



May 31, 2019

Via Electronic Mail Only

Competition Policy and Advocacy Section
Antitrust Division
U.S. Department of Justice
950 Pennsylvania Ave., N.W., Room 3317
Washington, DC 20530

Re: Submission by COSAL on the efficacy of the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA)

The Committee to Support the Antitrust Laws (COSAL) submits this paper in connection with the roundtable on ACPERA that was convened by the Antitrust Division on April 11, 2019.

I. INTRODUCTION.

COSAL was established in 1986 to promote and support the enactment, preservation and enforcement of a strong body of antitrust laws in the United States. COSAL members are law firms based throughout the country that represent individuals and businesses that have been harmed by violations of the antitrust laws. COSAL was involved in the deliberations when Congress enacted ACPERA in 2004 and again when the statute was reauthorized in 2010. Our members have broad experience litigating complex antitrust cases in which defendants seek reduced liability under ACPERA's leniency program.

In general, COSAL believes that ACPERA is working very well to accomplish its dual purposes: (1) incentivizing disclosure of cartel behavior to the DOJ, *and* (2) incentivizing cooperation with private plaintiffs to enhance the opportunity for victim recovery. It is our collective view that the statute has been very successful in securing timely and appropriate cooperation from ACPERA applicants.

In contrast to claims by ACPERA critics, COSAL members' experience suggests that leniency applications under ACPERA have not decreased. In fact, there has been an ACPERA applicant in most major antitrust MDLs in the last decade, following criminal investigations where guilty pleas were involved. In addition, we have not seen any empirical evidence that suggests that applications are declining.

COSAL opposes the various proposals that have been offered to provide antitrust conspirators increased incentives to disclose antitrust violations and to cooperate with both the DOJ and private litigants. We believe the proposals are unnecessary and they would upset the careful balance in the existing ACPERA legislation. These proposals include providing a rebuttable presumption of cooperation; civil immunity for admitted criminals; creating a statutory definition of "actual damages;" creating a statutory restitution fund; establishing a deadline for determining satisfactory cooperation; and limiting the scope of cooperation required for leniency in civil cases.

COSAL supports limited modifications to ACPERA to provide enhanced incentives for cooperation with civil plaintiffs. We propose a clarifying amendment stating expressly that the cooperation of the leniency applicant must be substantially completed prior to the deadline for the civil damages plaintiff to file its response to any motions to dismiss its complaint to better define the "timeliness" requirement and provide more effective assistance to private litigants.

COSAL would also like to see ACPERA amended to recognize, in some fashion, that the scope of the antitrust conspiracy and antitrust damages found by the jury sometimes exceeds that described by the antitrust applicant in its cooperation with plaintiffs under the leniency program. We would be interested in

exploring ways that the statute could be changed to provide appropriate incentives to encourage leniency applicants to be fully transparent as to the scope of the illegal antitrust activities.

Finally, COSAL believes the DOJ's existing Leniency Program and ACPERA would be greatly strengthened by enacting an antitrust whistleblower provision that: (1) protects those who report antitrust violations from retaliation, and (2) awards the whistleblower a bounty based on any fine arising from successful criminal prosecutions.

II. The Purpose of ACPERA and the 2010 Amendments.

The Antitrust Criminal Penalty Enhancement and Reform Act ("ACPERA") was enacted in 2004.¹ The statute was intended to achieve two goals:

- Incentivizing cartel participants to self-report to the DOJ under the Antitrust Division's Corporate Leniency Program and to provide "full, continuing and complete cooperation" to the DOJ in aid of its criminal prosecution of other cartel members.²
- Affording cooperation to civil plaintiffs pursuing damages claims—including providing a full account of all facts known to the applicant about the conduct at issue and furnishing all documents potentially relevant to the litigation—to enhance the likelihood and degree of victim recovery.³

As the Government Accountability Office ("GAO") has emphasized, the "Legislative history indicates that Members of Congress intended ACPERA to increase the number of companies and individuals applying for antitrust leniency with DOJ—and thus the detection of cartels—while *simultaneously benefiting consumers* by offering an incentive for leniency applicants to cooperate with plaintiffs in their civil cases."⁴

¹ Pub. L. No. 108-237, tit. II, 118 Stat. 661.

² DOJ Corporate Leniency Policy, <https://www.justice.gov/atr/corporate-leniency-policy>.

³ U.S. Gov't Accountability Off., GAO-11-619, *Criminal Cartel Enforcement: Stakeholder Views on Impact of 2004 Antitrust Reform Mixed, but Support Whistleblower Protection*, at 12 (July 2011) ("GAO 2011 Report").

⁴ GAO 2011 Report, at 2 (July 2011) (emphasis added).

Even before ACPERA’s enactment, the DOJ’s Leniency Program was considered a powerful tool to uncover, investigate, and prosecute antitrust cartels. Nonetheless, “the threat of exposure to a possible treble damages lawsuit by the victims of the conspiracy . . . with joint and several liability” was said by some to be a major disincentive to self-reporting.⁵ This is because even though securing DOJ leniency allows a cartel member to avoid criminal charges and sanctions, it could still be liable in civil cases for three times the damages that the entire conspiracy caused.⁶

ACPERA addresses this perceived disincentive to self-report.⁷ The benefits offered under the statute are (i) a reduction of the leniency applicant’s civil exposure to single—not treble—damages, which are (ii) based on the applicant’s market share—not on joint and several liability for all damages caused by the conspiracy.⁸ Thus, the ACPERA applicant, who admits to its criminal conduct, avoids not only criminal responsibility, but also both treble damages and joint and several liability in civil litigation. DOJ Assistant Attorney General Makan Delrahim has stated that “ACPERA complements the Division’s leniency program by reducing the civil damages exposure of the company granted leniency, if that company provides the civil plaintiffs with timely, satisfactory cooperation.”⁹

The benefits to civil plaintiffs—the victims of the cartel—are two-fold. First, “more companies will disclose antitrust crimes,” leading to more criminal prosecutions and more civil suits by victims to recover

⁵ 150 Cong. Rec. 6327 (April 2, 2004)

⁶ We refer here to the cartel member receiving DOJ leniency as the “leniency recipient” (bearing in mind that DOJ’s leniency grant typically is conditional). We refer to this same cartel member, when seeking ACPERA benefits, as the “leniency applicant” or “applicant” the definitional approach used in ACPERA itself.

⁷ U.S. Dep’t of Justice, Antitrust Div., Frequently Asked Questions About the Antitrust Division’s Leniency Program and Model Leniency Letters 1, n.1 (Jan. 26, 2017), available at www.justice.gov/atr/page/file/926521.

⁸ See ACPERA § 213(a) (the amnesty applicant can limit its civil liability to “the actual damages” sustained by civil plaintiffs that are “attributable to the [the amnesty recipient’s] commerce . . . in the goods or services affected by the violation.”); 150 Cong. Rec. 6327 (April 2, 2004).

