

**COMMENTS OF THE ANTITRUST LAW SECTION OF THE
AMERICAN BAR ASSOCIATION REGARDING THE
U.S. JUSTICE DEPARTMENT ANTITRUST DIVISION
ROUNDTABLE DISCUSSION OF THE ANTITRUST CRIMINAL PENALTY
ENHANCEMENT & REFORM ACT (ACPERA)
APRIL 11, 2019**

The views stated in this submission are presented on behalf of the Antitrust Law Section; they have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore should not be construed as representing the policy of the American Bar Association as a whole.

I. Introduction

On April 11, 2019, ABA’s Antitrust Law Section (the “Section”) participated in a public “roundtable discussion” focused on the Antitrust Criminal Penalty Enhancement & Reform Act (“ACPERA”). The event was organized by the Antitrust Division (the “Division”) of the U.S. Department of Justice (“DOJ”). In addition to the DOJ and the Section, other participants included the U.S. Chamber of Commerce, the Global Antitrust Institute, the Business Industry Advisory Committee to the OECD, the Hon. Douglas H. Ginsburg, Senior Judge of the United States Court of Appeals for the District of Columbia Circuit, and experienced antitrust practitioners speaking in their individual capacities. A purpose of the Roundtable was to allow the DOJ “to hear from interested stakeholders whether ACPERA has incentivized the self-reporting of criminal conduct and whether there are issues that have impeded the successful implementation of ACPERA.”¹ These comments summarize the views of the Section and have been approved by the Section’s Council. The comments have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the policy of the ABA. Likewise, these comments do not reflect those of any Section member’s law firm or clients.

Purpose of ACPERA

The Division has consistently made criminal cartel enforcement a top priority.² A key tool in carrying out the Division’s criminal enforcement mission has been and continues to be the

¹ U.S. Department of Justice, Public Roundtable on Antitrust Criminal Penalty Enhancement & Reform Act (ACPERA), available at <https://www.justice.gov/atr/events/public-roundtable-antitrust-criminal-penalty-enhancement-reform-act-acpera>

² Bryan Koenig, *DOJ Antitrust Head Says Leniency Program ‘Alive and Well,’* LAW 360 (Apr. 11, 2019, 7:51 PM), available at <https://www.law360.com/articles/1149183/doj-antitrust-head-says-leniency-program-alive-and-well->

Corporate Leniency Policy, which provides the possibility for complete immunity to the first corporation involved in an antitrust conspiracy that reports its conduct to the Division.

Under the Leniency Policy, the corporation and its executives will not be criminally charged for the reported violations of antitrust law provided that they fully cooperate with the Division's investigation and comply with other terms of the policy.³ The leniency program has helped the Division to uncover cartels affecting billions of dollars' worth of commerce in the U.S. and has led to prosecutions resulting in record fines and jail sentences for culpable employees.⁴ The DOJ's leniency policy also has helped the victims of anticompetitive conduct to identify losses they may have suffered, which they can seek to redress through civil litigation.⁵

Passed in 2004, ACPERA addressed a significant disincentive to self-reporting and cooperating with the Division under the Leniency Policy.⁶ Prior to ACPERA's passage, companies considering self-reporting faced the likelihood of subsequent civil lawsuits that entailed statutorily enhanced damage remedies against them. Specifically, follow-on civil litigation posed the threat of significant costs in the form of treble damages combined with joint and several liability. A company that self-reported to the Division could find itself faced with civil exposure of up to three times the total damages caused by the *entire conspiracy*.

