



**Comments of the American Antitrust Institute
Prepared for the Antitrust Division Roundtable on the
Antitrust Criminal Penalty Enhancement and Reform Act**

May 31, 2019

I. OVERVIEW

The American Antitrust Institute (AAI) is pleased to submit its comments to the Antitrust Division of the U.S. Department of Justice (DOJ) in connection with its public roundtable discussion of the Antitrust Criminal Penalties Enhancement & Reform Act (ACPERA). AAI is an independent, nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. It serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. See <http://www.antitrustinstitute.org>.

AAI commends the DOJ for hosting this roundtable discussion. We believe that the twin policies underlying ACPERA are laudable. These are: (i) encouraging applicants to participate in the Antitrust Division's Leniency Program and (ii) benefitting consumers by encouraging leniency applicants to cooperate with private plaintiffs in civil damages actions. We further believe that ACPERA generally has been successful in advancing its legislative goals and underlying policies. We therefore encourage the DOJ to support reauthorization of ACPERA in its current form, without substantive revisions to the existing provisions of the statute. However, the DOJ should support congressional action, through an ACPERA amendment or otherwise, to add protections against retaliation for individuals who participate in the Leniency Program or otherwise provide information to the Antitrust Division in connection with leniency applications.

II. THE OVERARCHING GOAL OF COMBATTING CARTELS

With rare exceptions, members of Congress and presidential administrations from both major parties have embraced vigorous enforcement of Section 1 of the Sherman Act for more than a century.¹ Combatting cartel behavior has been and continues to be the DOJ's top priority. In introductory remarks prepared for this roundtable, Assistant Attorney General Delrahim reaffirmed this commitment, stating that the "[J]ustice Scalia has been quoted numerous times for

¹ American Antitrust Institute, *American Cartel Enforcement in Our Global Era 1* (2016), *available at* <https://www.antitrustinstitute.org/wp-content/uploads/2018/08/Cartels.pdf>.

observing that collusion is ‘the supreme evil of antitrust.’ I could not agree more. Prosecuting cartels remains our highest priority at the Antitrust Division.”²

The Leniency Program has long been a key tool of cartel enforcement. In 2007, then-Assistant Attorney General Tom Barnett stated, “The Antitrust Division’s leniency program continues to be our greatest source of cartel evidence. The Antitrust Division has had great success combining vigorous criminal prosecution with our leniency program in order to increase the likelihood of cartel detection and prosecution.”³ Assistant Attorney General Delrahim shared a similar sentiment during the April roundtable: “[W]e 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.”⁴

III. ACPERA

The Leniency Program dates back to the 1970s. But it was substantially revamped in 1993 to provide the “first-in-line” leniency applicant with greater certainty that it would benefit from relief from criminal conviction, fines and prison sentences, if it satisfied the leniency requirements. These changes to the Leniency Program in 1993 are viewed as having successfully invigorated the program, resulting in increased leniency applications and greater enforcement.⁵

In 2004, Congress enacted ACPERA.⁶ “Legislative history indicates that Members of Congress intended ACPERA to increase the number of companies and individuals applying for antitrust leniency with DOJ—and thus the detection of cartels—while simultaneously benefiting consumers by offering an incentive for leniency applicants to cooperate with plaintiffs in their civil cases.”⁷ One of the key provisions of ACPERA is its “detrebling relief,”⁸ which provides that a leniency applicant accepted into the program is relieved of the full scope of damages available to plaintiffs in civil actions arising from the anticompetitive activity of the applicant that is within the scope of the leniency agreement. Specifically, the leniency applicant is relieved of the joint and several liability and trebling of damages afforded by the Clayton Act to all plaintiffs successfully asserting claims under Section 1 of the Sherman Act. The leniency applicant, then, is liable only for

² U.S. Dep’t of Justice, Antitrust Div., Public Roundtable Discussion: Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA), Transcript as Edited by Panelists 11 (April 11, 2019), *available at* <https://www.justice.gov/atr/page/file/1161371/download> (remarks of Assistant Attorney General Makan Delrahim) [hereinafter “Roundtable Transcript”].

³ Thomas O. Barnett, Asst. Att’y Gen., U.S. Dept. of Justice, Antitrust Div., Global Antitrust Enforcement, Remarks Presented at the Georgetown Law Global Antitrust Enforcement Symposium 2 (April 26, 2007), *available at* <https://www.justice.gov/atr/file/519236/download> [hereinafter “Barnett Speech”].

⁴ Roundtable Transcript, *supra* note 2, at 13.

