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Sunset on ACPERA draws the antitrust bar to DOJ's roundtable

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The Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA) incentivizes companies to self-report criminal antitrust conduct under the Antitrust Division's (the Division) leniency program by reducing civil liability for successful leniency applicants that also cooperate with plaintiffs in related civil litigation. ACPERA, however, will expire in 2020 unless Congress reauthorizes it. As part of the reauthorization process, the Division is considering proposing revisions to Congress. Last month, the Division hosted a roundtable to gather comments and insight into whether – and if so, how best – to revise ACPERA. The Division invites additional comment on its forthcoming revisions to Congress before 31 May.

What is ACPERA?

Cartelists face both criminal and civil liability. The Division's leniency program exempts successful leniency applicants from all criminal penalties; however, a cartelist's liability does not end with the criminal case. The cartelist may still have to pay restitution as well as damages from "follow-on" civil lawsuits. Civil damages can be substantial due to the potential for treble damages and joint and several liability. These civil damages can even exceed the related criminal fines. ACPERA was designed to enhance incentives for self-reporting cartel conduct by limiting damages for the leniency applicant to single damages and eliminating joint and several liability in return for "timely" and "satisfactory cooperation" with civil plaintiffs. ACPERA, however, may not be working as planned.

Leniency's applications appear to be down

Leniency applications are a critical source of antitrust investigations and prosecutions. The recent drop in antitrust enforcement suggests that leniency applications must be down. From 2011 to 2015, the Division secured an average of US$1 billion in total corporate criminal fines each year, while last year, the total in criminal fines was only US$172 million. The number of criminal cases filed also fell from 90 in 2011 to 18 in 2018, the lowest since 1972. Likewise, 27 corporations were charged in 2011 compared to five in 2018. Although there may be several explanations for this drop in enforcement, many antitrust practitioners believe that a drop in leniency applications is a core cause.

ACPERA may not be living up to its promise

ACPERA's purpose is to incentivize and therefore increase leniency applications. The antitrust defense bar, however, has expressed growing concern that ACPERA is not fulfilling that purpose.

There are two main criticisms of ACPERA: first, that key provisions of ACPERA are unclear; and second, that ACPERA does not sufficiently reduce civil damages.

ACPERA: What is satisfactory and timely cooperation?

The standard for "satisfactory" and "timely" cooperation is undefined and unpredictable. ACPERA gives no guidance on what constitutes "satisfactory cooperation" or when such cooperation should be considered "timely." In addition, the statute does not instruct courts when, in the course of the follow-on civil litigation, to assess an applicant's cooperation and grant ACPERA's protections.

ACPERA's "satisfactory cooperation" provision requires that the applicant provide a complete and truthful account of all relevant facts, furnish all potentially relevant documents, and agree to be available for interviews, depositions, or testimony. In practice, this standard gives companies little-to-no guidance regarding how much cooperation is enough, with plaintiffs and the leniency applicant often at odds as to how much cooperation ACPERA requires.

ACPERA also does not define "timeliness," or when a leniency applicant must cooperate with plaintiffs. Plaintiffs ask leniency applicants to cooperate immediately and provide documents on an expedited and nearly instantaneous basis. Leniency applicants must either acquiesce to plaintiffs' demands or risk a judicial determination that cooperation is untimely, thereby disqualifying the leniency applicant from ACPERA's benefits.

Finally, there is also uncertainty as to when the leniency applicant will realize the benefits of cooperation. ACPERA contains no guidance as to when the judge must decide the leniency applicant has fulfilled the requirements of the statute. So, a leniency applicant has no certainty that it has qualified for ACPERA benefits and faces constant risk that it will be found not to have qualified for ACPERA benefits.

Is the single damages limit a sufficient incentive?

The defense bar views ACPERA's single damages limit as ineffective when paired with the statute's uncertainty over the amount of cooperation required. A cooperative leniency applicant may evade treble damages, yet still significantly raise the cost of single damages by helping the plaintiffs uncover evidence they would not have had access to otherwise. Indeed, an overzealous applicant may inadvertently increase single damages beyond the initial treble damages exposure faced in the civil litigation. This outcome renders the single damage incentive obsolete.

Possible improvements to ACPERA

There were several suggestions at the roundtable for improving ACPERA, including:

- **Clarify ACPERA's "timeliness" language:** At the roundtable, plaintiffs' lawyers argued that cooperation should start very early in the litigation, perhaps even before an amended complaint is due, while defense lawyers suggested that cooperation should occur later in the litigation. Regardless, both sides agreed that a time-certain, whatever it may be, would be beneficial to leniency applicants.
- **Clarify ACPERA's "satisfactory cooperation" language:** At the roundtable, the defense bar argued that ACPERA's "satisfactory cooperation" requirement should be deemed satisfied if the leniency applicant provides plaintiffs with the same information as provided to the Division. Conversely, panelists from the plaintiffs' bar argued for a broader definition of "satisfactory cooperation," expecting complete cooperation with every request, even though plaintiffs' claims may be significantly broader than the Division's investigation. One defense practitioner proposed a compromise: a rebuttable presumption of satisfactory cooperation if

the company provides to civil plaintiffs' counsel all documents and information that the company provided to the Division, which could be rebutted if the company failed to meet any of the other statutory obligations, including providing a full account of all known facts relevant to the civil action, furnishing all documents or other items potentially relevant to the civil action, and using best efforts to secure and facilitate interviews, depositions, and trial testimony of individuals covered under the leniency agreement.

- **Earlier determination for granting ACPERA protections:** Panelists agreed that the determination of whether a company or individual has fulfilled ACPERA's requirements should be made in the early stages of litigation, and certainly before trial.
- **Reduced damages under ACPERA:** There was no consensus regarding the single damage calculation, but suggested approaches included:
  - Incentivizing the leniency applicant further by offering zero liability in exchange for full cooperation.
  - Limiting the applicants' damages based on a predetermined number, which would be paid into a restitution fund for the plaintiffs.
  - Calculating damages proven by coextensive cooperation with the Division as single damages, while removing ACPERA's detrebling benefit for damages that the plaintiffs' counsel could prove through its own investigation.

The Division is accepting comments on ACPERA until 31 May. If your organization is interested in submitting comments to the Antitrust Division please contact counsel at Hogan Lovells.

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