking
2 at do we have certainty on when we get
3 specific benefits. I think we need to think a lot
4 broader.

5 MS. DIXTON: Thank you. T.J., would you like
6 to share your views from your perspective,
7 representing leniency applicants?

8 MR. TERZAKEN: Sure. And it's interesting,
9 because when I was at the Government, people used to
10 complain all the time about these civil obligations
11 that they would have, and my line was always, well,
12 that's your problem. So, it was interesting to come to
13 the other side and then it was my problem. And it's a
14 complex one.

15 What I'll say about it is my experience,
16 having done this a number of times now before Boards,
17 is ACPERA definitely plays a role. It is a weight
18 that's on the scales, among every other, that clients
19 think about when they're coming in for leniency. And
20 I would say that in and of itself evidences the
21 benefit that ACPERA brings to the leniency program.

22 What I'll also tell you though is those same

1 clients are often quickly persuaded to take that
2 weight off the scales, when they learn how it actually
3 operates in practice. So, when you explain to them
4 what this is really going to mean for them, what it's
5 going to look like in civil litigation, they quickly
6 take that off and say well, maybe that's not as great
7 a benefit as it sounded when you first described it,
8 which evidences to me that maybe there are some tweaks
9 we can make to the program.

10 So that's about as concrete firsthand
11 experience as I can tell you about my experiences with
12 ACPERA so far. I think some of the tweaks we're going
13 to talk about in a little bit will really go to the
14 issue of gamesmanship. I think applicants and
15 plaintiffs' attorneys alike are guilty of some
16 gamesmanship. Maybe gamesmanship is the wrong word.
17 Maybe you would call it strong advocacy in favor of
18 their respective clients, as to how ACPERA should play
19 out.

20 There are probably better ground rules we
21 could provide both parties to make sure that the
22 discussion that they have actually takes some of the

1 advocacy out of the process.

2 MS. DIXTON: Thank you. And I'll move to
3 John, who spoke for BIAC earlier, but now you get to
4 speak on your own behalf, so what are your views on
5 ACPERA, is it working?

6 MR. TALADAY: I think there is an
7 important reason to focus on the decisions in the
8 boardroom, and any suggestion that certainty and risk
9 don't matter there, I think is misplaced. If you've been in those
10 discussions with the C Suite or the Board of
11 Directors, you now that it matters a lot.

12 Let's look at the leniency program itself.
13 The leniency program is successful because it
14 destabilizes cartels by creating a prisoner's dilemma,
15 creating a situation where one party is going to be
16 materially better off than the other parties by going
17 in first.

18 ACPERA was passed to try to
19 replicate that in the civil context. When you
20 go into a Board of Directors and explain to them the
21 ACPERA benefits, and on paper they sound good, as T.J.

1 was saying, but if they ask you the question, will I be
2 materially better off than the other defendants in the
3 case by having ACPERA, in most cases the answer is not
4 really. They're pretty much in the same position as the others
5 except you have these cooperation obligations, and you
6 won't actually know if you get the ACPERA benefits
7 until after the trial has occurred, after the damages
8 have already been calculated, after plaintiffs have done
9 everything in their power to maximize that, and then
10 you'll find out if it's single damages only instead of
11 treble damages and joint and several liability.

12 So, are there some situations
13 where it can benefit you to be the ACPERA applicant,
14 yeah, there are some. Are there plenty where it
15 really doesn't help you? Yeah, there are lots and
16 lots of those. So, is ACPERA succeeding in creating
17 that distinction between the ACPERA applicant in civil
18 cases and the non-ACPERA applicants? I don't think
19 it's doing its job.

20 MS. DIXTON: Thank you. Let's talk more
21 about the cooperation, benefits, what satisfactory
22 cooperation is. I'd like to ask Mr. Saveri, Joe, how

1 is cooperation working? The statute does have some
2 definition of what satisfactory cooperation is. I
3 think we talked a little bit about that earlier, full
4 account to the plaintiffs of facts known, furnishing
5 documents, and potentially relevant material in the
6 civil action, making individuals available for
7 depositions and so on.

8 Are you getting the cooperation that you
9 need? Is that definition sufficient? Can you tell us
10 your view?

11 MR. SAVERI: Sure. So, the first thing I'd
12 say about cooperation is it's, you know, the way the
13 statute is set up, it's not really a bargain between
14 plaintiffs and defendants. What we really do as
15 plaintiffs is we are the recipients of the
16 cooperation. We ask for more, but ultimately, it's the
17 defendant or the applicant's decision about what they
18 provide.

19 And then at the end or at some point we have
20 to determine whether that's sufficient. I think one
21 of the things that's changed over time is that
22 plaintiffs, experienced practitioners and defense

1 counsel have begun to work out in the context of
2 particular cases what the right level of cooperation
3 is. And so, I do think, just picking up on something
4 that was said earlier, the answer to the question
5 about whether cooperation is sufficient is really case
6 specific.

7 So, for example, I do think there are cases in
8 which we receive cooperation which describes the
9 nature of the scope, the extent of the conspiracy,
10 before filing our pleadings and before Twombly
11 practice. To the extent we get that kind of
12 cooperation, I think it's sufficient. To the extent
13 we don't get that cooperation, and I do think there
14 are instances where we do not, I think that is
15 insufficient.