⁹ Remarks of Makan Delrahim, ACPERA Public Roundtable Tr. at 6, available at <https://www.justice.gov/atr/page/file/1161371/download>.

damages. Senator Hatch anticipated that the effect of such additional revelations would mean that “total compensation to victims of antitrust conspiracies will be increased because of the requirement that amnesty applicants cooperate.”¹⁰ Second, cooperation benefits private plaintiffs in civil suits. Senator Hatch noted the significance of timely cooperation: “Importantly, the limitation on damages is only available to corporations . . . if they provide adequate and timely cooperation . . . to any subsequent private plaintiffs bringing the civil suit.”¹¹ Similarly, Representative Scott stated that the amnesty applicant will get criminal immunity and ACPERA’s civil benefits only “if the company provides adequate and timely cooperation to both the government and any subsequent private plaintiffs in civil suits.”¹²

In 2010, ACPERA was reauthorized for another 10 years. Then, ACPERA “was amended to include ‘timeliness’ in the consideration of satisfactory cooperation,”¹³ while also providing the DOJ a measure of control over disclosure if it sought a stay in the civil case in support of its criminal investigation or prosecution.¹⁴

ACPERA and the 2010 amendments emphasize a common sense and fact-based approach in evaluating whether an applicant has provided timely and satisfactory cooperation to civil plaintiffs. The legislative history sheds light on how to best evaluate whether an applicant’s cooperation is “timely.” As Senator Hatch noted, “the legislation requires the Amnesty Applicant to provide *full cooperation* to the victims as they *prepare and pursue* their civil lawsuit.”¹⁵ Satisfactory cooperation includes: “providing a full account to the claimant of all facts known to the applicant . . . that are potentially relevant to the civil

¹⁰ *Id.*

¹¹ 150 Cong. Rec. 6327 (Apr. 2, 2004).

¹² 150 Cong. Rec. H 3658 (June 2, 2004). *See also* Remarks of Rep. Conyers, at 150 Cong. Rec. H 3658 (June 2, 2004) (criminal immunity and ACPERA’s civil benefits only accrue, “if the company provides adequate and timely cooperation to both the government and any subsequent private plaintiffs in civil suits”)

¹³ ACPERA § 213(c).

¹⁴ ACPERA § 213(d).

¹⁵ 150 Cong. Rec. 6327 (April 2, 2004) (emphasis added); *see also Oracle Am., Inc. v. Micron Tech., Inc.*, 817 F. Supp. 2d 1128, 1132 (N.D. Cal. 2011) (quoting 150 Cong. Rec. 6327 (April 2, 2004)).

action”; providing documents or other items relevant to the civil action that are in the possession, custody, or control of the applicant; “using its best efforts to secure and facilitate” cooperation from its current or former directors, officers, and employees.”¹⁶ The applicant must also make its officers and employees available for interviews, depositions, or testimony in connection with the civil action as the civil plaintiff may reasonably require and respond completely and truthfully without intentionally withholding any potentially relevant information.¹⁷ Accordingly, an applicant seeking ACPERA’s benefits must cooperate with civil plaintiffs in substantially the same way that the applicant cooperates with the DOJ when it provides information and witnesses in criminal investigations and trials.

As Congress considers re-authorizing ACPERA, the twin aims of the renewed legislation—(1) incentivizing disclosure of cartel behavior to the DOJ, *and* (2) incentivizing cooperation with private plaintiffs to enhance the opportunity for victim recovery—must remain at the center.

III. ACPERA in Practice.

COSAL’s members have led many of the most successful and complex civil antitrust cases pursued since the enactment of ACPERA, many of which involved ACPERA applicants. It is our collective view that the statute has been generally successful in securing timely and appropriate cooperation from ACPERA applicants.

As a general matter, ACPERA applicants surface relatively early in civil cases, often after courts appoint interim leadership and before the filing of consolidated complaints. Applicants generally come forward with attorney proffers, followed by interviews of relevant employees. In light of what is often ongoing cooperation, ACPERA applicants are frequently the first parties to engage in settlement discussions with plaintiffs. Often, they are able to obtain favorable terms in such discussions, so long as their cooperation is timely and meaningful.

¹⁶ ACPERA, §§ 212(5) & 213(b)(3)(B).

¹⁷ ACPERA, § 213(b)(3)(A)-(B).

There is a natural give and take between plaintiffs and applicants as the cooperation process unfolds. All parties are aware that the sufficiency of cooperation may one day be challenged, providing significant incentive for applicants to work with plaintiffs as the litigation unfolds to satisfy the statutory requirements. Plaintiffs are also aware that robust cooperation efforts may be difficult to challenge. In settlement negotiations, applicants stress and plaintiffs recognize that the applicant's damages exposure will likely be limited to single damages and several (not joint) liability. In most cases, cooperation proceeds smoothly and efficiently. Counsel for all parties are well equipped to assess the risks of non-cooperation.

We are aware of only one case holding that an applicant was not entitled to the benefits of ACPERA in a civil class action, *In re Aftermarket Automotive Lighting Products Antitrust Litigation*, No. 09-MDL-2007 GW, 2013 WL 4536569 (C.D. Cal. Aug 26, 2013) ("*Auto Lights*"). The facts in *Auto Lights* illustrate the importance of maintaining a robust civil cooperation requirement. The case also underscores that ACPERA benefits are appropriately denied when the applicant has hidden key facts and prejudiced civil recovery.

Automotive Lighting arose from a conspiracy to fix the prices in aftermarket automotive lights. *Id.* at *1. The plaintiffs filed their class action complaint in October 2008, but formal discovery was stayed for an extended period of time due to an ongoing DOJ investigation and later prosecution. *Id.* at *2. Although the ACPERA applicants (a parent and its partially-owned affiliate) provided "attorney proffers" and certain other information purportedly to comply with their cooperation obligations, it was not until 2013 that plaintiffs learned the applicants had provided DOJ—and withheld from plaintiffs—information years earlier suggesting the conspiracy began in 1999. *Id.* at *4. Specifically, in 2013, the Plaintiffs learned that the President of one of the applicants told DOJ in 2009 that he had had meetings with co-conspirators in 1999 to end a "price war" and that prices subsequently returned to where they had been before the "price war." *Id.* at *5.

Importantly, the facts the applicants withheld from the *Auto Lights* Plaintiffs were not minor, ambiguous, or tertiary evidence. This was not information any good faith leniency applicant would have overlooked. The facts that were hidden from the Plaintiffs for four years were direct, compelling and credible proof of conspiracy. They also dovetailed exactly with Plaintiffs' theory that the conspiracy was motivated by a 1999 jury award in the United States.¹⁸ Yet, despite the obvious relevance of these facts to the Plaintiffs' case, the applicants failed to mention any of it in their "attorney proffers." By the time Plaintiffs learned in 2013 of the 1999 meetings, it was too late in the litigation to amend the complaint and the class allegations to allege claims extending back to a 1999 start date. *Id.* at *5. Not surprisingly, the Court found it irrelevant that, during the period when the information was being withheld, the applicants had obtained settlements with class members representing two-thirds of applicants' sales over the class period. *Id.*

Auto Lights is and should be a cautionary tale to ACPERA applicants. There was no unfair "uncertainty" at play. It was the applicant—the entity seeking leniency to avoid full statutory liability for a *per se* violation—that tried to run the clock. Denying ACPERA benefits in such circumstances prevents gamesmanship. By contrast, diluting civil cooperation requirements would only increase the incentives for others to do the same, depriving cartel victims of full recovery.

