PUBLIC ROUNDTABLE DISCUSSION:
ANTITRUST CRIMINAL PENALTY
ENHANCEMENT AND REFORM
ACT ("ACPERA")

Transcript as edited by Panelists

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Richard Powers, Deputy Assistant Attorney General

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P R O C E E D I N G

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

ASSISTANT ATTORNEY GENERAL DELRAHIM: Thanks, Ann. Good afternoon. I want to welcome all of you here. It's great that so many of our colleagues -- an honor to have Judge Ginsburg back at the Division to help us with this review of the ACPERA. And I want to welcome you. This is the first event we've having since we dedicated this lecture hall to Anne Bingaman, so, this is the Anne K. Bingaman Auditorium and Lecture Hall, and it's great that it's the first one.

It's also fitting that we're discussing this important ACPERA legislation here in this room, given that Anne -- her contributions to the Division's leniency program were incredible, and some of you who were here two weeks ago for that, would have heard from her directly about some of

what she has done and some of her colleagues.

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

It has resulted in the prosecution of sophisticated international cartels and the collection of billions of dollars in criminal antitrust fines. ACPERA compliments 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.

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

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

This benefit can be substantial. Under ACPERA, 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.

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

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

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

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

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

program."

Despite some recent eulogies over the purported death of leniency, the Division's leniency program is still alive and well. In fact, the number of 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. Indeed, the Division is vigorously investigating cartel conduct and closed FY 2018 with 91 pending grand jury investigations, the highest total since 2010.

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

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

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

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

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

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

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

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

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

important topic.

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

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

DEPUTY ASSISTANT ATTORNEY GENERAL POWERS: Thank you, Makan. And thank you to all of our panelists for taking the time to participate in today's roundtable discussion. We have many distinguished practitioners here with us today, and we are excited for what we hope will be a lively and deeply substantive discussion.

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

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

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

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

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

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

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

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

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

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

Now, that said, restitution for victims, of

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

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

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

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

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

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

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

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

for optimal deterrence of cartels.

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

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

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

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

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

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

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

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

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

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

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

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

know, a single cartel case brought tomorrow might drastically change the picture drawn by these conventional year-to-year enforcement statistics.

A more accurate account of the Division's productivity might be obtained by spreading its case, fine, and jail time statistics out over the entire period of years from the opening of an investigation through conviction and sentencing, in proportion to the resources they consumed each year – similar to amortizing R&D over the period during which it pays off. I suggest the Division try to develop and publish statistics along these lines.

Additionally, Makan mentioned the 91 grand juries now working, and I remember there were 130 working when I was here. The number of active grand juries at the end of the year may be another useful statistic for the Division to publish in order better to reflect its productivity.

In addition to the apparent decline in cases over these last few years, there has been a change in the kinds of

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

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

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

First is the increase of antitrust exposure in other

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

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

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

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

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

A second hypothesis is that technological

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

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

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

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

The third hypothesis worth considering is that the decrease in criminal cases simply reflects the success of the Division's criminal enforcement program. I think, Makan, you may be a little too quick to assume there is just as much cartel activity out there as ever; instead, the Division may be the victim of its own success. After all, more severe sanctions – especially here in the U.S. where individuals are liable for fines and imprisonment but in other jurisdictions as well – should be expected to deter the formation of more cartels. The success or failure of ACPERA and the Division's current criminal enforcement program should be judged by determining – as best we can when dealing with the inherently unknowable number of cartels – how various elements of the criminal enforcement program contribute to the Division's ability to detect established cartels and to deter the formation of new cartels.

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

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

One would expect a successful enforcement of criminal penalties pursuant to ACPERA to follow the same pattern. After all, the same calculus that leads a cartel member to report the cartel and to seek leniency should also apply to its ex ante decision whether to form or join the cartel. The lower rates of detection today are consistent with this hypothesis.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Passed in 2004 ACPERA addressed a significant disincentive to self-reporting and to cooperating with the Division under the leniency policy. Prior to ACPERA's passage companies considering self-reporting faced a likelihood of subsequent civil lawsuits that entailed statutorily-enhanced damage remedies against them. Specifically, follow-on civil litigation posed a 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 thus 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.