16 Frequently in a number of cases the applicant
17 will not self-report. In fact, when you ask defense
18 counsel if they are the applicant, and in fact they
19 are, they do not acknowledge that fact. And so it's
20 certainly the case that the statute is not set up so
21 that the applicant with respect to the private
22 plaintiffs takes a hear no evil, speak no evil, see no

1 evil, point of view. There are those situations. And
2 I think that's the kind of cooperation that is
3 inadequate.

4 I guess the other thing I would say is that
5 as far as I know right now, there has been no trial
6 involving -- a civil trial involving an ACPERA
7 applicant. It is an interesting situation to think
8 about, whether or what the ACPERA applicant's
9 obligations are at that trial, because I think one of
10 the things, one of the things that is fact on the
11 ground, is frequently the plaintiffs plead a case
12 which is more broad than the scope of the criminal
13 case. And part of that reason is that plaintiffs do
14 slightly better or different investigation. Burdens
15 in a civil case are different than those in a criminal
16 case.

17 And one of the things that happens over time
18 is plaintiffs learn more about the case, put together
19 a different and longer timeline than the applicant
20 originally describes. So, in that situation I don't
21 think the plaintiff should be criticized by trying to
22 prove a broader case and presenting that case to a

1 jury at trial.

2 In that circumstance I don't know what --
3 it's unclear to me exactly what the cooperation
4 obligations are of the applicant.

5 So, I guess what I would say is that generally
6 over all the cases I'm involved in, the extent of the
7 cooperation is mixed. There are some that are better
8 than others, some that are worse than others.

9 One other thing I would just say is that it's
10 also frequently the case that the kind of cooperation
11 and assistance and insight into the conspiracy that we
12 receive from a non-amnesty applicant from
13 the second party we talk to, turns out to be more
14 broad, more fulsome, more complete than we receive
15 from the amnesty applicant.

16 To tell you the truth, I haven't figured out
17 what that means, but I think it's a fact and I think
18 if you talk to the plaintiffs' lawyers, you will hear
19 that regularly.

20 MS. DIXTON: Thank you. From the leniency
21 applicant, defense perspective, I'd like to get views
22 from both T.J. and Scott on this. How is cooperation

1 playing out in practice based on your experience?

2 MR. TERZAKEN: So, I think when you think of
3 cooperation it's the when, what and how, right? You
4 think about how you deliver it. I mean, what's
5 interesting is I heard Bruce's comments and I've heard
6 Joe's comments. I think it's a bit -- we're probably
7 talking past each other on what the reality is when you
8 get into a case. I mean, I don't know how many of you
9 read the initial complaints that are filed in most of
10 these class action lawsuits, but they're not exactly
11 masterpieces that one would suggest came about after very lengthy
12 periods of diligence, evidence gathering and things that the
13 plaintiffs have looked at.

14 Normally it is some gobbledygook of basic
15 allegations, a little bit of econometrics and the fact
16 that DOJ has an investigation. That's the background.

17 So now if you're the ACPERA applicant and
18 you're faced with a question of do I cooperate now,
19 the question is well, did what I go in and give to the
20 Government, is that what they're actually after or are
21 they after something else? Because I don't think the
22 reality of the conspiracy that's actually been

1 reported to the Government looks anything like the
2 complaint that's been filed.

3 Now, that isn't to suggest then that an
4 applicant may not go forward and cooperate anyway, but then
5 normally the questions that you get, at least the ones
6 that I've gotten in my cases from plaintiffs, are not so much of boy,
7 that's really interesting, thank you for that. It's
8 well, how can you make this conspiracy longer? I've
9 pled a conspiracy that's four years longer than the one
10 that you seem to be reporting to me, and how can we
11 get after these people? Why aren't the parent
12 companies involved in this? Do you have evidence that
13 the parent companies were also attached to this?

14 So, it's not a question of what it is that you
15 provided to the Government and just give us that.
16 It's how can you help us make this bigger?

17 And again, I'm not here to challenge the
18 specific roles played by the Government or the plaintiffs.
19 Everybody has got their own right to advocate and
20 their own clients to deal with, and I think that's the
21 right approach. But I do think that when we're talking
22 about the cooperation that flows from self-reporting

1 to the Government, the goal here is to match that
2 cooperation so that we provide incentives for people
3 to come in in the first place; the cooperation
4 required ought to look like what was given to the Government.
5 My experience is the two don't match up currently.

6 MS. DIXTON: Thank you. T.J. If Scott and
7 I'd also like to get Roxann's views, if you could
8 react to that. Do the plaintiffs have -- do the
9 claimants have any requirements or should they have a
10 requirement to tailor their cooperation
11 request to what was provided to the Government?

12 MR. HAMMOND: Well, without doing it, you're
13 not going to have certainty. But I agree what Joe
14 said. It's not a bargain. Amnesty applicants are
15 required to provide timely cooperation. They have to
16 provide that full account of all known facts, all --
17 everything relevant to that litigation, to turn it all
18 over and in return plaintiffs obligation is nothing.
19 There is no bargain.

20 And so the amnesty applicant is giving up its
21 leverage, whatever leverage it has after it's already
22 confessed to the crime to the Antitrust Division, in

1 return for nothing. And plaintiffs take advantage of
2 that.

3 Last year at the Spring Meeting a prominent
4 plaintiff lawyer talked about that, talked about his
5 view has been changing and now he purposely avoids
6 settling with the leniency applicant. They got one
7 first-in mover discount and so he's looking for
8 another party in the litigation to settle with first.

