

June 24, 2020

## **EXPIRATION OF FEDERAL LAW LIMITING ANTITRUST CIVIL EXPOSURE CREATES UNCERTAINTY FOR CARTEL SELF-REPORTING**

To Our Clients and Friends:

The Antitrust Criminal Penalty Enhancement & Reform Act (“ACPERA”) is an essential complement to the Corporate Leniency Policy, which the Department of Justice, Antitrust Division has described as its “most important prosecutorial tool.”<sup>[1]</sup> In essence, ACPERA releases a leniency recipient from the treble damages and joint-and-several liability that would otherwise apply in private civil claims related to its self-reported cartel conduct. But this limitation on private damages was lost when ACPERA expired on June 22, 2020 following a legislative impasse between the DOJ and a member of the Senate Judiciary Committee regarding an unrelated oversight concern. Until a political solution is found, potential leniency applicants face significant uncertainty about the civil damages exposure they may eventually confront.

ACPERA was originally passed in 2004, after lobbying by the Antitrust Division, to “creat[e] greater incentives for corporations to self-report illegal conduct to the Department’s Antitrust Division.”<sup>[2]</sup> The Division recognized that the onerous burdens of private civil litigation were discouraging potential leniency applicants.<sup>[3]</sup> ACPERA was an effort to craft a policy solution that eliminated punitive treble damages for leniency applicants, while continuing to hold them accountable for “actual damages” caused by their own misconduct and to require their cooperation with the plaintiffs against their co-conspirators.

Among the legislative compromises reflected in the final ACPERA bill was a “sunset” provision that required reauthorization in five years. Following a brief one-year extension in 2009, Congress reauthorized ACPERA for ten years in 2010 after studying its effectiveness.<sup>[4]</sup> As the 2020 horizon for reauthorization approached, the DOJ again supported reauthorization and this time lobbied for a bill to permanently extend ACPERA,<sup>[5]</sup> which Sen. Lindsey Graham introduced earlier this year.<sup>[6]</sup> While there have been active debates about ACPERA’s effectiveness and ways in which it could be improved,<sup>[7]</sup> the DOJ, plaintiffs’ bar, and defense bar all seemed to agree that ACPERA should be reauthorized in some form.<sup>[8]</sup>

Despite the apparent broad support for ACPERA’s reauthorization in the criminal antitrust community, it has encountered difficulties in Congress. On June 9, 2020, Sen. Whitehouse sent a letter to Makan Delrahim, the Assistant Attorney General for the Antitrust Division, explaining that he would “withhold [his] consent to any request to expedite consideration of [Sen. Graham’s] bill” until he had received “satisfactory answers” to questions relating to a prior Antitrust Division investigation.<sup>[9]</sup> In particular, Sen. Whitehouse expressed concern with “the Antitrust Division’s investigation of agreements four automakers made with the State of California to follow vehicle greenhouse gas emissions standards set

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by the state.”<sup>[10]</sup> Sen. Whitehouse similarly raised “concerns of political interference and improper use of the Department’s legal authority to intimidate businesses that made decisions contrary to the interests of the President” when AAG Delrahim appeared before the Senate Judiciary Committee on September 17, 2019.<sup>[11]</sup>

The Department of Justice has responded to Sen. Whitehouse, but has not yet satisfied his concerns. In a response to Sen. Whitehouse on June 19, 2020—three days before ACPERA was scheduled to expire—the DOJ explained that the Antitrust Division’s investigation into the automakers’ agreement with California was “entirely reasonable.”<sup>[12]</sup> However, this assertion was challenged when AAG Delrahim’s former acting chief of staff testified on June 23, 2020 at an oversight hearing before the House Committee on the Judiciary that explored “Political Interference and Threats to Prosecutorial Independence.”<sup>[13]</sup> While the broader issues between the Department of Justice and Congress may take time to resolve, ACPERA’s June 22, 2020 expiration date has now come and gone, changing the cartel enforcement landscape.

The immediate effect of ACPERA’s expiration will be uncertainty for potential leniency applicants. At least in the near term, leniency applicants must weigh the risk of increased civil liability against the benefits of immunity from criminal prosecution. Congress had the foresight to ensure that recipients of a marker or conditional leniency letter prior to ACPERA’s expiration would continue to be protected.<sup>[14]</sup> However, it remains to be seen whether Congress will reauthorize ACPERA. Anyone applying for leniency during this interim period must account for this risk.