Specifically, the Act eliminates the trebling of damages and joint and several liability for sales other than the reporting firm's own sales, 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 anti-competitive conduct. Section 213(b) of the Act defines the required cooperation to include "providing a full account to the claimant of all facts known to the applicant … that are potentially relevant to the civil action" and "all documents for other items potentially relevant to the civil action that are in the possession, custody or control of the applicant."

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

passage of ACPERA, and we recognize those efforts.

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

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

In 2004, the Section supported the adoption of the proposed legislation that became ACPERA, and also offered some suggestions as to how to strengthen certain aspects of the proposed law. In particular, the Section recognized that the detrebling provision of the legislation was 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 trebling and of joint and several liability for sales other than the firm's own, was a very significant reduction in potential liability that the Section believed would directly affect direct purchaser actions, opt out cases, foreign direct purchaser claims and state indirect purchaser claims.

The proposed damages limitations were also consisted with the leniency applicant's obligation to pay restitution, since the legislation preserves liability for action 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 liability is enormous. Potential liabilities with, or even without, criminal fines 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 also requiring substantial cooperation by the leniency applicant, could serve the public interest without compromising restitution to the victims.

The Sections' most pressing concern with regard to 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 limitation benefits. In addition, the legislation as proposed prior to adoption offered little guidance on the timing of the decision and whether the leniency applicant would be eligible for 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 civil plaintiffs, had the

potential to seriously undermine the intended benefits of the legislation.

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.

And now a few words about the 2009 comments by the Section. So as passed in 2004, ACPERA's damages limitations provision was set to expire under a five-year sunset provision. 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.

A principal factor behind the Section's recommendations 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.

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

those provisions played a very 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 the victims of the crime would receive compensation.

In contrast, and as the Section acknowledged, others believed that the detrebling provision was unnecessary and not a significant factor in a company's decision to seek leniency. Generally critics argued that applicants were motivated to seek leniency by two primary considerations, the threat of prison time for high-level executives involved in the conduct, and 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, which were based on the company's own sales and not the total sales of the conspiracy.

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

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

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

Today's roundtable provides a timely opportunity 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 applicants have been declining as the costs associated with self-reporting have risen. Although it may also be that the threat of discovery as a result of ACPERA is effectively deterring wrongful conduct, or that this phenomenon is attributable to factors other than ACPERA.

The Antitrust Division does not publish

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

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

So 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. That's a mouthful.

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

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

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

In authorizing ACPERA's extension in 2009 Congress inserted a requirement that leniency applicants must provide timely cooperation, including a full account of all facts, as well as documents, in the leniency recipient's possession. However, uncertainty exists as to when leniency recipients may realize the benefits of their cooperation. 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 by the leniency applicant.

At the 2018 ABA Antitrust Section Fall Forum Assistant Attorney General Delrahim announced that the Antitrust Division "will exercise Clayton Act Section 4(a) authority to seek compensation for taxpayers when the Government has been the victim of an antitrust violation." 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 detrebling incentive will apply to any Section 4(a) claims brought by the Government and noted that cooperating companies subject to penalties under multiple statutes can gain certainty and finality. However, his remarks did not address whether the detrebling incentive will apply equally to False Claims Act claims, when a leniency recipient reports

bid rigging involving Government procurement.

The Section recommends exploring how 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. We also recommend that the DOJ clarify its policy with regard to whether it will limit Clayton Act 4(a) and False Claims Act recoveries from leniency recipients who cooperate fully with the Antitrust Division and the Civil Division, to actual damages or subject them to joint and several liability.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And finally, disqualification from Government

contracts for bidding on public tenders.