9 You've got a silver bullet for that first
10 mover-in discount. Why give it to the leniency
11 applicant? The leniency applicant has to fully cooperate
12 anyway. This lawyer said he would rather keep the
13 leniency applicant in the case until the eve of
14 trial, if not longer, recognizing the leverage that
15 the plaintiffs have because the leniency applicant has
16 got to cooperate but that doesn't mean there has to be
17 a settlement.

18 I'm not surprised to hear that second-in
19 settlement cooperation can be quite good, because you
20 know what, that's a bargain. That's I've got some
21 cooperation and if you want it, we need to talk
22 settlement.

1 That's not happening with leniency
2 applicants. They've having to give up the
3 cooperation, in return getting nothing. I have no
4 doubt that there is gamesmanship going on with these
5 amnesty applicants, who want to try to keep their
6 leverage, who don't want to just surrender the
7 cooperation for nothing in return.

8 But what is happening in the plaintiff Bar is
9 gamesmanship in terms of not dealing with the leniency
10 applicant and providing, reaching resolutions, in
11 connection with the provision of the cooperation, and
12 with respect to overcharging.

13 You keep a leniency applicant who has
14 provided cooperation until the eve of trial, you make
15 deals with second-ins and give them the first
16 mover-in discount, and not reward leniency applicants
17 with a substantially or materially better result, or
18 keep them in the litigation until trial, then you've just wiped out
19 whatever benefits were intended to come from the
20 leniency program and ACPERA.

21 So that has to change in order to make ACPERA
22 a meaningful benefit again.

1 MS. HENRY: So, looking at that, I think
2 you've made a very good point of how the process
3 works, but I don't see it as gamesmanship on the part
4 of the plaintiff's lawyer or the part of the second-in
5 person. That's how the program works. I mean, it
6 makes sense. That's kind of just how it flows, so
7 again, I think you have to look at it from a different
8 perspective, and that's one of the reasons why I do
9 think you need a broader restructuring.

10 But I think the focus here is
11 the dramatic lack of alignment between the civil
12 conspiracy scope and the criminal conspiracy scope; this is
13 always going to create some issues here, and there
14 isn't actually much clarity in the statute on this.

15 There's the possibility of giving basically
16 the benefit of joint and several liability and
17 single damages, only for the scope of the criminal
18 disclosure, that's got some problems, I think with
19 that. You can do it if the criminal scope is
20 encompassed within the civil scope, then you get it
21 for the whole thing. That's the approach I would
22 prefer. I think it makes better sense, but I'm not

1 going to tell you that it's a perfect solution either.

2 It's got some warts on it.

3 The other possibility is to give it only for
4 the scope of the civil conspiracy that's defined, but
5 as a practical matter I cannot possibly endorse that
6 because my sense is that the civil conspiracy is
7 defined a little bit out of the air, because they
8 didn't have enough information when they first filed
9 the complaint. As John -- as TJ basically said,
10 they've put it together based on some media reports or
11 something. And they've come up with a broad timeframe
12 that doesn't make any sense, and you need to be able
13 to deal with that entire timeframe.

14 So, there's pros and cons at each
15 of these approaches and none of them is actually
16 without some warts here or there.

17 MR. TALADAY: To zoom out for a minute and
18 think about the ACPERA statute itself, I don't see a
19 lot of controversy over what the scope of cooperation
20 should be. I think it should be very robust
21 cooperation. I wouldn't argue that. I think Jeffrey
22 said the same thing.

1 I think the question is what you get for
2 that, as Scott was saying, and I've, you know,
3 provided gold-plated cooperation before, only to have
4 the plaintiff's counsel say we don't care how much
5 cooperation you provide, because we're going to
6 challenge your ACPERA status- if we don't settle with
7 you, no matter what, and the jury will love you
8 because you're an admitted price fixer, and afterwards
9 we'll see whether the Judge agrees with us that you
10 didn't cooperate. And by the way, you know that
11 obligation to provide documents from all over the
12 world? We have a whole bunch of discovery requests
13 just waiting in the wings for you that's going to make
14 it really hard for you to comply with our requests.
15 And, of course, you can go to the Judge and argue that
16 it's not relevant and fight us, but that only provides
17 more evidence that you really weren't cooperating. So
18 it's up to you.

19 Now, I'm sure not every plaintiff is that unsubtle
20 about how they do this, but I don't blame the
21 plaintiff's lawyers for doing it. It's their
22 obligation. They have an ethical obligation to

1 provide zealous representation. So, one should expect
2 them to try to be as dismissive of the benefits of
3 ACPERA as possible.

4 And so, you can't look at this through the
5 lens of how it executes in a single case, because
6 that's the plaintiffs job. I think you
7 have to zoom out and ask what statutory protections
8 are provided to ensure those benefits arise on both
9 sides, because you have to assume that the plaintiffs
10 are going to challenge ACPERA in every case to the utmost extent
11 possible or they're not doing their job.

12 MR. SAVERI: Let me jump in and respond to a
13 couple things. First, I always find these kinds of
14 discussions a little bit remarkable, because I hear a
15 lot of people who don't do plaintiffs work talk about
16 how plaintiffs' lawyers operate, and craft their
17 pleadings and all the hard work we do. So, I just want
18 to draw a circle around that.