IV. There Is No Empirical Evidence Suggesting that Applications Are Declining; Actual Experience Suggests Otherwise.

Some critics of ACPERA have claimed, without any support or empirical evidence, that ACPERA applications are decreasing. Experience dictates otherwise. There has been an ACPERA applicant in many major antitrust MDLs in the last decade, following criminal investigations where guilty pleas were involved. In fact, in the *Auto Parts* case, there were multiple applicants spread across sub-cases. Presumably, if the defendants in such cases did not like how they saw ACPERA playing out for their predecessors—conspirators in the same industry—they would have refrained from seeking leniency. But

¹⁸ See *Auto Lights*, Consolidated Amended Complaint, Dkt. 158, at ¶40 (July 20, 2010).

that was not the case. Conspirators competed for leniency in each such subcase, even years after the first leniency applicant came in and settled out.

V. Certain Proposals to Reform ACPERA Miss the Mark.

Certain stakeholders have advocated for changes to ACPERA that they contend would provide greater clarity in the law's application and therefore greater incentives to disclose antitrust violations and to cooperate with both the DOJ and private litigants. However, as explained below, these proposals have two overarching flaws. First, they purport to fix problems that do not exist. Second, they would upset the careful balance in the existing ACPERA legislation—to incentivize disclosure of otherwise secret cartels to the DOJ *and* to assist victims in their civil cases to recover damages.

A. COSAL Opposes a Rebuttable Presumption of Satisfactory Cooperation.

One “reform” that has been advanced is the creation of a rebuttable presumption that upon the leniency applicant's timely disclosure to private plaintiffs of the information it shared with the DOJ, its obligation under ACPERA would be presumptively satisfied, subject to challenge by private plaintiffs.¹⁹ The presumption could be rebutted if the leniency applicant failed to satisfy certain other obligations under ACPERA, including: (1) a full of account of all facts known to the applicant that are potentially relevant to the civil action; (2) providing all documents potentially relevant to the civil action that are in the applicants' possession or control; and (3) using best efforts to secure and facilitate witness interviews and testimony covered by the leniency application.²⁰

On this view, a rebuttable presumption would purportedly provide the leniency applicant a measure of clarity early in private litigation that its obligations are satisfied and thus will entitle the applicant to the statutory benefits—*i.e.*, the elimination of treble damages and joint and several liability. And, this view

¹⁹ See, e.g., John M. Taladay, *Why ACPERA Isn't Working and How to Fix It*, CPI Antitrust Chronicle (Jan. 2019).

²⁰ See Taladay, *supra*, at 6.

contends, that clarity would, in turn, make disclosure in the civil litigation *more* prompt and *more* meaningful.

This proposed presumption purports to fix a problem that does not presently exist in ACPERA. Nothing in the current statute prohibits a leniency applicant from seeking a court order whenever it believes it has satisfied ACPERA's requirements. While some courts have, in passing, said that an ACPERA-entitlement determination of satisfactory cooperation (the statutory standard) should be made at the latter stages of litigation, no court ruling has categorically rejected a leniency applicant from seeking such relief well in advance of trial or judgment.

Thus, in *Oracle America, Inc. v. Micron Technology, Inc.*,²¹ the court considered the question of whether to strike Micron's ACPERA-based affirmative defense to joint-and-several liability and treble damages. The court denied the application stating that it was "required to make the substantive determination whether the amnesty applicant has satisfied the requirements of the civil leniency provisions near the end of the litigation, not at the outset."²² Likewise, in *In re Polyurethane Foam Antitrust Litigation*,²³ the court declined to determine whether ACPERA benefits should be considered when assessing plaintiffs' expert's damages model for purposes of class certification, stating that it was best left for later stages. Neither case involved a proceeding in which the applicant asserted that it had discharged its obligations under ACPERA; nor did any decision consider any plaintiff's argument disputing entitlement to ACPERA benefits.

²¹ 817 F. Supp. 2d 1128 (N.D. Cal. 2011).

²² *Id.* at 1133.

²³ 2014 WL 6461355, at *69 (N.D. Ohio Nov. 7, 2014). *See also In re TFT-LCD (Flat Panel) Antitrust Litig.*, 618 F. Supp. 2d 1194, 1196 (N.D. Cal. 2009) (noting in the context of a motion to compel the leniency applicant to disclose itself and begin cooperation, that "the language of ACPERA suggests that the Court's assessment of an applicant's cooperation occurs at the time of imposing judgment or otherwise determining liability and damages").

Accordingly, if an ACPERA applicant and the plaintiff cannot agree that cooperation has been satisfactory, then the question of entitlement to ACPERA benefits can be resolved by application to the court. The court will then consider the cooperation provided and the statutory requirements on which entitlement to ACPERA benefits is conditioned. In the only case to resolve ACPERA-entitlement on the merits, the court rejected entitlement on the plaintiffs' motion for a ruling.²⁴

Because ACPERA applicants and private plaintiffs alike may apply to the court to resolve whether an applicant has satisfied its ACPERA obligations, a rebuttable presumption in favor of satisfactory cooperation would serve no unmet need. Rather, creating a presumption would simply add an unnecessary procedure.

Equally important, the trigger for the proposed presumption itself entails the applicant doing substantially what the statute already requires. The only additional statutory requirement calls for witness interviews and testimony, which generally follow a proffer and document productions anyway. Creating a presumption of ACPERA entitlement before the civil plaintiff has a chance to probe and confirm other information provided through witnesses seems unwarranted. Furthermore, a rebuttable presumption would disincentivize continuing cooperation, which is in most cases necessary as the factual record develops, witnesses are interviewed, and the case proceeds to trial.

Finally, even on its own terms, the presumption proposal is not well-suited to promoting clarity. As illustrated by the ways an antitrust plaintiff could rebut the presumption, a leniency applicant would have no assurance that the court would confirm ACPERA-entitlement at some later date in the litigation. Even if some uncertainty were lessened by a presumption of compliance, the prospect of a disentitlement ruling would still exist, and therefore, still play a role in a leniency applicant's cooperation, litigation, and settlement strategy.

²⁴ *In re Aftermarket Automotive Lighting Prods. Antitrust Litig.*, 2013 WL 4536569 (C.D. Cal. Aug. 26, 2013).

B. COSAL Opposes “Civil Immunity” for Admitted Criminals.

Another proposal calls for eliminating damages for the antitrust violations covered by the leniency grant. This proposed change seems directed to the scenario where one or more non-leniency cartel members negotiate settlements, which include providing the same type of cooperation the leniency applicant could offer. This, the argument goes, would diminish the value of the ACPERA applicant’s cooperation to the civil plaintiff and either: (1) result in the plaintiff offering less favorable settlement terms to the leniency applicant; or (2) so devalue the ACPERA applicant’s potential cooperation that it would preclude the applicant’s satisfaction of ACPERA.²⁵ In either circumstance, the ACPERA applicant might, arguably, be *worse off* than the cartel members who did not self-report to the DOJ.²⁶

When viewed in isolation, eliminating all civil damage exposure of course would protect the ACPERA applicant from these scenarios. However, it also would eliminate the very stick essential to incentivize meaningful cooperation—damage liability for the antitrust violation. In other words, conferring civil immunity would undermine a core of feature of ACPERA: providing civil antitrust plaintiffs with valuable cooperation to pursue recovery for victims of the violation.