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

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

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

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

States highlights the tension and the need for proportionate and strong relief from this uncertainty.

The Justice Department should take note of the fact that civil consequences of antitrust violations have increased drastically since ACPERA was first introduced. Settlements in civil class actions have knocked out cases in the United States, have hit really startling levels, with follow-on cases routinely producing hundreds of millions of dollars in damages, and those are just for the reported class settlements, because the actions that are brought by opt-outs, including large corporate buyers, are often to the tune of tens or even in the hundreds of millions of dollars in additional payments that are not made public.

The dual recovery regime in the United States resulting from Illinois Brick that allows both direct and indirect purchasers to obtain multiple recoveries, creates the threat not only of treble damages but even something that exceeds treble damages. And direct purchaser settlements are often negotiated before opt-outs are known, so that what is being paid to the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

this roundtable.

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

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

Thank you, John.

MR. WOOD: Thank you very much and good

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

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

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

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

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

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

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

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

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

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

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

Second, there remains significant uncertainty regarding what constitutes satisfactory cooperation

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

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. Does that mean that the company's cooperation is not satisfactory? Does it mean that the company's ACPERA protection is limited to the scope of the conduct that it reports, but that the company will still face joint and several liability and treble damages for claims that may be outside the scope?

Companies are rightfully concerned that such uncertainty could be used to extract higher settlements from leniency recipients. The requirement that a leniency recipient provide timely cooperation to civil plaintiffs further complicates the analysis. As with satisfactory cooperation, the statute does not define timely, which provides additional uncertainty. The leniency recipient may receive no benefit from cooperating early if the plaintiffs allege a conspiracy broader than the reported conduct. The leniency recipient named in a civil complaint that alleges a vast overarching conspiracy with little connection to the conduct it reported surely has an interest in moving to dismiss that complaint and narrow the claims against it. Yet, as the litigation progresses with no cooperation, the plaintiff's arguments that the leniency recipient has not provided timely cooperation gain more credence.

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

cooperation and what constitutes timely cooperation under ACPERA.

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

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

predictability required to make it a meaningful incentive for businesses to self-report cartel conduct.

We hope that Congress takes action to extend ACPERA's detrebling provisions beyond 2020, but that Congress and the Courts also take steps to make the benefits of ACPERA more predictable.

I look forward to discussing today how to make ACPERA a strong component of antitrust enforcement. Thank you.

MS. O'BRIEN: Right on time. Very impressive. So, we'll take a brief break until 2:30 to set up for our next panel. Thank you.

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

MR. GRUNDVIG: So, my name is Mark Grundvig. I'm Assistant Chief here of the Antitrust Division in what's called Criminal II Section, and I'll briefly introduce myself and then I'll introduce my colleagues on the panel, but first let me just generally say a big thanks to those that are joining us for panel two. This is a very experienced and distinguished group of attorneys who have a vast amount of experience in the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

represented a number of U.S. and international companies in criminal and civil investigations, in which ACPERA issues have been prominent.

Jeffrey successfully defended Matsushita and JBC against claims of a worldwide conspiracy in the landmark U.S. Supreme Court case Zenith versus Matsushita, and he is regarded as a leading commentator on international antitrust law. He has been involved in numerous NDL's over the last ten years that have involved companion Government criminal investigations, including six different auto parts investigations for six different companies.

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

penalties after the Sherman Act became a felony.

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

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

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

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

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

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

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

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

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

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

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

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

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

talking about.

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

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

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

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

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

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

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

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

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

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

MR. GRUNDVIG: Thank you, Amy. Bonny, what

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. GRUNDVIG: So, Peter, you were also involved in the…

MR. HALLE: I certainly was.

MR. GRUNDVIG: I'm suspecting a slightly different perspective. What are your thoughts on that?

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

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

obviously, and to the Antitrust Division's leniency program.

