



March 4, 2020

The Honorable Lindsey Graham  
Chairman, Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510

The Honorable Dianne Feinstein  
Ranking Member, Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510

The Honorable Mike Lee  
Chairman, Subcommittee on Antitrust,  
Competition Policy and Consumer Rights  
Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510

The Honorable Amy Klobuchar  
Ranking Member, Subcommittee on Antitrust,  
Competition Policy and Consumer Rights  
Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510

Dear Senators,

The Committee to Support the Antitrust Laws (COSAL) strongly supports the “Antitrust Criminal Penalty Enhancement and Reform Permanent Extension Act,” which would permanently reauthorize ACPERA.<sup>1</sup>

COSAL was established in 1986 to promote and support the enactment, preservation and enforcement of a strong body of antitrust laws in the United States. COSAL members are law firms based throughout the country that represent individuals and businesses that have been harmed by violations of the antitrust laws. COSAL was involved in the deliberations when Congress enacted ACPERA in 2004 and again when the statute was reauthorized in 2010. Our members have broad experience litigating complex antitrust cases in which defendants seek reduced liability under the DOJ’s leniency program and ACPERA’s damage reduction provisions.

The DOJ’s leniency program enables a leniency applicant to avoid all criminal penalties if the applicant admits its criminal conduct, provides full and continuing cooperation as the DOJ pursues criminal charges against the other cartelists, and meets the other leniency conditions the DOJ has prescribed. ACPERA, in turn, enables the leniency applicant to reduce its damages responsibility in related civil litigation brought on behalf of the cartel’s victims *provided* that the applicant makes complete and timely cooperation to the civil plaintiffs. Where the court determines that such disclosure is made, the cartel participant is liable for single—not treble—

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<sup>1</sup> Pub. L. No. 108-237, tit. II, 118 Stat. 661.

damages, which are based on the applicant’s market share—not on joint and several liability for all damages caused by the conspiracy.<sup>2</sup> Thus, the cartel participant who admits its criminal conduct avoids not only criminal responsibility, but also both treble damages and joint and several liability in civil litigation. DOJ Assistant Attorney General Makan Delrahim has stated that “ACPERA complements 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.”<sup>3</sup>

In 2010, ACPERA was reauthorized for another 10 years. At that time ACPERA “was amended to include ‘timeliness’ in the consideration of satisfactory cooperation,”<sup>4</sup> while also providing the DOJ a measure of control over disclosure if it sought a stay in the civil case in support of its criminal investigation or prosecution.<sup>5</sup>

ACPERA and the 2010 amendments emphasize a common sense and fact-based approach in evaluating whether a leniency applicant has provided timely and satisfactory cooperation to civil plaintiffs. The legislative history sheds light on how to best evaluate whether an applicant’s cooperation is “timely.” As Senator Hatch noted, “the legislation requires the Amnesty Applicant to provide *full cooperation* to the victims as they *prepare and pursue* their civil lawsuit.”<sup>6</sup> Satisfactory cooperation includes: “providing a full account to the claimant of all facts known to the applicant . . . that are potentially relevant to the civil action”; providing documents or other items relevant to the civil action that are in the possession, custody, or control of the applicant; “using its best efforts to secure and facilitate” cooperation from its current or former directors, officers, and employees.”<sup>7</sup> The applicant must also make its officers and employees available for interviews, depositions, or testimony in connection with the civil action as the civil plaintiff may reasonably require and respond completely and truthfully without intentionally withholding any potentially relevant information.<sup>8</sup> Accordingly, an applicant seeking ACPERA’s benefits must cooperate with civil plaintiffs in substantially the same way that the applicant cooperates with the DOJ when it provides information and witnesses in criminal investigations and trials.

In general, COSAL believes that ACPERA is accomplishing its dual purposes: (1) incentivizing disclosure of cartel behavior to the DOJ, *and* (2) incentivizing cooperation with private plaintiffs to enhance the opportunity for victim recovery. It is our collective view that the statute has helped secure timely and appropriate cooperation from cartel participants who are DOJ leniency beneficiaries.

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<sup>2</sup> See ACPERA § 213(a) (the leniency applicant can limit its civil liability to “the actual damages” sustained by civil plaintiffs that are “attributable to the [the amnesty recipient’s] commerce . . . in the goods or services affected by the violation.”); 150 Cong. Rec. 6327 (April 2, 2004).

<sup>3</sup> Remarks of Makan Delrahim, ACPERA Public Roundtable Tr. at 6, available at <https://www.justice.gov/atr/page/file/1161371/download> (“DOJ Roundtable”).

<sup>4</sup> ACPERA § 213(c).

<sup>5</sup> ACPERA § 213(d).

<sup>6</sup> 150 Cong. Rec. 6327 (April 2, 2004) (emphasis added); see also *Oracle Am., Inc. v. Micron Tech., Inc.*, 817 F. Supp. 2d 1128, 1132 (N.D. Cal. 2011) (quoting 150 Cong. Rec. 6327 (April 2, 2004)).

<sup>7</sup> ACPERA, §§ 212(5) & 213(b)(3)(B).

<sup>8</sup> ACPERA, § 213(b)(3)(A)-(B).

Some critics have claimed, without any support or empirical evidence, that DOJ leniency applications are decreasing. The DOJ itself, however, has publicly stated otherwise.<sup>9</sup> Equally important, there have been ACPERA applicants in many major antitrust Multi-District Litigations during the last decade, following criminal investigations based on DOJ leniency grants. In fact, there are sometimes multiple DOJ grants of leniency spread across sub-cases. Indeed, defendants have benefitted from and competed for leniency in each such subcase, even years after the first leniency applicant came in and settled out. Both the DOJ and the civil plaintiffs benefitted.

Private enforcement of the antitrust laws compensates victims of antitrust violations and provides a strong deterrent to future misconduct. COSAL's members have led many of the most successful and complex private civil antitrust cases pursued since the enactment of ACPERA, several of which involved leniency applicants who also sought damage reduction under ACPERA. ACPERA, thus, was a key part of the success of these cases. We applaud your efforts to permanently reauthorize this important law.

Sincerely,



Robert S. Kitchenoff  
President  
Committee to Support the Antitrust Laws

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<sup>9</sup> Remarks of Makan Delharim, DOJ Roundtable Tr. at 9 (“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”).