⁵ Barnett Speech, *supra* note 3, at 2 (referring to “[t]he extraordinary success of the Antitrust Division’s leniency program”).

⁶ Antitrust Criminal Penalty Enhancement & Reform Act (“ACPERA”), Pub. L. No. 108-237, § 213(a)-(b), 118 Stat. 661, 666-668 (June 22, 2004).

⁷ U.S. GOV’T ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL COMMITTEES, CRIMINAL CARTEL ENFORCEMENT, STAKEHOLDER VIEWS ON IMPACT OF 2004 ANTITRUST REFORM ARE MIXED, BUT SUPPORT WHISTLEBLOWER PROTECTION 2 (2011), *available at* <http://www.gao.gov/assets/330/321794.pdf> [hereinafter “GAO REPORT”].

⁸ In addition to providing the “detrebling relief” to incentivize leniency applicants, ACPERA strengthened criminal penalties, both fines and prison sentences.

damages proportional to its share of the commerce affected by the anticompetitive conduct.⁹ This “detrebling relief” is available to the applicant only if it cooperates satisfactorily with the civil damages plaintiff.¹⁰ In reauthorizing ACPERA in 2010,¹¹ Congress clarified the leniency applicant’s cooperation requirement by making explicit that the cooperation must be “timely,” although without further defining “timeliness.”

IV. THE GAO REPORT

Around the time of the 2010 reauthorization, there appeared to be consensus among stakeholders that ACPERA generally has been beneficial,¹² but there had been “no comprehensive study of ACPERA’s effect.”¹³ Congress therefore directed the Government Accountability Office (GAO) to study the impact of ACPERA and report to Congress. The GAO made its report to Congress the next year, and, as noted above, found that stakeholders generally were supportive. The GAO also appeared to support the underlying legislative purposes of ACPERA to bolster the Antitrust Division’s leniency program and benefit consumers.¹⁴

⁹ The pertinent language of ACPERA provides that “in any civil action alleging a violation of Section 1 or 3 of the Sherman Act, or alleging a violation of any similar State law, based on conduct covered by a currently effective antitrust leniency agreement, the amount of damages recovered by or on behalf of a claimant from an antitrust leniency applicant who satisfies the requirements of subsection (b), together with the amounts so recovered from cooperating individuals who satisfy such requirements, shall not exceed that portion of the actual damages sustained by such claimant which is attributable to the commerce done by the applicant in the goods or services affected by the violation.” ACPERA, *supra* note 6, § 213(a).

¹⁰ The relevant language provides that “an antitrust leniency applicant or cooperating individual satisfies the requirements of this subsection with respect to a civil action described in subsection (a) if the court in which the civil action is brought determines, after considering any appropriate pleadings from the claimant, that the applicant or cooperating individual, as the case may be, has provided satisfactory cooperation to the claimant with respect to the civil action, which cooperation shall include—

- (1) providing a full account to the claimant of all facts known to the applicant or cooperating individual, as the case may be, that are potentially relevant to the civil action;
- (2) furnishing all documents or other items potentially relevant to the civil action that are in the possession, custody, or control of the applicant or cooperating individual, as the case may be, wherever they are located; and
- (3)(A) in the case of a cooperating individual—
 - (i) making himself or herself available for such interviews, depositions, or testimony in connection with the civil action as the claimant may reasonably require; and
 - (ii) responding completely and truthfully, without making any attempt either falsely to protect or falsely to implicate any person or entity, and without intentionally withholding any potentially relevant information, to all questions asked by the claimant in interviews, depositions, trials, or any other court proceedings in connection with the civil action; or
- (B) in the case of an antitrust leniency applicant, using its best efforts to secure and facilitate from cooperating individuals covered by the agreement the cooperation described in clauses (i) and (ii) and subparagraph (A).”

Id. § 213(b).

¹¹ Pub. L. No. 111-190, 124 Stat. 1275 (June 9, 2010).

¹² GAO Report, *supra* note 7, at 26 (“Plaintiffs’ attorneys from most of the cases in our sample reported that ACPERA’s cooperation provision has generally helped advance their civil cases by improving their cases’ strength and efficiency.”); *id.* at 20 (“All of the defense attorneys for the four post-ACPERA leniency applicants told us that the benefit from relief from treble damages and joint and several liability motivated the company to apply for leniency.”).

¹³ GAO Report, *supra* note 7, at 13.

¹⁴ *See id.* at 50 (“Criminal cartel activity can harm businesses, consumers, and the U.S. economy in the form of lack of competition and overcharges. For the last 17 years, DOJ has relied heavily on its corporate and individual leniency programs to encourage wrongdoers to self-report such activity.”).