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

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

It is my perception, and as

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

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

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

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

Aftermarket Automotive Lights case.

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

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

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

forth, is a prime example.

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

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

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

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

often an impediment to settlement.

Parallel proceedings complicate the ACPERA claimant's cooperation. The ACPERA claimant must navigate a really fine and difficult line. It's like Scylla and Charybdis in The Odyssey. Between the Division on the one hand needing the claimant’s attention and cooperation at the same time as the civil cases crank up with the civil plaintiffs' attorneys chopping at the bit for full cooperation and attention too.

So, here's one point. Where stays of the civil case are sought by the Division, those cases should clearly address the restrictions, if any, imposed on ACPERA claimant's ability to cooperate. I think it important and one of the learning points of this Aftermarkets case is that the Judge really should be involved right from the beginning of the case in terms of cooperation, and what is expected and when it should occur.

The ACPERA statute itself in the last renewal, Section 213(d), was added, because it is normal

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

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

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

was that the claimant never sought a delay of any kind in the litigation.

The ACPERA applicant does not want to look like the foot dragger, but sometimes the dragging is a result of other issues that should be addressed at the outset. Indeed, one of the lessons learned, is that the ACPERA statute should be addressed in the initial Rule 16 conference, and the Justice Department should be part of that addressing. Whether or not the Division intervenes early to seek a stay, it should be involved in the Rule 16 Conference if it needs the full attention of the ACPERA Applicant to complete its ongoing Grand Jury investigation of the other defendants in the Civil Action

Using Rule 16 and pretrial orders preserves the flexibility that some fear would be lost if there were more definiteness in the ACPERA statute itself.

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

MR. GRUNDVIG: Pete?

MR. HALLE: Yeah.

MR. GRUNDVIG: Let me jump in there, because

I think we're going to go back to more on that case. So, you raised some of the challenges and issues and we heard from others.

MR. HALLE: Okay.

MR. GRUNDVIG: But maybe I'll throw it to Bruce to ask simply, is ACPERA working?

MR. SIMON: Well, first I want to say something that I've never said on a panel, and I've always heard the DOJ folks say, I am on the ABA Antitrust Section Council, and I am not speaking for the Council. The views I'm expressing are my own today.

I want to talk about uncertainty for a minute. I mean, there is uncertainty in every aspect of the law. Uncertainty is what makes balance and negotiation. Uncertainty happens every day. I mean, I like to pride myself in being a trial attorney, and a lot of you out there are.

How certain are you of the outcome every time you walk in? How certain are you of the outcome of what a witness is going to say, even when that witness has given you their proffer?

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

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

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

perspective and a public perspective.

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

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

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

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

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

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

call it what it is because that's what it is. It will chill public and private enforcement, if we go that direction. I have some comments about the rebuttal presumption, if we get to it later.

So, the other thing is, you know, somehow this is being cast as if it's the plaintiffs' fault. The argument goes something like this. We're being too aggressive in our cooperation provisions and the threat is out there that you possibly will, if you are an amnesty applicant, have to pay more than you should have to pay.

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

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

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

And the other thing I'd like to say is, and not to pick on John, but I'm going to pick on him. He wrote an article where he put out the rebuttal presumption, you know, idea, but one of the things he said in his article also is it is impossible to know whether this reduction in DOJ cases and fines is tied to ACPERA's failure to provide certainty to potential leniency applicants regarding civil penalties. That is a fact. We don't know. We are speculating. There could be multiple causes for why this is happening. The other point I want to make is I don't think there's anybody who could say that ACPERA hasn't been a gigantic success. And I am one of those people who says it has been. Maybe people don't like it, you know, maybe some people represent companies that come back to the well three, four, five times, to apply for leniency or get in trouble that many times, maybe they don't like it, but the fact of the matter is what we're trying to accomplish is enforcement of the antitrust laws, and it is being

successful in that way.

So, I would basically get back to where I started, is that if it ain't broke, don't fix it.