Thus, the rationale underlying the civil immunity proposal is strained. The ACPERA applicant will receive a conditional leniency grant from the DOJ only after providing substantial cooperation that the DOJ grant requires. The ACPERA applicant is well-positioned to furnish the same information to the civil plaintiffs promptly. Indeed, the self-reporting cartel member granted conditional leniency should be *better*-positioned to cooperate with the civil plaintiffs early on than would non-leniency cartel members. And the same dynamic that motivates a cartel member to seek leniency from the DOJ—to obtain leniency first, before another cartel member does—motivates the applicant to cooperate with civil plaintiffs—to be first and thus preserve its entitlement to reduced liability. If, despite the ACPERA applicant’s favorable position,

²⁵ See Remarks of Scott Hammond, DOJ ACPERA Roundtable Tr. at 141-142.

²⁶ *Id.*

the civil plaintiffs settle first with other cartel members, that circumstance probably is one of the ACPERA applicant's own making.

The ACPERA applicant should not be heard to complain that its own unwillingness to offer prompt cooperation, for whatever reason, enabled another cartel member to cooperate first and to receive benefits associated with that cooperation. ACPERA affords the applicant an opportunity to earn benefits—not a vested right to them that allows it to cooperate only when it deems fit. ACPERA further incentivizes the applicant to move quickly to obtain those benefits.

Concern has been expressed, nonetheless, that private plaintiffs may attempt to use a defendant's known ACPERA status to extract more in a settlement than that demanded in settlement from other cartel members. But this concern is both irrelevant and overstated. First, to reiterate, ACPERA is intended to create an incentive to cooperate—not to assure the leniency applicant settlement parity, or a most-favored settlement position compared to that available to other cartel members. Second, there is no evidence that private plaintiffs repeatedly use such an approach when dealing with ACPERA applicants, suggesting that the concern is exaggerated. Third, plaintiffs who refuse to offer the ACPERA applicant settlement on terms that can be justified in the overall settlement context, or who decline to give the ACPERA applicant the opportunity to cooperate, would do so at their own risk. It is unlikely that a court would fault an applicant whose cooperation attempts were rebuffed, leaving the plaintiff with recourse only to single, non-joint-and-several damages.

Equally important, affording civil immunity to a DOJ leniency recipient would fly in the face of the private enforcement provisions of the Clayton Act. From the very enactment of the Sherman Act, private enforcement—embodied in the Act's treble damage remedy—has been integral to the antitrust regime that Congress adopted.²⁷ As an early Sherman Act study reminds:

²⁷ See Act of July 2, 1890 ch. 647, § 7, 26 Stat. 209, 210 (“Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or

In the thought of the [eighteen-]nineties the law should be as nearly self-enforcing as possible. The main reliance seems to have been placed upon the private suit. A man knew when he was hurt better than an agency or government above could tell him. Make it worth their while—as the triple-damage clause was intended to do—and injured members could be depended upon to police an industry.²⁸

The Supreme Court itself has reiterated the integral role of private enforcement in many decisions. The most recent example is *Apple Inc. v. Pepper*, decided on May 13, 2019. In holding that Apple App Store customers had standing to sue for damages, the Supreme Court majority highlighted antitrust’s *raison d’être*: “The plaintiffs seek to hold retailers to account if the retailers engage in unlawful anticompetitive conduct that harms consumers who purchase from those retailers. *That is why we have antitrust law.*”²⁹

Indeed, uniqueness of the private treble damage remedy, adopted in the 1890 Sherman Act and re-enacted in Section 4 of the Clayton Act of 1914, is itself noteworthy. At the time, no other federal law offered treble damages to an injured party.³⁰ Congress adopted this remedy to drive home its intent to make private actions vital to effective antitrust enforcement.

In the interest of encouraging self-reporting under the DOJ’s Leniency Program, ACPERA relaxes the treble damages remedy—while still ensuring that cartel victims receive a damage recovery equal to the conspiratorial overcharges attributable to the ACPERA applicant’s share of sales. To immunize the

declared to be unlawful by this act, may sue . . . and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney’s fee.”)

²⁸ Walton Hamilton & Irene Till, Senate Temporary National Economic Committee, INVESTIGATION OF CONCENTRATION OF ECONOMIC POWER, Monograph No. 16, 76th Cong., 3d Sess. 82 (Sen. Comm. Print 1941).

²⁹ *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1516 (2019) (emphasis added). *See also, e.g., Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) (“private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations”); *Perma Life Mufflers, Inc. v. Int’l Parts Corp.*, 392 U.S. 134, 139 (1968) (“the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter any one contemplating business behavior in violation of the antitrust laws”).

³⁰ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 653 (1985) (Stevens, dissenting).

ACPERA applicant from any civil damages exposure at all would disserve the antitrust laws' overarching intent to encourage private enforcement. No empirical data has been offered to suggest that damage relief already available is insufficiently beneficial to incent self-reporting. To the contrary, top-level DOJ officials have stated that criminal leniency applications are "on par with . . . historical averages."³¹

At a policy level, civil immunity would similarly be unwarranted. Those self-reporting under the DOJ's Leniency Program are confessing to committing a federal felony. Under the Leniency Program, the first confessing company-felon escapes criminal liability that could otherwise result in a fine running into the hundreds of millions of dollars.³² Officers and employees of the leniency recipient similarly escape potential imprisonment of up to 10 years, provided that they cooperate with the DOJ.³³ So, the Leniency Program offers the first cartel member to self-report a get-out-of-jail free card. To add civil immunity from damages as well would mean that crime in fact pays. The ACPERA applicant would get to keep *all* the money it received from its felonious conduct. That would be bad policy.

³¹ Remarks of Makan Delrahim, DOJ ACPERA Roundtable Tr. at 9 ("Despite some recent eulogies over the purported death of leniency, the Division's leniency program is still alive and well. In fact, the number leniency applications the Division received in 2018 was on par with our historical averages and there's no sign that we've become a victim of our own success and somehow rooted out collusion entirely."); Karen Hoffman Lent and Kenneth Schwartz, Insights from the ABA Antitrust Spring Meeting 2019, N.Y.L.J. (Apr. 14, 2019) ("Principal Deputy AAG Andrew Finch rebutted claims that the DOJ has decreased the number of leniency program participants in recent years. He emphasized that leniency is not dead; rather, application numbers are consistent with historical averages, pointing to his staff's recent data points in support of his position. Echoing this sentiment during the Enforcers Roundtable, AAG Delrahim downplayed concerns about the effectiveness of the Division's criminal enforcement regime."), <https://www.law.com/newyorklawjournal/2019/04/08/insights-from-the-aba-antitrust-spring-meeting-2019/>.