19 I think that when you paint the
20 plaintiffs Bar with this brush, it's a very broad
21 brush, and I think it's tremendously unfair to sort of
22 members of the plaintiffs' Bar. I mean, I would say,

1 for example, the complaints that I work on are highly
2 detailed. We do a lot of work. We spend a lot of
3 time on the economists, and I think there are people
4 in the room who know that we sometimes beat the
5 Government to the punch in terms of the allegations of
6 the conspiracy.

7 So, and I want to be very clear that this is
8 not just a situation where there are plaintiffs free
9 riding on work the defendants have done. Second, I
10 want to be clear about what I meant about a bargain.
11 There is a bargain here, and under the statute the
12 bargain is that in exchange for cooperation plaintiffs
13 are -- the right for them to pursue single, treble
14 damages, and joint and several liability, is removed.
15 That is not a bargain for exchange, where you're
16 sitting across the table from one another. That's the
17 statutory system, and that is the bargain. That is
18 the trade-off that is explicit in the statute.

19 So, you know, I guess -- I do think there is
20 -- to your point, Roxann, I do think there is a little
21 bit of a mismatch that comes up because of some kind
22 of difference between the -- what the Department of

1 Justice is trying to prove in the criminal case and
2 what is going on in the civil case, that has to do
3 with things like prosecutorial discretion. It has to
4 do with burdens of proof. It has to do with a number
5 of different things.

6 I do think there is a little bit of a
7 misalignment there, but actually I think that that's
8 something that we can work on in these cases as we go.
9 And my experience is frankly, that gets accommodated.

10 MS. DIXTON: Thank you. I want to move on to
11 something that was mentioned at the last panel, which
12 is an idea that John Taladay had come up with
13 along with some of his colleagues about a presumption that would
14 apply in the context of providing cooperation. I'll
15 explain it, and if I do it wrong, you can correct
16 me. Basically, the presumption would allow the
17 leniency applicant to go in with the presumption that
18 the applicant was providing satisfactory cooperation,
19 which could then be rebutted by the claimants if the
20 applicant was indeed not doing that in the course of
21 the litigation.

22 So, I wanted to get John to explain, you know,

1 the reasoning for that. I think you did a little bit
2 in some of your remarks. And then also get reactions
3 from our panel on whether that type of change would
4 indeed provide more certainty or clarity to the
5 statute.

6 MR. TALADAY: Yes, I thought it was a pretty
7 modest proposal honestly, until Bruce spoke. But let
8 me talk about what it wasn't. It wasn't a suggestion
9 that cooperation obligations should be reduced. And it
10 wasn't a suggestion that liability as to leniency
11 applicant should be reduced. It wasn't either of
12 those things.

13 It was simply addressing some of the echoes
14 of what we heard before — that the decision as to
15 whether one has ACPERA protection doesn't happen until
16 after the trial.

17 And, Joe, I think what you said is
18 technically not correct. You said ACPERA removes the
19 right to seek treble damages and joint and several
20 liability. It doesn't remove the right to seek it.
21 The plaintiff still has the right to seek it, and I
22 think if they weren't seeking it, they wouldn't be

1 doing their job.

2 What my proposal addressed was a timing
3 issue and a presumption issue, and it played off of
4 the Autolights case and simply said, okay, no one
5 knows exactly what cooperation is and there needs to
6 be a determination of that at some point. I agree
7 with Peter and Jeffrey that pretrial is better than
8 post-trial, so everyone knows -- you don't have to go
9 through the ritual of a trial before you know what
10 people's risks are.

11 But my proposal was simply saying that there should be
12 a presumption that if the leniency applicant provides
13 to the plaintiff in a timely fashion at least
14 everything they provided to the DOJ, then there should
15 be a rebuttable presumption going forward that they've
16 met their ACPERA obligations. It doesn't mean that
17 that's the end of their cooperation. I don't think it
18 can or should be.

19 Look, there's obviously a lot more you can
20 find out about scope and participants and so forth in
21 a five-year discovery period than you can in a two-
22 year criminal investigation. But at least it puts

1 some weight on the scale at a point in time where it
2 matters to the leniency applicant, in terms of their
3 ability to negotiate a settlement and try to do better
4 than their co-defendants. So that was the proposal
5 and the entire scope of it.

6 MS. DIXTON: Joe, can you I get your...

7 MR. SAVERI: So just to give Bruce -- of
8 course, it was tort reform. No, but seriously, look.
9 I think that in a lot of -- I guess it depends what
10 you mean by a rebuttable presumption. I think that
11 the -- at some level the statute does basically do
12 what you are describing. There is a point in time
13 where the Court has the opportunity to review the
14 quality of the cooperation.

15 Now, then the question -- there are two
16 questions to me, is when do you measure it? You know,
17 is it 30 days after applying? Is it 60 days after
18 applying? Is it before the consolidated complaint has
19 been filed? Is it after all of the discovery? I
20 think there are important questions about when the
21 timing should be measured and I do think some clarity
22 around when -- about when the timing, about when the

1 cooperation should be evaluated, would be useful,
2 although as Bonny noted earlier, I think it really
3 depends on a particular set of facts in a case.

4 So, you know, I guess the basic things that
5 the plaintiffs want to know are who the participants
6 are in the conspiracy, what the scope of that
7 conspiracy is, both in terms of products and time. I
8 think some estimate of what the sales are, what the
9 injuries were caused, are all things that are part of
10 cooperation.

11 It seems to me if the applicant provides that
12 early, and there is some opportunity to determine
13 whether that's sufficient, that probably has some
14 value.