MR. GRUNDVIG: All right. Jeff. He says if it ain't broke, don't fix it. Do you agree or do you think there are some areas that need attention?

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

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

MR. KESSLER: -- disagreeing with my co-counsel in a number of cases -- I'm going to both disagree and agree with him. And try to approach it from a slightly different perspective because my view is that it's not that it's broken, but like the VHS recorder, it still works but it's outdated, and I agree with him that ACPERA has been a great success. It was a tremendous innovation in this country, which countries around the world have emulated. I think it's been extraordinarily positive, but the environment has changed, just like it changed for the VHS recorder, and what I fear is that it's not going to be the same success for the next ten years, if it's renewed exactly as it is right now. Now, why is that? What

has changed? What are we looking at?

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

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

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

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

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

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

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

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

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

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

becomes the ticket to get to the restitution remedy.

And the restitution would be under formulas that would be known, so you could actually calculate, this is what my damage exposure is going to be and it's proper. It would thus solve the "what is the actual damage" issue that I heard raised.

It solves the scope issue, because you have some belief that you're going to go in and you're going to get a restitution based on the scope of what you're revealing and the Government accepts this full cooperation of what's there, so it solves that, and maybe it serves as an inspiration, just like ACPERA did for other countries to follow suit, so we've invented a new form of protection here.

I think that would lead to more ACPERA applicants. I think it would lead to more countries uncovering cartel behavior that would not otherwise be detected at all in the future, so it will be good for the plaintiffs because there will be more cases to pursue against the other companies that are being revealed by this, and it will be better for the economy because you'll have less cartel conduct that doesn't get caught.

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

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

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

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

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

MR. SIMON: I think, Jeffrey, you better be careful what you ask for. I've spent 39 years doing class actions, antitrust and others. If you think it's so easy to administer a settlement fund to get the money out to people to deal with allocation issues, professional objectors, people who are purportedly not represented by you that you've left out, it can be a nightmare. And I think what you'll do is end up -- it's basically going to be an interpleader. You're going to interplead your money somehow and let everybody carve it up. I mean, the private plaintiffs' Bar does what they do best. The DOJ does what they do best.

They at this point have not sought restitution or a restitutionary fund. They have stakeholders who are different than who the private plaintiffs' Bar represent. We have State AG's out there who have something to say about this too and have a claim to the funds. DOJ has a different burden of proof. But I think it would be a nightmare and I

just don't see how it would work.

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

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

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

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

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

MR. GRUNDVIG: Let me jump in here.

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

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

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

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

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

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

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

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

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

What is the appropriate standard for judging the fulsomeness of cooperation? I think Judge Wu laid it out.

The ACPERA Statute is nebulous on this issue. Words in need of a legal standard.

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

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

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

MS. MANNING: Can I say something about certainty and --

MR. HALLE: May I just finish this point because it's an important point. The public record in the case shows that the Department of Justice issued an Information in 2011, I think, and we're talking about an ACPERA hearing in 2013, and in that Information, the Division laid out that the conspiracy alleged started in April of 2000. Thus, the plaintiffs had relevant information two years earlier, and in time to amend the Complaint. Bonny has already said that the plaintiffs has a timeline that they had already made. While I think the Judge was actually right in terms of the standard that he set forth, the notion that there was actually any harm from the specific points that drew him to conclude there was harm, is not supported by the public record and certainly by what we've heard today.

MR. GRUNDVIG: Amy, what are your thoughts on that?

MS. MANNING: So, I've been thinking a lot about this. I've been thinking about it since our conversation yesterday in preparation for this panel about certainty and transparency in the amnesty

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

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

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

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

program that made people kind of nervous.

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

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

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

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

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

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

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

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

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

MS. SWEENEY: As a minimum.

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

don't also get the witnesses and everything else, but at least then you would have an understanding.