The long-term repercussions of ACPERA’s expiration may be more profound. While Congress may soon reauthorize the legislation, the uncertainty it injects into the Antitrust Division’s leniency program will not quickly subside. The Antitrust Division has previously explained that a leniency program can only excel if there is “transparency and predictability to the greatest extent possible throughout a jurisdiction’s cartel enforcement program, so that companies can predict with a high degree of certainty how they will be treated if they seek leniency and what the consequences will be if they do not.”<sup>[15]</sup> The expiration of ACPERA thus undermines the confidence that the Antitrust Division recognizes is a necessary predicate for its leniency program to succeed and may negatively affect its future criminal enforcement efforts if not quickly remedied.

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[1] Richard A. Powers, Deputy Assistant Attorney General, Dep’t of Justice, *A Matter of Trust: Enduring Leniency Lessons for the Future of Cartel Enforcement* (Feb. 19, 2020), available at <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-richard-powers-delivers-remarks-13th-international>.

[2] Dep’t of Justice, *ACPERA Roundtable Executive Summary*, available at <https://www.justice.gov/atr/page/file/1184396/download>.

[3] United States, Organisation for Economic Co-operation and Development, *Relationship Between Public and Private Antitrust Enforcement* (June 9, 2015), available at

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<https://www.justice.gov/atr/file/823166/download> (“ACPERA protects a successful leniency applicant from the burden of treble damages and joint and several liability in private litigation . . .”).

[4] Gibson Dunn, *U.S. Congress Renews Civil Leniency for Companies That Self-Report Sherman Act Criminal Violations* (June 4, 2010), available at <https://www.gibsondunn.com/u-s-congress-renews-civil-leniency-for-companies-that-self-report-sherman-act-criminal-violations/>; Gov’t Accountability Office, *Criminal Cartel Enforcement: Stakeholder Views on Impact of 2004 Antitrust Reform Are Mixed, but Support Whistleblower Protection* (July 2011), available at <https://www.gao.gov/new.items/d11619.pdf>.

[5] Richard A. Powers, Deputy Assistant Attorney General, Antitrust Division, Dep’t of Justice, *A Matter of Trust: Enduring Leniency Lessons for the Future of Cartel Enforcement* (Feb. 19, 2020), available at <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-richard-powers-delivers-remarks-13th-international> (“The division supports reauthorization and the elimination of the sunset provision.”).

[6] Antitrust Criminal Penalty Enhancement and Reform Permanent Extension Act, S. 3377, 116th Cong. (2020).

[7] Dep’t of Justice, *ACPERA Roundtable Executive Summary*, available at <https://www.justice.gov/atr/page/file/1184396/download>.

[8] Scott Hammond, Global Competition Review, *Takeaways from the DOJ’s ACPERA Roundtable and Proposed Next Steps* (April 17, 2020), available at <https://globalcompetitionreview.com/article/1225312/takeaways-from-the-doj%E2%80%99s-acpera-roundtable-and-proposed-next-steps>.

[9] Letter from Sen. Sheldon Whitehouse to Makan Delrahim, Assistant Attorney General, Antitrust Division, Dep’t of Justice (June 9, 2020), available at [https://www.whitehouse.senate.gov/imo/media/doc/200609\\_Follow-up%20letter%20to%20Makan%20Delrahim\\_Final.pdf](https://www.whitehouse.senate.gov/imo/media/doc/200609_Follow-up%20letter%20to%20Makan%20Delrahim_Final.pdf).

[10] *Id.*

[11] *Id.*

[12] Kelsey Tamborrino, Politico, *A New Era of WOTUS* (June 22, 2020 10:00 AM EST), available at <https://www.politico.com/newsletters/morning-energy/2020/06/22/a-new-era-of-wotus-788682>.

[13] House Committee on the Judiciary, *Oversight of the Department of Justice: Political Interference and Threats to Prosecutorial Independence* (June 17, 2020 12:05 PM), available at <https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=3034>; Kelsey Tamborrino, Politico, *A new era of WOTUS* (June 22, 2020 10:00 AM EST), available at <https://www.politico.com/newsletters/morning-energy/2020/06/22/a-new-era-of-wotus-788682>; U.S.

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House Committee on the Judiciary, *Testimony of John W. Elias* (June 24, 2020), available at [https://judiciary.house.gov/uploadedfiles/elias\\_written\\_testimony\\_hjc.pdf?utm\\_campaign=4024-519](https://judiciary.house.gov/uploadedfiles/elias_written_testimony_hjc.pdf?utm_campaign=4024-519).

[14] Act to amend the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 111-190, § 1, 124 Stat. 1275, 1275 (2010).

[15] Scott Hammond, Director of Criminal Enforcement, Antitrust Division, Dep't of Justice, *Cornerstones of an Effective Leniency Program* (Nov. 22, 2004), available at <https://www.justice.gov/atr/speech/cornerstones-effective-leniency-program>.



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