ACPERA's signature feature is a limitation on damages for the leniency applicant.⁷ Specifically, the Act eliminates (1) the trebling of damages and (2) joint and several liability for sales other than the reporting firm's own, thereby removing a key disincentive to self-reporting. In addition, to qualify for the limitation on damages, ACPERA requires a leniency applicant to provide satisfactory cooperation to civil claimants seeking redress and compensation for losses resulting from the anticompetitive conduct. Section 213(b) of the Act defines the required cooperation to include providing (1) "a full account to the claimant of all facts known to the applicant ... that are potentially relevant to the civil action," and (2) "all documents or other items potentially relevant to the civil action that are in the possession, custody, or control of the applicant."⁸

II. Summary of Section's Recommendations in 2004 and 2009 ACPERA submissions

³ Under the Antitrust Division's leniency program, a company or individual who is the first to self-report a criminal antitrust violation, and who meets certain requirements, can obtain full immunity from prosecution for itself and its executives and employees. See Model Corporate Conditional Leniency Letter, available at <http://www.justice.gov/atr/public/criminal/239524.pdf>; Model Individual Conditional Leniency Letter, available at <http://www.justice.gov/atr/public/criminal/239526.pdf>. See also Scott D. Hammond & Belinda A. Barnett, *Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters*, (Nov. 19, 2008, updated Jan. 26, 2017), <http://www.justice.gov/atr/public/criminal/239583.pdf>.

⁴ Assistant Attorney General Makan Delrahim Opening Remarks at Roundtable Discussing the Antitrust Criminal Penalty Enhancement & Reform Act, (Apr. 11, 2019), available at <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-opening-remarks-roundtable-discussing>.

⁵ Deputy Attorney General Rod Rosenstein, Remarks to the New York City Bar White Collar Crime Institute (May 9, 2018), available at <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-new-york-city-bar-white-collar>.

⁶ See 150 CONG. REC. H3657 (daily ed. June 2, 2004).

⁷ Niall Lynch and Kathleen Fox, *How ACPERA Has Affected Criminal Cartel Enforcement*, LAW 360 (Aug. 11, 2011, 1:32 PM), available at <https://www.law360.com/articles/263095/how-acpera-has-affected-criminal-cartel-enforcement>.

⁸ Pub. L. 108-237, § 213(b), 118 Stat. 666 (emphases added).

2004 Support

In 2004, the Section supported the adoption of the proposed legislation that became ACPERA and offered some suggestions as to how to strengthen certain aspects of the proposed law. In particular, the Section recognized the detrebling provision as a creative step towards enhancing the incentive of firms to come forward to cooperate with the Division with regard to criminal antitrust activity. The legislation's proposed elimination of (a) trebling and (b) joint and several liability for sales others than the firms' own in both federal and state actions was a very significant reduction in potential liability that the Section believed would directly affect (i) direct purchaser class actions; (ii) opt out direct purchaser cases; (iii) foreign direct purchaser claims; and (iv) state indirect purchaser actions.

The proposed damages limitations were also consistent with the leniency applicant's obligation to pay restitution, since the legislation preserves liability for actual damages suffered by consumers as a result of the cooperating firm's sales.

In its support of the legislation, the Section focused on three factors. First, the corporate risk created by civil antitrust liability is enormous. Potential civil liabilities (with or even without the criminal fine) can be, and in many cases have been, "bet the company" in scope. Second, the prospect of those liabilities could prevent companies from disclosing their involvement with cartel activity through the Division's leniency program, to the ultimate detriment of consumers and the public generally. And, third, incentivizing disclosure by reducing exposure through detrebling but requiring of substantial cooperation by the leniency applicant could serve the public interest without compromising restitution to victims.

As ACPERA was being debated, the Section's most pressing concern with the proposed legislation was that it did not include objective standards for measuring a company's cooperation to determine whether the company's efforts were sufficient to qualify for the damages limitations benefit. In addition, the legislation as proposed offered little guidance on the timing of the decision whether a leniency applicant would benefit from detrebling.

In the Section's view, the lack of a reasonable means for a leniency applicant to determine its eligibility for detrebling in advance of proffering cooperation to the civil plaintiffs had the potential to seriously undermine the intended benefits of the legislation. Accordingly, the Section encouraged Congress to hold hearings and public briefings in order to more concretely define procedural standards for assessing the sufficiency of an applicant's cooperation.