That doesn't resolve the timing uncertainty issue, which I think can be complicated, by stays and different investigations. I agree completely there should be sufficient cooperation that the Civil plaintiffs have time to use the cooperation provided in their case. That's what the Autolights case was about. The Plaintiffs claimed they were prejudiced by the timing. I do think if there was some increased way to define that that is the scope, then at least you'd understand exactly what we did with the DOJ, and that was enough, so I'm going to turn all that over regarding these products to the plaintiffs. That would give you some certainty, at least in my --

MR. GRUNDVIG: Bruce has something he'd like to --

MR. SIMON: So, I think cooperation to paraphrase a Supreme Court Justice, is a little bit like pornography. I can't define it but I know it when I see it. And I have gotten gold-plated

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

know what's going to happen.

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

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

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

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

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

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

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

MR. GRUNDVIG: Almost 30 seconds each. Very good. Thanks to our lively panel.

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

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

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

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

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

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

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

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

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

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

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

whether ACPERA is serving its purpose.

MR. SAVERI: So, thank you. Let me start with I think what my top line conclusion is, which is I think ACPERA is generally working. I think that it is accomplishing its general principles. I think it is permitting and allowing additional detection of conspiracies. I think that there is little evidence of decline in leniency applications.

I think to the extent there is data out there, it indicates that the number of cartel actions is going up. So, I think at a very general level it is working.

I think one of the things though that I would say is that I think in the discussions we have to be clear that one of the key stakeholders in this are the victims of the conspiracy. I think it is one of the key parts of ACPERA, that victims do receive redress for their injuries. We've talked about restitution. I think everybody recognizes it's important. I think that more broadly the interest of justice requires victims to obtain redress for their injuries. And, in fact, I think Congress explicitly recognized this in

the statutory scheme.

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

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

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

is not complete.

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

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

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

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

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

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

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

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

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

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

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

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

But second, ACPERA does go to the heart of

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

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

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

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

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

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

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

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

What I'll also tell you though is those same

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

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

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

advocacy out of the process.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

jury at trial.

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

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

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

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

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

playing out in practice based on your experience?

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

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

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

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

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

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

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

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

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

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

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

return for nothing. And plaintiffs take advantage of that.

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

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

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

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

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

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

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

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

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

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

going to tell you that it's a perfect solution either. It's got some warts on it.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

doing their job.

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

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

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

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

MS. DIXTON: Joe, can you I get your…

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

So, the Antitrust Division brought an

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

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

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

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

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

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

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

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

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

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

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

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

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

Companies were doing that but if it turns out

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

So, I do have some concerns about that.

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

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

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

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

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

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

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

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

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

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

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

MS. DIXTON: Thank you. John.

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

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

MS. DIXTON: Thank you. T.J.

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

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

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

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

MS. DIXTON: Scott.

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

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

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

Powers.

DEPUTY ASSISTANT ATTORNEY GENERAL POWERS: So I want to end today by thanking a couple of folks, but first of all thanking those from our side who made today possible, Ann O'Brien, Jennifer Dixton and Sarah Oldfield for all their hard work in putting this together.

And secondly, I'd like to thank all of our roundtable panelists and participants. We were hoping for a lively discussion with differing views, and it's fair to say it exceeded our expectations.

And finally, just note that the job isn't done. I think we have until May 31st to submit or to send in your submissions, so we encourage everyone, all the stakeholders to do that. So, with that, thank you very much.

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

CERTIFICATE OF NOTARY PUBLIC

I, MICHAEL FARKAS, the officer before whom the foregoing proceeding was taken, do hereby certify that the proceedings were recorded by me and thereafter reduced to typewriting under my direction; that said proceedings are a true and accurate record to the best of my knowledge, skills, and ability; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this was taken; and, further, that I am not a relative or employee of any counsel or attorney employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

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Notary Public in and for the

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I, SANDRA K. McCURDY, do hereby certify that this transcript was prepared from audio to the best of my ability.

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