15 Now, I don't know what that means when you
16 say it's rebuttable. But I do think some clarity
17 about the adequacy or what the timing is, is useful. I
18 guess it feels a little bit like we're talking about
19 creating a safe harbor here.

20 And my experience with safe harbors is this,
21 is that safe harbors are good when you're inside the
22 safe harbor. Safe harbors are very unpleasant when

1 you're outside the safe harbor, and so I think we have
2 to be -- you have to be careful about what that means,
3 because if you fail to provide any of that
4 information, I think there's a very strong argument
5 for taking away the ACPERA protections. And so, I
6 think you have to be very careful about that.

7 And so, my own view is that this should be --
8 some clarity on timing would be useful. I think it's
9 useful to develop that on a case-by-case basis and
10 ultimately, I think it's the Trial Judge that has to
11 resolve this, in the full context of the particular
12 case.

13 MS. DIXTON: Thank you. Do other panelists
14 have reactions to John's proposal?

15 MR. TERZAKEN: I think it's a great idea.
16 But my thoughts on timeliness, just to offer on that,
17 I think the presumption is helpful. I think you
18 probably have to couple it with a few things. I mean, the
19 issues that we run into in this bargained for exchange,
20 as you go through the cooperation process, really do
21 relate to timeliness and the scope of the
22 cooperation.

1 And I think from both sides' perspective the
2 problem is that it's subjective, right, and so it does
3 come down to the advocacy process. Bonny talked about
4 this on her panel, well, let's leave it to the litigators
5 and the litigators will work it out. Well, we're all
6 litigators in this room and you know how that works
7 out, when we get on the phone and try to work things
8 out. I've got my idea. You've got yours, and we hope
9 to meet in the middle, but often not there either.

10 Right?

11 So, I think part of this process, at least in
12 the tweaks that I would suggest, is why don't we look
13 to find more objective ways to measure these things?
14 Why can't timeliness have a time limitation?

15 Bruce mentioned on his panel a similar idea I
16 had of why can't timeliness be at some moment in time
17 before a consolidated and amended complaint or before
18 the response to the motion to dismiss? Why can't we
19 hook it to a date specific? Or at least make that
20 the default, absent exceptional circumstances?
21 Similar for cooperation. Why can't we have a
22 definition of what preliminary cooperation, like this

1 presumption assumes, means everything you gave to the
2 Government? If you give everything over that you gave
3 to the Government, that's a presumption in favor of
4 the fact that you have satisfactorily cooperated, as
5 long as you continue to cooperate going forward in the
6 case, and then you can litigate that presumption, if
7 you have to.

8 So, I don't see why we can't come up with a
9 few more objective facts as opposed to simply leaving
10 it to people to battle out in between, because I don't
11 agree with the proposition that's been mentioned a few
12 times, that we all really know how this works.

13 So, I've been out in private practice now
14 seven years, eight years, and in that time I've been
15 in a number of these cases, as the leniency applicant
16 and I will tell you that not every plaintiff lawyer
17 knows how ACPERA works, and everybody has got their
18 own definitions of what ACPERA means.

19 I can also tell you on the other side,
20 frankly other people I've worked with in combination in
21 these cases, don't know what it means to be an ACPERA
22 applicant and don't understand or have their own views

1 on what it means to provide cooperation. So, I don't
2 agree there's a sort of well-tread path that everybody
3 can negotiate down. The bottom line is it comes down
4 to taking the gloves off and figuring it out in the middle
5 of a particular fact case. I just don't think that's
6 the right place for ACPERA, if we're really talking
7 about incentivizing leniency applicants. Make it
8 the standards objective.

9 MS. DIXTON: Thank you. Let's move into
10 other suggestions that I think our panelists have on
11 how ACPERA could function better and I'll move to
12 Scott. I think you had a few suggestions that we
13 discussed in preparation. Could you share those with
14 us and we can talk more about them?

15 MR. HAMMOND: Jennifer asked me what I
16 thought the DOJ could be doing to make ACPERA operate
17 better, so I'll offer three suggestions.

18 One is as was talked about today, obviously
19 the costs of self-reporting are going up, and so one
20 observation is, you know, don't pile on. Here's what
21 I mean by that.

22 So, the Antitrust Division brought an

1 incredibly important recent case. I'm sure you all
2 saw it, involving bid rigging on Government contracts
3 in the fuel supply contracts in Korea, monumental
4 case, resulting not only in heavy fines on the
5 defendants, four of which have been charged now, but
6 also, an unprecedented outcome involving both the
7 recovery of civil damages, based on
8 4(a) of the Clayton Act, and simultaneously FCA
9 claims, as well.

10 So, a great result for the Antitrust Division,
11 huge important deterrent message spread with regard to
12 high criminal fines and civil penalties, great example
13 of coordination between the Antitrust and the Civil
14 Division, something the Antitrust Division should be
15 and is deservedly proud of.

16 Makan spoke at the Fall Forum and it was
17 great to see him not only talking about that, but
18 proactively addressing that not only this is an
19 important case, you're going to see more of it, so
20 strap in. But just in case you have concerns, and I
21 really like seeing this being dealt with proactively by the DOJ,
22 for leniency applicants when the Antitrust Division pursues civil penalties

1 under the Clayton Act, your leniency applicant, the
2 detrebling provisions of ACPERA will apply, so the leniency applicant's
3 liability will be limited to actual damages. That was
4 terrific.