2009 Support

As passed in 2004, ACPERA's damages limitation was set to expire under a five-year sunset provision.⁹ In 2009, the Section submitted to the House and Senate Committees on the Judiciary comments in support of a five-year extension of these key provisions.¹⁰ A principal factor behind

⁹ See Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, tit. II, 118 Stat. 661 (2004).

¹⁰ Letter from James A. Wilson, Chair, Section of Antitrust Law, the American Bar Association, to Hon. Patrick Leahy, Chairman, Committee on the Judiciary, United States Senate, Hon. Jeff Sessions, Ranking Member, Committee on the Judiciary, United States Senate, Hon. John Conyers, Jr., Chairman, Committee on the Judiciary,

the Section's recommendation was to allow additional time to fully evaluate the benefits of ACPERA and specifically to consider whether the pluses of the damages limitations outweighed any minuses.

Even in 2009, there was debate as to the impact and effectiveness of the damages limitations provision.¹¹ Proponents of the detrebling and actual damages provisions believed the provisions played a significant role in a company's decision to seek leniency from the Division, thus often effectively ending ongoing criminal conduct and making it more likely that victims of that crime would receive compensation for their losses.

In contrast, as the Section acknowledged, others believed the detrebling provision to be unnecessary and not a significant factor in a company's decision to seek leniency. Generally, critics argued applicants were motivated to seek leniency by (1) the threat of prison time for high-level executives involved in the conduct, and (2) the necessity of making amnesty decisions on a global scale. They further argued that amnesty applicants routinely resolved subsequent civil exposure in exchange for cooperation and relatively small settlement amounts based on the defendant company's own sales, not the total sales of the conspiracy and, thus, it was unnecessary to codify the proposed damages limitations via ACPERA.

In 2010, Congress extended ACPERA for another ten years.¹²

III. Judicial Rulings Interpreting ACPERA

There is a dearth of judicial rulings interpreting ACPERA.¹³ One possible reason for this is that the text of ACPERA provides little specific guidance to courts or leniency applicants for applying § 213(b), which requires that a leniency applicant “respond[] completely and truthfully, without making any attempt either falsely to protect or falsely to implicate any person or entity, and without intentionally withholding any potentially relevant information” and provide “a full account to the claimant of all facts known to the applicant . . . that are potentially relevant to the civil action.”¹⁴

This general language of § 213(b), combined with a relative paucity of case law addressing substantive issues under the statute,¹⁵ has led some to question whether there is too much uncertainty concerning an applicant's eligibility for damages-limiting benefits under the Act. However, in the fifteen years since ACPERA went into effect, there has been only one case in

United States House of Representatives, Hon. Lamar Smith, Ranking Member, Committee on the Judiciary, United States House of Representatives (May 8, 2009).

¹¹ Michael D. Hausfeld, et al., *Observations from the Field: ACPERA's First Five Years*, 10 SEDONA CONF. J. 95, at 106-10 (2009).

¹² See Antitrust Criminal Penalty Enhancement and Reform Act of 2004 Extension Act, Pub. L. No. 111-30, § 2, 123 Stat. 1775 (2009) (extending the Act's date of termination by one year) and Pub. L. No. 111-190 § 1, 124 Stat. 1275 (2010) (delaying the earlier sunset provision to extend the Act ten years).

¹³ See Amy Manning, ACPERA – *Eight Years Later*, “Satisfactory Cooperation” Lacks a “Satisfactory” Definition, 2012 International Cartel Workshop, American Bar Association Section of Antitrust Law and the International Bar Association (February 2012), available at <https://www.mcguirewoods.com/news-resources/publications/antitrust/ACPERA-Eight-Years-Later.pdf>.

¹⁴ The Antitrust Criminal Penalty Enhancement and Reform Act of 2004, at §213(b).