The GAO conducted a systematic examination of the impact of ACPERA’s “detraining relief” provisions on the DOJ’s Leniency Program. The GAO found that while there was only a slight increase in overall leniency applications in the six years after the enactment of ACPERA relative to the six years prior to the enactment, the increase in leniency applications was somewhat greater relative to the pre-enactment period dating back to 1993, when the Leniency Program was revamped.¹⁵ The GAO further determined that there were a variety of factors that could have impacted a reduction in leniency applications, notwithstanding provisions of ACPERA incentivizing leniency applications.

Further, the GAO noted that while post-enactment leniency applications increased only slightly, “in the 6 years after ACPERA’s enactment, there were nearly twice as many successful Type A applications—33 compared to 17—as in the 6-year period prior to ACPERA and these applications accounted for the largest share (about 59 percent) of successful applications.”¹⁶ Type A leniency applications provide information about cartel behavior of which the Antitrust Division had no prior awareness. The Division views these applications as the most valuable.¹⁷

V. CONCLUSION & RECOMMENDATIONS

In AAI’s view, the GAO analysis of the data supports the conclusion that the “detraining relief” provisions of ACPERA as initially enacted and as modified in the 2010 reauthorization are working and are carrying out the underlying legislative policies of incentivizing leniency applicants and benefitting consumers. This conclusion, together with the generally favorable views of the stakeholders interviewed by the GAO, favor the reauthorization of ACPERA in its current form, without any substantive changes to existing provisions of the statute. It is also consistent with the GAO’s report, which makes no recommendation for any substantive changes to ACPERA except to consider adding anti-retaliation protections for individuals who seek leniency or provide information in connection with leniency applications.¹⁸

The stakeholders invited to participate in this Roundtable Discussion offered several proposals for substantive changes to ACPERA.¹⁹ Other than using this opportunity to add anti-retaliation protections for leniency applicants or persons who provide the DOJ with information in connection with a leniency application, AAI recommends that the DOJ support no substantive changes to the statute.²⁰ As the GAO Report concluded, there is no systematic evidence to suggest

¹⁵ *Id.* at 17, Fig. 3.

¹⁶ *Id.* at 18-19, Fig. 4

¹⁷ *Id.* (“The Antitrust Division’s Deputy Assistant Attorney General for Criminal Enforcement and other senior division officials regard Type A applications as the most valuable . . .”).

¹⁸ In the conclusion section of the report, the GAO explains: “[I]nnocent third parties may also report illegalities and in so doing may expose themselves to risk of retaliation. Without a civil remedy for those who are retaliated against as a result of reporting criminal antitrust violations, whistleblowers are currently unprotected and may therefore be hesitant to report wrongdoing to DOJ. It is widely accepted as good public policy to protect those who take risks to report crime and Congress has passed numerous laws providing protection for whistleblowers reporting various types of illegalities in various industries. By considering a civil remedy for whistleblowers who are retaliated against for reporting criminal antitrust violations, Congress could provide existing whistleblowers an assurance of protection for their efforts and, further, could motivate additional individuals to come forward with evidence of criminal cartel activity.” *Id.* at 50.

¹⁹ See generally Roundtable Transcript, *supra* note 2, at 38-173.

²⁰ AAI believes that Congress or the DOJ of its own accord should institute whistleblower rewards in cartel cases akin to those made available in *qui tam* civil suits under the False Claims Act, though we have recognized that the DOJ has historically opposed such a program. See American Antitrust Institute, American Cartel Enforcement in Our Global

that ACPERA is not working or successfully carrying out its legislative goals and policies. At the same time, there is no systematic evidence to allow confident predictions that the substantive proposals suggested by some stakeholders will adequately preserve the balance of policies and interests reflected in the current ACPERA structure, without negative unintended consequences. At bottom, AAI believes there is simply no need to tamper with a salutary statute that is working, nor to risk a deleterious influence on the DOJ's important leniency program.

Because the GAO Report provides ample systematic evidence that whistleblower protections do in fact work, without negative effects on the underlying statutory schemes to which they are applied, this proposed change is distinguishable.²¹ The evidence supports congressional implementation of whistleblower protections, whether in the course of ACPERA reauthorization or otherwise.

Era, *supra* note 1, at 4-5. We encourage the DOJ to reconsider its position and to remain open to further studying the potential efficacy of such programs, including by examining the impact of such programs where they have been enacted, including in the United Kingdom, Hungary, and Korea. *See id.*

²¹ GAO Report, *supra* note 7, at 47-50.