5 However, what hasn't happened yet is the
6 Department of Justice hasn't said how ACPERA will apply to FCA claims,
7 because if the Antitrust Division and the Civil
8 Division are jointly bringing antitrust and FCA
9 claims, and the Antitrust Division agrees to single
10 damages, but the Civil Division is still coming after
11 you for treble damages, then -- I mean, that wipes out
12 ACPERA. It frankly at that point doesn't matter what
13 the Antitrust Division is doing, because the Civil
14 Division is still taking or taken the position that
15 treble damages are appropriate, so we need a statement
16 from the Department of Justice from the Civil Division
17 in terms of where they stand with regard to ACPERA.

18 If you're a leniency applicant and you come
19 in and you self-report bid rigging and public
20 procurement, which is the highest -- really the

1 highest priority of the Antitrust Division is to root
2 out that type of conduct, what can you expect as an
3 amnesty applicant in terms of your exposure on FCA.

4 Secondly, another thing that the Antitrust
5 Division is doing, which I personally think is great,
6 which is their involvement in getting more involved as
7 an AMICI in civil litigation. Of course, we all know that they've
8 become very active in the no poach space in getting
9 their reviews out. Well, I'd love to see them do that
10 in the -- with respect to ACPERA.

11 Before pen was put to paper on the Hill for
12 ACPERA, Congress called us -- I was at the Antitrust
13 Division. I was in the first delegation that went up
14 to the Hill. They wanted to help the Antitrust
15 Division's criminal enforcement program. What can we
16 do? That was the question.

17 And then we talked to them about well, civil
18 damages is still a major disincentive to self-
19 reporting. And that gave birth to a discussion about
20 ACPERA, that ultimately involved, you know, other
21 stakeholders, and I would say bipartisan support.

1 So, this is your baby, Antitrust Division,
2 ACPERA. It was made for you. It was made to
3 incentivize leniency applicants, and I just encourage
4 the Antitrust Division to be more proactive in terms
5 of defending the intentions of Congress when that was
6 passed.

7 And the last thing is, this is always the
8 first and last thing about the leniency program, so
9 again, speaking to the Antitrust Division, is to be
10 ever mindful of the Golden Rule. There are many
11 different opportunities where the Antitrust Division
12 and its actions can protect the leniency applicant to
13 ensure self-reporters are not worse off.

14 I don't know if this is still true, but there
15 were a lot of leniency applicants that came in when I
16 was there, that were reporting marginal -- conduct
17 they just weren't sure. Remember the message to
18 leniency applicants is come in right away at the first
19 hint of wrongdoing, before you've completed your
20 internal investigation, before you even know for sure
21 there's a violation. Run, don't walk.

22 Companies were doing that but if it turns out

1 there's not an antitrust violation, but then they face
2 civil damage exposure, well, that applicant is worse
3 off. And the Antitrust Division I think historically,
4 and I don't -- I'm not suggesting it's different
5 today, used to take measures. They would look at that
6 conduct very closely before taking -- serving
7 compulsory process and taking other action, which they
8 knew would trigger civil litigation. That's one way
9 to be mindful.

10 Another way is when you're drafting
11 conditional leniency letters. Obviously the Antitrust
12 Division wants to be very careful not to protect a
13 leniency applicant who is not telling the whole truth
14 and nothing but the truth, but they also can be very
15 mindful of the situation that we're describing today
16 and not writing a conditional leniency letter that is
17 so narrow that it's unnecessarily leaving the leniency
18 applicant exposed to greater litigation.

19 So that's just two examples. There are many
20 more that I know the Division is conscious of, but if
21 they keep that Golden Rule in mind, they will
22 certainly continue to incentivize applications.

1 MS. DIXTON: Thank you, Scott. Roxann, do
2 you have anything to add to that?

3 MS. HENRY: So, I think all of that is very
4 helpful for the Department to think about. I
5 want to suggest that it really does need to go beyond
6 the Department. We need to go -- Congress needs to
7 think about this issue a lot more broadly and bigger.
8 They need to think about tailoring the balance
9 of the civil and criminal exposure to yield greater
10 disclosure.

11 We heard in the first panel, Judge Ginsburg,
12 Lindsey, virtually everybody, explained greater
13 disclosure is better for everybody. Greater
14 disclosure is what is better for deterrence. It's
15 better for damage claims. It is the issue that's
16 going to really further the agenda here to get to
17 where we want to be.

18 And to do that we need to think much more
19 broadly than tweaking, and I don't want to take
20 anything away from the tweaking. It's all important.
21 But we really need to go broader. Think about the
22 issue of restitution as a possibility. Think about

1 the concept of creating a different system basically
2 for follow-on damage actions that have an amnesty
3 applicant. Think about detrebling. Think about
4 damage preclusion for the amnesty applicant unless
5 there is some reason why joint and several liability
6 isn't going to end up giving full restitution by the
7 other folks.

8 These are things where the attorneys' fees,
9 we haven't talked about those, you know, my kids are
10 already self-supporting, so now I can talk about this.
11 I mean, it's -- the attorneys' fees on the defense
12 side are also a big chunk of who's paying for those.
13 Somebody is paying for that, and whether it's the --
14 you can say it's the shareholders. I've always
15 actually thought it's the people who bought the
16 products to begin with, who are going to end up paying
17 for this, because it goes across the industry. So
18 whether it's the plaintiff's fees or the defense fees,
19 these are huge things. We can streamline this
20 process, take out a huge chunk of that, and do
21 something that is a lot more tailored to get to
22 disclosure.