¹⁵ A Westlaw search conducted in the preparation of these comments revealed only 25 reported decisions citing ACPERA since its 2004 passage, most of which merely mention the Act in passing.

which an applicant was denied those benefits. *See In re Aftermarket Auto. Lighting Prod. Antitrust Litig.*, 2013 WL 453569 (C.D. Cal. Aug. 26, 2013) (“*Auto Lights*”). In *Auto Lights*, the leniency applicants failed to inform plaintiffs that the conspiracy had started several years earlier than alleged in plaintiffs’ complaint, which plaintiffs only learned (from obtaining witness memoranda from the sentencing proceeding) after the deadline for amending the complaint had passed. The court found that the applicants had thus failed to provide plaintiffs, to plaintiffs’ prejudice, “with a ‘full account’ of facts *potentially* relevant to the conspiracy.” *Id.* at *4.

In an earlier decision from the same District, the court found that it could not “compel the amnesty applicant to identify itself and cooperate with plaintiffs,” but acknowledged that the “value of an applicant’s cooperation diminishes with time” and reserved judgment on the issue of eligibility for the liability limitation. *In re TFT-LCD Antitrust Litig.*, 618 F. Supp. 2d 1194, 1196. Another court held that while a leniency applicant is not required to be at plaintiffs’ “beck and call,” it must use “its best efforts to secure and facilitate from cooperating witnesses” their “availability for such interviews, depositions, or testimony in connection with the civil action as the claimant may reasonably require.” *In re Sulfuric Acid Antitrust Litig.*, 231 F.R.D. 320, 329 (N.D. Ill. 2005).

In view of the circumstances raised in the limited case law, it may be useful to consider criteria for providing to plaintiffs information turned over to the Division in sufficient time to be used in an amended pleading or in opposition to a motion to dismiss. The Division would have to make known its timing constraints, in order both to permit the court to take them into account in its scheduling order and to not jeopardize the criminal investigation by premature disclosure. Either a stipulation or a motion by the Division for a stay or partial stay of the civil proceedings is a logical means to address such case management issues.

IV. A Timely Opportunity to Review Whether ACPERA Operates as Intended

With ACPERA on the verge of expiration, it is an opportune time to review whether ACPERA is operating as intended by serving to induce self-reporting by companies to the Antitrust Division’s Corporate Leniency Program. The perception exists among some that leniency applications have been declining as the costs associated with self-reporting have risen¹⁶, although it also may be that ACPERA is effectively deterring wrongful conduct or that this phenomenon is attributable to factors other than ACPERA.¹⁷

The Antitrust Division does not publish statistics on the Leniency Program. However, the Antitrust Division’s Ten Year Workload Statistics Report show a sharp drop in criminal cases filed by the Antitrust Division in recent years.¹⁸ Over the ten-year period between 2008-2017, the Antitrust Division filed charges against approximately 20 companies per year. However, the number of companies charged dropped to eight in FY 2017 and fell to only two in FY 2018. While these statistics may not represent an equivalent decline in the use of the Leniency Program, the Section recommends exploring whether this decline reflects any failure of ACPERA to incent self-

¹⁶ See John M. Taladay, *Why ACPERA Isn’t Working and How to Fix It*, CPI ANTITRUST CHRONICLE (Jan. 21, 2019), available at <https://www.competitionpolicyinternational.com/why-acpera-isnt-working-and-how-to-fix-it/>.

¹⁷ *Criminal Cartel Enforcement: Stakeholder Views on Impact of 2004 Antitrust Reform Are Mixed, But Support Whistleblower Protection*, U.S. Gov’t Accountability Office, GAO-11-619 (July 2011), available at <http://www.gao.gov/assets/330/321794.pdf>.

¹⁸ Antitrust Division Workload Statistics, available at <https://www.justice.gov/atr/division-operations>.

reporting, as distinguished from other potential factors such as the growth of foreign enforcement proceedings and the challenges of obtaining leniency markers in multiple jurisdictions.