³² See *United States v. Hui Hsiung*, 758 F.3d 1074, 1096 (9th Cir. 2014) (affirming imposition of criminal fine of \$500 million against TFT-LCD cartel member). See also *Sherman Act Violations Yield a Corporate Fine of \$10 Million or More*, <https://www.justice.gov/atr/sherman-act-violations-yielding-corporate-fine-10-million-or-more> (listing over 30 corporations receiving criminal fines of \$100 million or more).

³³ 15 U.S.C. § 1.

Moreover, granting immunity from civil damages claims would also be inconsistent with other DOJ self-disclosure programs—none of which permits such immunity. For example, self-disclosure of violations under the False Claims Act (“FCA”)³⁴—which like the Sherman Act, carries significant civil and criminal penalties—does not relieve the violator of its obligation to repay the government for overcharges it caused by the violation. Rather, the most recent OIG’s Provider Self-Disclosure Protocol states that self-disclosure generally allows the disclosing violator a reduction of the damage multiplier from three times single damages to a minimum of 1.5 times.³⁵

Accordingly, under the FCA program, the self-reporting violator still pays *at least* 1.5 times actual damages to the victim of the statutory violation—there, the U.S. government. Under ACPERA, an antitrust violator is eligible, under the current law, to more *favorable* treatment than an FCA violator—single damages, payable to victims, rather than damages multiplied by at least 1.5.

The DOJ has also recently adopted a program under the Foreign Corrupt Practices Act (“FCPA”), which is designed to encourage self-reporting violations. The program does not ensure criminal immunity, but provides, instead, the opportunity for a discretionary non-prosecution decision (known as “declination”), assuming there is (1) complete cooperation, (2) the absence of aggravating circumstances, *and* (3) “full disgorgement, forfeiture, and/or restitution resulting from the misconduct at issue.”³⁶ So again, the benefits available to an ACPERA-eligible cartel member already exceed those available under the FCPA program.

C. COSAL Opposes the Creation of a Statutory Definition of “Actual Damages.”

³⁴ See 31 U.S.C. §§ 3729 – 3733.

³⁵ OIG’s Provider Self-Disclosure Protocol, at 2 (Apr. 17, 2013), <https://oig.hhs.gov/compliance/self-disclosure-info/files/provider-self-disclosure-protocol.pdf>.

³⁶ DOJ Fraud Division, 9-47.120 – FCPA Corporate Enforcement Policy (updated Mar. 2019), <https://www.justice.gov/criminal-fraud/file/838416/download>. “Aggravating circumstances” warranting criminal prosecution include, among others, “involvement by executive management of the company in the misconduct; a significant profit to the company from the misconduct; pervasiveness of the misconduct within the company; and criminal recidivism.” *Id.*

Yet another proposal to amend ACPERA would create a statutory definition of actual damages, which would limit the injury to the dollar amount sustained by the victims of the violation. For example, if Cartel Member ABC Corp. sells a price-fixed widget to Retailer XYZ Inc., who then sells that widget to Consumer Jane, passing through the entire overcharge, ACPERA would define “damages” as those suffered by Jane—*i.e.*, the person that actually suffered the overcharge. Because Retailer XYZ Inc. passed through 100% of the overcharge on the price-fixed widget, it would receive no damages.

The rationale here seemingly is that by limiting the ACPERA applicant’s exposure to actual damages suffered, the plaintiffs’ settlement position would be weakened relative to their position under existing law. Currently, damages may exist at the direct purchaser level under federal law (Retailer XYZ Inc. can recover) and at each successive “indirect” purchaser level under state “*Illinois Brick*” repealer laws (Jane can recover). An “actual damages” amendment would mean that the ACPERA applicant would have to compensate those injured by its conduct—Jane in our hypothetical—while avoiding theoretical duplication of damages arising from purchases at various levels upstream in the distribution chain (here, Retailer XYZ Inc.).

This proposal would effectively overturn, for the benefit of the ACPERA applicant, *Hanover Shoe*, *Illinois Brick*, and their progeny, which establish that only direct purchasers may recover damages under the Clayton Act—and that they may do so even if they pass on 100% of the overcharge.³⁷ A potential amendment to ACPERA should not be the vehicle for chipping away at decades of precedent establishing not only the direct purchasers’ ability to pursue damages actions under the Sherman Act, but also the states’ authority to authorize damages claims for indirect purchasers.³⁸ Congress has had decades to address the rule in *Illinois Brick*—most recently in the wake of the report issued by the Antitrust Modernization

³⁷ See *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968); *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); *Kansas v. UtiliCorp United Inc.*, 497 U.S. 199 (1990).

³⁸ See *California v. ARC Am. Corp.*, 490 U.S. 93 (1989) (rejecting preemption of state antitrust laws authorizing indirect purchaser suits by *Illinois Brick*).

Commission’s recommendations. Yet, it has never acted. The courts themselves continue to recognize and apply the rule, the most recent example being the Supreme Court’s ruling in *Apple Inc. v. Pepper*.³⁹

Moreover, as commentators and enforcers alike have noted, there has been no identified case where parallel damages actions by direct and indirect purchasers have led to duplicative recoveries against an antitrust defendant.⁴⁰ Thus, the risk of duplication is theoretical—not real—and courts have demonstrated the ability to competently review expert damages analyses and any damages issues that may arise.

D. COSAL Opposes the Creation of a Restitution Fund.

ACPERA currently incentivizes cooperation and compensates victims by limiting an applicant’s civil liability to single damages on a several (and not joint) basis, provided the applicant has satisfied its cooperation obligation. One proposed change is to eliminate the ACPERA applicant’s exposure to potential civil damages altogether and, instead, allow the applicant to pay restitution into a government-controlled fund.⁴¹ Under the proposal, an applicant would still have to provide at least “substantial cooperation” to eliminate civil liability.⁴² However, the amount of restitution would be determined under some (yet-to-be-defined) formula, without input from the victims or full fact-finding under the oversight of judiciary court. According to its proponents, the “restitution fund” approach would increase certainty and predictability for the applicant by allowing it to calculate in advance what its exposure would be if it seeks leniency.⁴³

³⁹ See *Apple Inc. v. Pepper*, 139 S. Ct. 1514 (2019) (upholding the direct-purchaser status of Apple App Store consumers under *Illinois Brick*).

⁴⁰ See, e.g., State Amici Br., *Apple Inc. v. Pepper*, No. 17-204 (U.S., filed Oct. 1, 2018); Robert G. Harris & Lawrence A. Sullivan, *Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis*, 128 U. Pa. L. Rev. 369 (1979); J. Thomas Prud’homme, Jr. & Ellen S. Cooper, *One More challenge for the AMC: Repairing the Legacy of Illinois Brick*, 40 U.S.F. L. Rev. 675 (2006); Antitrust Modernization Comm’n, Report and Recommendation (Apr. 2007).

⁴¹ <https://www.justice.gov/opa/pr/department-justice-hold-roundtable-antitrust-criminal-penalty-enhancement-reform-act> at 100:2

⁴² One proponent suggested willingness to agree to an increased cooperation requirement to qualify for the restitution model. <https://www.justice.gov/atr/page/file/1161371/download> at 99:11 and 101:10

⁴³ <https://www.justice.gov/atr/page/file/1161371/download> at 100:2.