1 Think about this balance between what is it
2 that you're taking off the table in terms of the
3 criminal penalty, and what's still on the table. And
4 is that balance going to tip it to say let's go in
5 there and get the benefit of leniency.

6 MS. DIXTON: Thank you, Roxann. Following-up on
7 Damages: We've heard a lot about damages in the last
8 Panel, reliance on restitution, as a possible way to reform how
9 damages are calculated. Obviously, the Department has
10 a significant interest in seeing that restitution is
11 paid to victims and ill-gotten gains are disgorged.
12 Can I get Joe's perspective on damages? You know,
13 could they be streamlined in any way from your
14 perspective?

15 MR. SAVERI: Well, if you're talking about
16 what is now I think the Kessler proposal about
17 restitution, the -- so you know, I think having been
18 involved in recently in some of the CVRA procedures in
19 some recent cases, I think that one thing that is true
20 and I agree with Bonny when she said it earlier, is
21 that the plaintiffs Bar is very well experienced in
22 both determining the amount of damages caused to

1 victims by price fixers, as well as administering
2 claims programs involving lots of different types of
3 claims. It's an enormously kind of complex
4 enterprise. I think the first step in the process is
5 figuring out what the volume of commerce is that's
6 affected.

7 I don't think it's so simple to simply use
8 the volume of commerce that's agreed to between the
9 applicant and the Government. My experience is that
10 that volume of commerce number is frequently
11 negotiated and that if subject to proof the damage
12 number would actually far exceed that.

13 I think the second part of that is figuring
14 out what the amount of the damages as measured by the
15 overcharge. That is a subject which is subject to
16 expert proof. It is a difficult and expensive thing
17 to do, so in order to get that right, I do think there
18 is a considerable amount of expense and attention that
19 -- and care that has to be put to that.

20 Then, assuming that you have the pot of money
21 right, I think there are a number of other
22 complexities. It includes figuring out who the

1 claimants are, what the process is, whether they're
2 direct purchasers, whether they're indirect
3 purchasers. Most of the claimants in the direct
4 purchaser cases that have big claims on the race with
5 the settlement fund, are multi-national corporations,
6 which have a supply chain that runs across the planet,
7 including through various intermediaries and figuring
8 out what of those claims are properly subject to a
9 claims process in a U.S. antitrust case, is
10 complicated.

11 You know, when the
12 Department of Justice wants to have the panel on the
13 FTAIA and how complex that is, I hope I get invited
14 back, because that's a whole other kettle of fish, but
15 that's a very, very complicated thing that enters into
16 that.

17 Having said that, so what I really believe is
18 I think the plaintiff and my experience also is that
19 in situations where the Department has been involved,
20 the Judge has been involved, the plaintiffs' lawyers
21 have been involved representing victims, the way this
22 has come out recently is the Court has been very

1 comfortable with the idea that the plaintiffs' Bar is
2 going to get this right.

3 And so I do think we have the expertise on
4 that. I think it's developed. I think it's present
5 and I think it's available.

6 Having said that, there could be more
7 collaboration in developing a different process. But
8 to me that -- the idea that the Department would be
9 taking on that administrative burden without a
10 significant commitment to the enterprise, would be
11 very difficult. And in the meantime, people who are
12 victims would not get paid for some period of time.

13 So, I do have some concerns about that.

14 MS. HENRY: If I could just address real
15 quickly, I mean, we heard about it takes ten years.
16 We just heard about how difficult it is. That does
17 not strike me as a reason to say yes, we should keep
18 doing it this same way. That strikes me as a clear
19 reason why we should think about a different way of
20 doing it.

21 Yes, it's not necessarily something you snap
22 your fingers and it's all done. But there are Special

1 masters. There's ways in which this can be done. The
2 fact that it's complicated right now is not a reason
3 to suggest that we ought to keep it complicated.

4 MR. SAVERI: Yeah, I guess just to maybe
5 respond to that, I think that if the first move
6 is to appoint a Special Master, I mean, to me that
7 highlights the fact that there's going to be
8 additional cost and expense associated with the
9 enterprise.

10 You know, right now it's a burden that is
11 borne by the plaintiffs. We do it well. We do it
12 consistent with due process. We do it better than
13 we've ever done, and I think generally the victims are
14 satisfied with the process.

15 And so to me, I mean, the other rule that we
16 should be talking about is maybe some version of like
17 the Hippocratic Oath here. We should do no harm, and
18 so I think that that part of the system does work, and
19 so -- that's kind of where I come down on that.

20 MS. HENRY: The cost is not borne by the
21 plaintiffs. The cost is borne by whoever is paying
22 all this at the end of the day.

1 MS. DIXTON: I see that we're about at the
2 end of our time and I want to give each of our
3 panelists again just a minute to say if there is one
4 thing that they would do to further incentivize their
5 clients to report or if there's one thing that, Joe, you
6 would like as a plaintiffs' -- claimants' attorney,
7 what would that be, and then we'll wrap up because I
8 don't want to take too much more of our time.