V. Meaning of “Actual Damages”

ACPERA states that “the amount of damages recovered by or on behalf of a claimant from an antitrust leniency applicant who satisfies [certain cooperation] 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.*”¹⁹

However, ACPERA provides little guidance to the courts, plaintiffs and defense bar regarding how to define “actual damages,” and the DOJ has not expressed its view publicly. While not possible to measure objectively, there is some concern, particularly among the defense bar, that this uncertainty regarding ACPERA’s benefits potentially undermines its effectiveness. Therefore, the Section recommends the Division consider whether a clearer definition of “actual damages” should be adopted to further Congress’ intentions to promote leniency applications.

VI. DOJ Policy re Antitrust and FCA damage claims

In authorizing ACPERA’s extension in 2009, Congress inserted a requirement that leniency applicants provide “timely” cooperation, including “a full account” of all facts as well as documents or other items in the leniency recipient’s possession, custody, or control that are “potentially relevant to the civil action.”

However, uncertainty exists as to when leniency recipients may realize the benefits of their cooperation.²⁰ ACPERA’s benefits may be greatly reduced if an applicant’s eligibility for reduced liability is not determined before litigation through trial.

The Section recommends that the Division consider how ACPERA can be implemented (and, if necessary, amended) to facilitate settlement agreements at an early stage, consummated without delay to be co-extensive with the provision of timely and fulsome cooperation provided by the leniency recipient.

At the 2018 ABA Antitrust Section Fall Forum, AAG Delrahim announced that the Antitrust Division “will exercise [Clayton Act Section] 4A authority to seek compensation for taxpayers when the government has been the victim of an antitrust violation.”²¹ The announcement was made in connection with civil resolutions jointly announced by the Antitrust Division and the Civil Division involving alleged bid rigging on Korean fuel supply contracts. The Civil Division pursued charges against the cooperating defendants for the alleged bid-rigging scheme under the False Claims Act. AAG Delrahim’s remarks at the Fall Forum clarified that ACPERA’s

¹⁹ Pub. L. 108-237, § 213(a), 118 Stat. 666 (emphases added).

²⁰ Thomas Mueller and Gregory Evans, *ACPERA and the Value of Uncertainty*, 2010 International Cartel Workshop, American Bar Association Section of Antitrust Law and the International Bar Association (February 2010), available at <https://www.wilmerhale.com/en/insights/publications/acpera-and-the-value-of-uncertainty-february-12-2010>.

²¹ Assistant Attorney General Makan Delrahim Remarks at the American Bar Association Antitrust Section Fall Forum, (Nov. 15, 2018), International Cartel Workshop available at <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-remarks-american-bar-association-antitrust>.

“detrbling incentive will apply to any Section 4A claims brought by the government” and noted that “[c]ooperating companies subject to penalties under multiple statutes can gain certainty and finality.” However, his remarks did not address whether the “detrbling incentive” will apply equally to False Claims Act claims when a leniency recipient reports bid rigging involving government procurement.

The Section recommended exploring the extent to which DOJ’s pursuit of antitrust and False Claims Act damages from leniency applicants will impact incentives to report conduct to the Antitrust Division’s Leniency Program. The Section also recommended that the DOJ clarify its policy with regard to whether it will limit Clayton Act 4A and False Claim Act recoveries from leniency recipients, who cooperate fully with the Antitrust Division and Civil Division, to actual damages and subject them to joint and several liability.

VII. Further Input From Experienced Practitioners

Because of the diversity of viewpoints among its membership, the Section cannot take concrete positions on whether, and to what extent, ACPERA should be amended in light of some of the potential concerns outlined above. The Section does, however, encourage the Division to reach out to experienced practitioners from both the plaintiff and defense sides to gauge their experiences with ACPERA and receive any suggestions for improvement. For example, the Division could consider soliciting the views both of defense counsel who have represented applicants to the Leniency Program over the past five years and members of the plaintiffs’ bar who have litigated related class actions during the same timeframe.