

ANTITRUST ALERT

CONGRESS EXTENDS LIMITATIONS ON CORPORATE LIABILITY FOR ANTITRUST OFFENSES FOR ONE YEAR

DETREBLING, SINGLE DAMAGES PROVISIONS OF THE ANTITRUST CRIMINAL PENALTY ENHANCEMENT AND REFORM ACT OF 2004 REMAIN IN PLACE

On June 19, 2009, President Obama signed into law a bill that will extend for one year the detrebling and single damages provisions of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA). The bill extends the provisions of ACPERA that allow corporate recipients of leniency from the Department of Justice's Antitrust Division to avoid treble damages as well as joint and several liability in civil follow-on actions. Without the bill, the sunset provisions in ACPERA would have caused those liability limits to expire on June 23, 2009. By extending these provisions, Congress has ensured that, for at least another year, there will be an enhanced incentive for corporations to report wrongdoing to the Antitrust Division. The Division considers these provisions to be an important tool in finding new cases, and their extension will increase the Division's ability to continue to prosecute a significant number of cartel cases.

BACKGROUND ON THE ANTITRUST DIVISION'S CORPORATE LENIENCY POLICY AND ACPERA

The Antitrust Division of the Department of Justice has long considered its Corporate Leniency Policy to be its most effective tool for detecting and prosecuting criminal antitrust conspiracies.¹ Under the leniency policy, there is a possibility for complete immunity for a corporation and its cooperating employees. If a company confesses its involvement in an antitrust conspiracy to the Antitrust Division and offers the cooperation of the employees involved in the conspiracy, then it can avoid prosecution for itself and its cooperating employees. The end result is that the corporation meeting the requirements of the leniency program can avoid potentially substantial criminal fines, and the company's cooperating employees can avoid possible jail terms. There is a catch, though: The Antitrust Division's corporate leniency policy is a "winner-take-all" policy. That is, only the first company to report its involvement in an antitrust conspiracy can qualify. Every other company involved in the conspiracy can expect that the company and its employees involved in the conspiracy will be charged with crimes. Thus, the Division's leniency policy is designed to destabilize antitrust conspiracies by creating a race for leniency among the participants in the conspiracy.

Before ACPERA was passed in 2004, companies considering whether to seek leniency had to weigh the benefits of the leniency program against the civil consequences of leniency. U.S. antitrust laws allow private claimants to bring civil actions against antitrust offenders. If the claim succeeds, each member of the antitrust conspiracy faces joint and several liability for treble the damages caused by the conspiracy. In addition, most states have laws permitting victims of antitrust offenses to recover damages as well. Thus, prior to 2004, a potential applicant to the Antitrust Division's Corporate Leniency Program had to factor in the potentially high cost of joint and several treble damages liability. In some cases, these costs likely presented a significant disincentive to reporting the conduct.

ACPERA removes much of the disincentive to self-reporting antitrust crimes by limiting damages that can be recovered against a corporate amnesty applicant by private litigants². The statute eliminates treble damages as well as joint and several liability in actions against a leniency applicant under both state and federal antitrust laws. To qualify for the limitation on damages, a corporate leniency applicant, including its cooperating employees, must provide "satisfactory cooperation" to the civil claimants. The determination of satisfactory cooperation is made by the judge in the civil case.

When ACPERA was passed in 2004, it contained a sunset provision ending the damages limitations for amnesty applicants after five years. The legislation signed on June 19 only extends those provisions for one more year. The Antitrust Division is on record as believing that the damages limitations provisions have increased the effectiveness of its leniency program;³ presumably the Division would prefer the sunset provisions to be removed altogether. But with only a one-year extension of the damages limitations, the Division may feel some pressure to show Congress the efficacy of the limitations provision on its leniency program by increasing the number of cases it files in investigations aided by a leniency applicant. Thus, corporations may face an increased risk of enforcement activity.

Advisors at Akin Gump Strauss Hauer & Feld LLP have extensive experience representing companies in government investigations of cartels and related criminal conduct.

¹ See, e.g., "Recent Developments, Trends, and Milestones In The Antitrust Division's Criminal Enforcement Program," Speech by Deputy Assistant Attorney General Scott D. Hammond, Antitrust Division, U.S. Department of Justice, before the 56th Annual Spring Meeting of the Section of Antitrust Law, American Bar Association, Washington, D.C., March 26, 2008 ("Hammond Speech").

² There remains the risk of debarment for a leniency applicant that is also a government contractor.

³ See, e.g., Hammond Speech at 15.

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