9 MR. SAVERI: So quickly, one of the things
10 that I think has developed significantly since I
11 started doing it is that on the plaintiffs Bar, I
12 think we've developed our ability to work
13 cooperatively in these cases with the Department of
14 Justice, and to work in a way early in the case so
15 that we can do things not to step on each other's
16 toes, and to satisfy our legitimate and important
17 interest. And so one of the things that I think we
18 have done and we continue to do is things like
19 cooperating on scheduling, phasing of discovery.

20 We have certainly done things like putting
21 the depositions of key witnesses off until the
22 resolution of the criminal trial. All of those things

1 are things that have developed with experience and I
2 really do think that that's a place where this process
3 can run better both -- certainly for the Department of
4 Justice, for the plaintiff's Bar, and also for the
5 Court and the applicant and everybody involved.

6 MS. DIXTON: Thank you. John.

7 MR. TALADAY: So, this in closing, I
8 guess, I'm reminded of a joke from a now disgraced
9 comedian, who used to say -- used to say when he was a
10 kid, he'd do something wrong, and his father would say go
11 get me a stick to beat you with. And so, he would go
12 outside and find the smallest twig he could possibly
13 find. And we have that kind of dilemma here,
14 except I think people on the defense side of the Bar
15 would say it's go get me the biggest stick you can
16 find and I promise I won't hit you that hard with it.
17 But what would make it a lot better is clarity, right?
18 More clarity on the size of the stick, more clarity on
19 the size of the beating, so that a decision could be
20 made in advance that has better
21 calculability to it at the time those decisions are being
22 made, I think the Justice Department in figuring

1 out what it should endorse really needs to focus on
2 the decision in the boardroom of whether to seek
3 leniency.

4 MS. DIXTON: Thank you. T.J.

5 MR. TERZAKEN: So, I think there have been a
6 lot of great ideas. In fact, I share a lot of them.
7 I don't think Jeff's idea is wildly out of the ball
8 park. There are obviously a lot of moving parts you'd
9 have to figure out. We talked about a lot of
10 objective things you could do on the timeliness and
11 the scoping of cooperation.

12 One aspect we didn't talk about is the sort
13 of damage piece of it beyond whether we could maybe come
14 up with a better modeling exercise to come up with
15 damages. One easy fix, I think, to the statute would
16 be to -- for the avoidance of doubt, actually define
17 the fact that actual damages means actual damages.
18 That is that Hanover Shoe and Illinois Brick don't
19 apply in the context of a leniency applicant.

20 That would significantly change the leverage
21 in a lot of the discussions we have out there with the
22 plaintiffs' firms in terms of how do you actually

1 calculate what the damages were to your client,
2 because by and large the people driving these lawsuits
3 are not the ones that are absorbing the actual damage.
4 So, I think that could be something either
5 fixed legislatively, just to make it clear, or
6 frankly I think it's clear already, and so maybe it's
7 something that the Department is willing to weigh in
8 on in the future.

9 MS. DIXTON: Scott.

10 MR. HAMMOND: Well, I appreciate that I've
11 had an opportunity to share my views with all of you
12 and thank you, Jennifer, for putting those questions
13 to us. I'm going to save my time.

14 MS. HENRY: I just also want to say thank you
15 very much for the Division to put this on, because I
16 think it's very important. I want to endorse what
17 John said, which is the focus needs to be on that
18 decision-making process, and really what's going to
19 tip the needle and make a significant difference here.
20 And that's where I think we ought to focus.

21 MS. DIXTON: Thank you. I want to thank our
22 panelists. Deputy Assistant Attorney General, Richard

1 Powers.

2 DEPUTY ASSISTANT ATTORNEY GENERAL POWERS: So

3 I want to end today by thanking a couple of folks, but

4 first of all thanking those from our side who made

5 today possible, Ann O'Brien, Jennifer Dixton and Sarah

6 Oldfield for all their hard work in putting this

7 together.

8 And secondly, I'd like to thank all of our

9 roundtable panelists and participants. We were hoping

10 for a lively discussion with differing views, and it's

11 fair to say it exceeded our expectations.

12 And finally, just note that the job isn't

13 done. I think we have until May 31st to submit or to

14 send in your submissions, so we encourage everyone,

15 all the stakeholders to do that. So, with that, thank

16 you very much.

17 (Whereupon, at 4:51 p.m. the proceeding was

18 concluded.)

19

20

21

22

1 CERTIFICATE OF NOTARY PUBLIC
2 I, MICHAEL FARKAS, the officer before whom
3 the foregoing proceeding was taken, do hereby certify
4 that the proceedings were recorded by me and
5 thereafter reduced to typewriting under my direction;
6 that said proceedings are a true and accurate record
7 to the best of my knowledge, skills, and ability; that
8 I am neither counsel for, related to, nor employed by
9 any of the parties to the action in which this was
10 taken; and, further, that I am not a relative or
11 employee of any counsel or attorney employed by the
12 parties hereto, nor financially or otherwise
13 interested in the outcome of this action.

14

15

16 <% 13394, Signature%>

17 MICHAEL FARKAS

18 Notary Public in and for the

19 District of Columbia

20

21

22

1 CERTIFICATE OF TRANSCRIBER

2 I, SANDRA K. McCURDY, do hereby certify that

3 this transcript was prepared from audio to the best of
Page 175

4 my ability.

5

6 I am neither counsel for, related to, nor

7 employed by any of the parties to this action, nor

8 financially or otherwise interested in the outcome of

9 this action.

10

11

12 <% 14858,Signature%>

13 DATE SANDRA K. McCURDY

14

15

16

17

18

19

20

21

22