As a threshold matter, we are not aware of any robust data showing the current limits on liability insufficiently incentivize cooperation. Particularly for smaller cartel members, the opportunity to avoid joint and several liability and avoid trebling is a powerful incentive. As discussed further below, the “restitution fund” proposal also cannot achieve any useful increase in “certainty” without severely undercutting victim compensation. A “restitution fund” approach also improperly allocates valuable—and overtaxed—DOJ resources and would distract DOJ from its core investigation and prosecution missions.

1. The restitution fund proposal does not eliminate uncertainty.

Critics of ACPERA claim it does not provide sufficient “certainty” to incentivize cartelists to seek leniency. The principal criticism is that the cooperation standards allegedly are not sufficiently defined. As addressed elsewhere, that criticism is not well-founded, and any dilution of the cooperation requirement will weaken the ability to ferret out the full scope and impact of a cartel. Moreover, because the restitution fund model would still be tethered to a requirement of substantial cooperation, switching to that model will not cure any alleged concerns about the cooperation requirement.

To the extent that a restitution model is meant to eliminate the secondary issue of uncertain financial exposure, it would sacrifice full, just compensation to victims. As proposed, restitution would be based on a pre-determined set of formulas (perhaps akin to a workers’ compensation scheme). It is doubtful that any set of formulas could adequately capture the full range of damages suffered by different types of victims, in different markets, injured by a wide-range of unlawful agreements and cartels. The history of civil antitrust litigation shows calculating damages is rarely that simple or rote.

A formulaic system that achieves the predictability desired by ACPERA critics could not account for the variations. Acknowledging this, proponents of the restitution model are forced to admit it would deliver only “rough justice.”⁴⁴ But any system that disregards these variations and unnecessarily increases

⁴⁴ <https://www.justice.gov/atr/page/file/1161371/download> at 104:7.

the risk of under-compensation frustrates an important goal of ACPERA, ensuring that victims get full recovery and private enforcement goals of the Sherman and Clayton Acts themselves.

Moreover, any formula is only as good as the inputs. Under the current system, ACPERA ensures victims (represented in follow-on civil litigation) are heard, can develop a full factual record, and present expert analyses to protect their interests in full compensation. But, under the restitution fund proposal, the amount of restitution would be calculated without input from—let alone fact-finding by—victims. It is a system ripe for under-compensation

Finally, there is no evidence that ACPERA applicants are systematically overpaying damages under the current system. Switching to a rigid restitution fund model that risks under-compensation to victims also risks allowing cartelists to keep a portion of their unlawful gain, an outcome fundamentally at odds with Congressional intent and the interests of justice.

2. A restitution fund model would impose a substantial and unnecessary strain on DOJ resources.

A restitution fund model also would force the DOJ to take on the responsibility of calculating the amount of restitution, administering the fund, and processing victims' claims. These responsibilities at a minimum would impose significant administrative burdens and costs. Indeed, even in situations in which damages are relatively mechanical to calculate, such as securities fraud class actions, an entire industry of claims processors has developed to handle these tasks—at substantial cost. Again, if compensation is to be adequate and fair, it cannot be mechanical and, therefore, the DOJ would have to devote its already limited resources to reviewing and assessing claims. This is an exceptionally poor use of DOJ's resources and would unnecessarily distract from the DOJ's core missions to investigate and prosecute antitrust violations (and other violations of federal law).

The preceding issues are exacerbated in circumstances like those existing in many antitrust cases where direct and indirect purchasers have asserted claims. Determining an appropriate restitution model in

those cases is highly complex. Moreover, given that indirect purchaser claims arise under state laws, it is at least highly questionable whether the DOJ could administer a fund for both types of purchasers.

The burdens and costs imposed are not offset by the potential increase in self-reporting that ACPERA critics imagine. Again, whether, and to what extent, the proposed system would increase self-reporting is entirely speculative and based on incorrect assumptions that restitution is simple to calculate and that a restitutionary fund easy to administer. As discussed above, neither of those assumptions is true.

3. Existing victim compensation funds are not analogous.

Proponents of the restitution fund model have suggested it is analogous to existing paradigms, such as the Victims Compensation Fund administered by the Attorney General to compensate victims of crimes committed by individuals in the federal witness protection program. 18 U.S.C. § 3525 (the “VCA”). But the VCA is fundamentally different from the fund proposed to replace civil damages under ACPERA. First, it is not intended as a substitute for civil liability under a statutory scheme, like the Clayton Act, that provides a right to compensation. The VCA is a discretionary scheme.⁴⁵ Second, a victim is not forced to resort to the VCA and, indeed, is eligible for VCA compensation only to the extent insurance or other recovery has not made them whole.⁴⁶ Third, the VCA simply is not a restitution scheme. The VCA is funded by the federal government (not the criminal) and, therefore, there is no premise that the fund is intended to disgorge ill-gotten gains and no formulas or other process are needed to ensure that a restitution fund in fact is adequate to fully and fairly compensate victims.⁴⁷ By contrast, under the ACPERA-replacement proposal, victims would have no recourse beyond the fund—and yet no input at the outset to ensure it will provide sufficient compensation.

⁴⁵ 18 U.S.C. § 3525(a).

⁴⁶ *Id.* § 3525(d).

⁴⁷ *Id.* § 3525(c).

In sum, restitution funds analogous to that proposed by ACPERA critics are effective only when they are linked to the sort of rigorous, fact-finding that civil plaintiffs undertake under ACPERA—and that ACPERA’s critics oppose.

E. COSAL Opposes Revising ACPERA to Set a Deadline for Determining Whether Cooperation Has Been Satisfactory.

COSAL recommends against amending ACERA to set in the statute a time for determining whether an amnesty applicant has provided satisfactory cooperation to civil claimants to incentivize leniency applications. First of all, such a determination necessarily varies from cases to case, and district courts are fully capable of deciding the appropriate timing under the circumstances.

Current ACPERA provisions help criminal prosecutors end conspiratorial behavior and proceed with their investigations on their desired timeframe, which may require stays in related civil cases. Civil claimants carry the stick of a potential finding of non-cooperation that will help them get the information needed to compensate victims of antitrust conspiracies.

ACPERA applicants can take comfort in knowing they will not be criminally prosecuted and can cut their civil damages, as well as in the fact that seeking a determination of timely sufficient cooperation is most likely in their hands and their hands alone. At least one court has rejected plaintiffs attempt to compel an ACPERA amnesty applicant to identify itself and provide cooperation, even after the civil case had been ongoing for more than two years. *See In re TFT-LCD (Flat Panel) Antitrust Litig.*, 618 F. Supp. 2d 1194 (N.D. Cal. 2009).

ACPERA applicants may also benefit from uncodified benefits arising from the nature of the relationship between the cooperating defendant and plaintiffs’ attorneys. These benefits may include minimizing litigation expenses, encouraging a more open discovery process, and reducing litigated discovery disputes. Proffers that ACPERA applicants provide will also help to move civil cases along.

Cooperating defendants may also benefit from early settlement discussions and further discounts to damages liability.

Despite the codified and uncodified benefits, counsel for potential leniency applicants suggest that before their clients come forward to confess their crimes, they still need more incentives, such as more specificity about a deadline for determining sufficient cooperation. Leaving aside that, without breaching privilege it is impossible to know how many potential leniency applicants have decided not to come forward due to lack of certainty about timeliness and sufficient cooperation, there are plenty of predictable benefits that come from cooperating as detailed above.

To be sure, there are a limited number of cases addressing ACPERA “timely” and “sufficient cooperation” provisions. However, arguments that the lack of guidance deters ACPERA applicants from doing the right thing are not based on a good understanding of the existing case law. There is but one example of a judge finding that the provided cooperation was insufficient. In *Auto Lights*, the would-be cooperating defendant forfeited the benefits of limited civil liability under ACPERA when it failed to provide all of the information provided to the U.S. Department of Justice, including an accurate start date for the conspiracy, until after plaintiffs could no longer amend their complaint. *Auto Lights*, 2013 WL 4536569, at *5-6. In reality, this decision provides common sense guideposts as to what is timely and complete cooperation.

From COSAL’s perspective, the lack of court opinions about sufficient cooperation and timeliness issues for a statute that has been in place for more than 15 years suggests parties to civil antitrust conspiracy cases with ACPERA applicants are working out their differences without court intervention. That tends to confirm that the law as written is working as intended to balance competing interests and does not need further amending to encourage greater cooperation.

F. COSAL Does Not Support Narrowing Cooperation to Encompass Only Information Provided to the DOJ.

Some critics have argued that cooperation should be expressly limited to information provided to the DOJ and have posited that it is unfair that civil plaintiffs may pursue a broader case than the scope of the criminal investigation. For example, at the ACPERA roundtable on April 11, 2019, John Wood of the U.S. Chamber of Commerce noted that “Plaintiffs may claim that the conduct lasted for a longer time period, involved additional companies or involved additional products. A leniency recipient may have no information to offer about those expanded allegations, because they fall outside of the scope of the reported conduct.”⁴⁸ These critics would cabin cooperation to only information provided to the DOJ.

COSAL opposes any effort to re-define the scope of cooperation under ACPERA. The text of the statute expressly requires an ACPERA applicant to: “provid[e] a full account to the claimant of all facts known to the applicant or cooperating individual, as the case may be, that are *potentially relevant to the civil action*.”⁴⁹ By its terms, ACPERA requires an applicant to conform its cooperation to matters at issue in the civil action—not negotiated disclosures to the federal government.

It is often the case that plaintiffs’ allegations in civil litigation do not match the confines of a federal guilty plea. The scope of the charged offense and plea is frequently a matter of negotiation between the DOJ and the ACPERA applicant. That negotiation may involve matters of prosecutorial discretion, especially in light of the differing burdens of proof applicable in the criminal and civil actions. The United States may determine to pursue a narrower case than civil plaintiffs because their case must be proven beyond a reasonable doubt. *See In re Polyurethane Foam Antitrust Litig.*, 152 F. Supp. 3d 968, 995–996 (N.D. Ohio 2015) (“The DOJ must negotiate plea agreements against the backdrop of the beyond-a-reasonable-doubt standard.”)

⁴⁸ April 11, 2019 Roundtable Tr. at 61:11-19, <https://www.justice.gov/atr/page/file/1161371/download>

⁴⁹ ACPERA §213(b).

ACPERA's broader scope of cooperation helps ensure that the applicant will provide fulsome cooperation that is not limited by a narrow interpretation of what is relevant. Of course, if an ACPERA applicant lacks any further information than that provided to the DOJ, it may advise civil attorneys of the limitations of the information in its possession. Under these circumstances, the ACPERA applicant's inability to provide information it does not have should be taken into consideration, along with its complete cooperation on other matters.

VI. COSAL Supports Limited Modification of ACPERA to Further Incentivize Cooperation with Civil Plaintiffs.

A. Cooperation Should Happen Before Motion to Dismiss Opposition is Filed.

Congress's intent in enacting ACPERA,⁵⁰ among other things, was to bolster the DOJ Antitrust Division's leniency program.⁵¹ The statute did this by incentivizing ACPERA applicants through significant limitations on the applicant's liability in civil actions seeking damages redress from the relevant anticompetitive (cartel) activity. The civil damages limitations – the elimination of treble damages and joint and several liability – were conditioned on the ACPERA applicant providing cooperation to the civil lawsuit plaintiff(s). In reauthorizing ACPERA in 2010,⁵² Congress clarified the ACPERA applicant's cooperation requirement by making explicit that the cooperation must be “timely”, although without further defining “timeliness.”

⁵⁰ Pub. L. No. 108-237, § 213(a)-(b), 118 Stat. 661, 666-668 (June 22, 2004).

⁵¹ United States Government Accountability Office, Report to Congressional Committees on Criminal Cartel Enforcement (No. GAO-11-619) at p. 2 (“Legislative history indicates that members of Congress intended ACPERA to increase the number of companies and individuals applying for antitrust leniency with DOJ – and thus the detection of cartels”) (2011) (“GAO Report”).

⁵² Pub. L. No. 111-190, 124 Stat. 1275 (June 9, 2010).

Both ACPERA and the 2010 amendments are positive legislation, advancing the goal of enhancing the enforcement of our nation’s antitrust laws. There appears to be consensus among the “stakeholders” that ACPERA and the 2010 amendments are generally beneficial. See generally GAO Report.⁵³

A clarifying amendment to the timeliness of cooperation requirement – stating expressly that the cooperation of the ACPERA applicant must be substantially completed prior to the deadline for the civil damages plaintiff to file its response to any motions to dismiss its complaint – will dissipate the conflict and confusion among the parties’ lawyers as to ACPERA’s requirement of timely cooperation and will advance one of the primary legislative purposes of ACPERA, that is, to enhance the enforcement of the nation’s antitrust laws.

B. Congress Should Consider Whether Damages Related to a Conspiracy Broader than the Cooperation Should be Trebled.

One of the key provisions of the ACPERA is its “detrebling relief”, which provides that an applicant may be relieved of the full scope of damages available to plaintiffs in civil actions arising from the anticompetitive activity of the applicant that is within the scope of the DOJ’s leniency agreement. Specifically, the ACPERA applicant is relieved of the joint and several liability and trebling of damages afforded by the Clayton Act to all plaintiffs successfully asserting claims under section one of the Sherman Act—provided that it meets the satisfactory cooperation requirements under ACPERA. The ACPERA applicant, then, is liable only for damages proportional to its share of the commerce affected by the anticompetitive conduct.⁵⁴

⁵³ GAO Report at p. 26 (“Plaintiffs’ attorneys from most of the cases in our sample reported that ACPERA’s cooperation provision has generally helped advance their civil cases by improving their cases’ strength and efficiency.”); at p. 20 (“All of the defense attorneys for the 4 post-ACPERA leniency applicants told us that the benefit from relief from treble damages and joint and several liability motivated the company to apply for leniency.”).

⁵⁴ The pertinent language of ACPERA provides that “in any civil action alleging a violation of section 1 or 3 of the Sherman Act, or alleging a violation of any similar State law, based on conduct covered by a currently effective antitrust leniency agreement, the amount of damages recovered by or on behalf of a

While the “detrbling relief” of ACPERA is considered one of the salutary incentives attracting cartelists to make DOJ leniency applications,⁵⁵ this policy goal should be balanced against other fundamental policy goals considered important to antitrust enforcement. Thus, the courts have long recognized that private civil antitrust litigation is a bulwark of antitrust enforcement⁵⁶ and that treble damages and joint and several liability are important factors that induce robust private civil actions.⁵⁷ A reasonable balance of these respective goals suggests that Congress should consider whether the “detrbling

claimant from an antitrust leniency applicant who satisfies the requirements of subsection (b), together with the amounts so recovered from cooperating individuals who satisfy such requirements, shall not exceed that portion of the actual damages sustained by such claimant which is attributable to the commerce done by the applicant in the goods or services affected by the violation.” Pub. L. No. 108-237, § 213(a)-(b), 118 Stat. 661, 666-668 (June 22, 2004), as amended by Pub. L. No. 111-190, 124 Stat. 1275 (June 9, 2010), codified as amended at 15 U.S.C. § 1 note (“ACPERA”).

⁵⁵ Assistant Attorney General Delrahim stated recently in an ACPERA Roundtable discussion: “ACPERA not only increased the criminal antitrust penalties, but promised to bolster [the DOJ] leniency program by allowing a company that’s qualifies for leniency to avoid paying the treble damages and follow-on civil suits. This benefit can be substantial under ACPERA, that the leniency applicant that satisfies the cooperation requirements is civilly liable only for the actual damages to his own conduct, rather than being liable for the treble damages caused by the entire unlawful conspiracy. While treble damages liability can be an important deterrent for engaging in anti-competitive behavior, such enormous civil exposure can also have the unfortunate consequence of deterring the self-reporting of criminal wrongdoing.” <https://www.justice.gov/atr/page/file/1161371/download>, at pp. 6-7.

⁵⁶ *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) (“Congress created the treble-damages remedy of Section 4 precisely for the purpose of encouraging private challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations.”).

⁵⁷ See Hovenkamp, A Primer on Antitrust Damages, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2848&context=faculty_scholarship, at n. 5 (“In a private enforcement system such as that created by § 4 of the Clayton Act, however, an increase in the size of the expected fine will increase, not decrease, the probability of having to pay the fine, because there would be more private enforcement.”)

relief” accorded by the current ACPERA provisions should be modified in circumstances where plaintiffs prove a broader conspiracy at trial.

At a civil trial it may be that the scope of the antitrust conspiracy and antitrust damages found by the jury exceeds that described by the ACPERA applicant in its cooperation with the plaintiffs. Congress should consider whether, in certain circumstances where the ACPERA applicant has participated in a broader conspiracy, the applicant should be liable for treble damages and joint and several liability for that amount of damages that reflects the scope of the antitrust conspiracy that exceeds that described in the cooperation of the ACPERA applicant. For example, if the ACPERA applicant in its cooperation with plaintiffs describes a conspiracy for the duration of 2012 through 2015, and the jury finds that the conspiracy and its impact extended through 2017, the ACPERA applicant should be jointly and severally liable for treble the amount of damages attributable to the years 2015, 2016, and 2017. This modest refinement on ACPERA’s current “detrbling relief” provision should not substantially undermine the incentive to the cartelist to come forward, because it will still get “detrbling relief” for the damages attributable to the scope of the conspiracy it describes in cooperation. On the other hand, the refinement we propose would have the salutary effects of (i) encouraging private antitrust enforcement and (ii) encouraging the ACPERA applicant to disclose fully the scope of the illegal antitrust activities of which it has knowledge or information.

C. Providing a Bounty for Antitrust Whistleblowers.

One way to strengthen the DOJ’s existing Leniency Program and ACPERA would be to enact an antitrust whistleblower provision that: (1) protects those who report antitrust violations from retaliation, and (2) awards the whistleblower a bounty based on any fine arising from successful criminal prosecutions. Robust whistleblower programs exist within the Internal Revenue Service, the Securities Exchange

Commission, and the Commodity Futures Trading Commission.⁵⁸ Further, the European Commission recently announced a whistleblower program to augment its antitrust enforcement efforts (among other areas).⁵⁹

In July 2011, the GAO issued a report recommending that Congress amend ACPERA to add anti-retaliatory protection for those reporting criminal antitrust violations.⁶⁰ Since early 2013, Congress, too, has flirted with enacting an antitrust whistleblower statute, but no bill has yet passed both Houses.⁶¹ However, unlike comparable whistleblower programs for tax, securities, and commodities violations, neither bill included a bounty for the whistleblower.

Adding whistleblower protection against retaliation and a bounty provision would enhance the DOJ's existing Leniency Program by incentivizing individuals with knowledge of cartel behavior to report such conduct to the DOJ. The GAO noted in its July 2011 Report that several stakeholders stated that a bounty provision "might motivate more whistleblowers to report criminal activity to DOJ which, in turn, could result in greater cartel detection by the agency."⁶² The Antitrust Division, however, has been less

⁵⁸ See, e.g., NYSBA Commercial & Federal Litigation, Antitrust Committee, *Whistle While You Work—For a Cartelist: Whistleblower Protection and Antitrust*, N.Y. Litigator (Fall 2015) (discussing IRS and SEC whistleblower programs); 26 U.S.C. § 7623 (IRS bounty program); 15 U.S.C. § 78u-6 (SEC whistleblower program); 7 U.S.C. § 26 and 17 C.F.R. Part 165 (CFTC's whistleblower program).

⁵⁹ See Michael Acton, *Antitrust whistleblowers safe after tweaks to new EU law, Dutch regulator says*, MLEX (Mar. 19, 2019), <http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1075114&siteid=190&rdir=1>; European Parliament Press Release, *Protecting whistle-blowers: new EU-wide rules approved* (Apr. 16, 2019), <http://www.europarl.europa.eu/news/en/press-room/20190410IPR37529/protecting-whistle-blowers-new-eu-wide-rules-approved>.

⁶⁰ *Criminal Cartel Enforcement: Stakeholder Views on Impact of 2004 Antitrust Reform Are Mixed, but Support Whistleblower Protection*, GAO-11-619, <http://www.gao.gov/assets/330/321794.pdf>.

⁶¹ See Criminal Antitrust Anti-Retaliation Act of 2013, S.42, 113th Cong. § 216 (2013); Criminal Antitrust Anti-Retaliation Act of 2017, S.807, 115th Cong. § 216 (2017).

⁶² *Criminal Cartel Enforcement: Stakeholder Views on Impact of 2004 Antitrust Reform Are Mixed, but Support Whistleblower Protection*, GAO-11-619, at 37.

supportive, noting that while such a provision might reveal more cartels, that benefit would, in its view, be outweighed by, among other things, the fact that whistleblowers would be interested witnesses at trial—and thereby be subject to impeachment.

The DOJ's position seems unpersuasive, however. As it is, the officers and employees of the company granted leniency—who escape criminal fines and imprisonment—are similarly interested trial witnesses. Skilled trial lawyers—and especially criminal prosecutors—are fully able to present their cases through such individuals. And, this sort of concern has not hobbled the enforcement efforts of the IRS, the SEC, or the CFTC.