

March 23, 2010

THE COMMITTEE TO SUPPORT THE ANTITRUST LAWS (COSAL)  
SUPPORTS RENEWAL OF THE  
ANTITRUST CRIMINAL PENALTY ENHANCEMENT AND REFORM ACT OF 2004  
WITH MINOR MODIFICATIONS TO ENSURE THAT CIVIL CLAIMANTS RECEIVE  
PROMPT AND FULL COOPERATION FROM AMNESTY APPLICANTS

In order to enhance the effectiveness of the Justice Department's corporate leniency policies, the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA) was enacted in June 2004. Those parts of Subtitle A – dealing with Antitrust Enforcement Enhancements and Cooperation Incentives – that were scheduled to sunset last June were reauthorized for one year in 2009. ACPERA was intended to provide additional incentives for corporations and persons with knowledge about antitrust cartels to come forward and provide information to the Antitrust Division of the Department of Justice.

As described in the Congressional Record of April 2, 2004, the DOJ's leniency program serves to destabilize cartels and causes members of the cartels to turn against one another in a race to the Government. By being first to "spill the beans" to the Government, the first in receives amnesty for its wrongdoing, on the condition that it fully cooperates with the Government. While the DOJ's amnesty program provided relief from criminal fines, often substantial, amnesty applicants still were, according to some, reluctant to come forward because they remained subject to treble damages and joint and several liability in civil cases that often follow Government investigations or indictments.

To remedy that imbalance and provide additional incentives for corporations and persons to come forward and cooperate with the Department of Justice, ACPERA amended the antitrust laws to limit damage recoveries from corporations and executives that receive amnesty from the Antitrust Division. ACPERA does this by eliminating treble damages and joint and

several liability for corporate amnesty applicants, provided that in return for these benefits the amnesty applicant must provide “satisfactory cooperation” to the civil claimants by disclosing all facts known that are potentially relevant to the civil action, including the furnishing of all documents potentially relevant to the civil action. Additionally, cooperating individuals are required to make themselves available for interviews, depositions or testimony as the claimant may reasonably require it.

The sponsors of ACPERA contemplated that in return for being relieved of treble damages and joint and several liability, the amnesty applicant would provide full and prompt cooperation to the civil litigants to assist in prosecuting their civil lawsuits. As noted in the comments by Senator Hatch in connection with the Senate’s consideration of ACPERA:

Importantly, this limitation on damages is only available to corporations and their executives if they provide adequate and timely cooperation to both the Government investigators as well as any subsequent private plaintiffs bringing a civil suit based on the covered criminal conduct . . . . And again, the legislation requires the amnesty applicant *to provide full cooperation to the victims as they prepare and pursue their civil lawsuit.*

Similarly, during House consideration of ACPERA, House Judiciary Committee member Bobby Scott stated that an amnesty recipient’s damages will be limited only “if the company provides *adequate and timely* cooperation.”

We are not in a position to assess whether, since passage of ACPERA, corporate offenders have become more willing to report their wrongdoing to the Department of Justice. On the other hand, it has been our experience that corporations have seized upon some language found in the Timeliness section of ACPERA (Section 213 (c)) to *delay* providing civil claimants with the cooperation to which they are entitled. As a result, the cooperation comes, if at all, late in the civil proceeding, when it may be of limited or no value. In addition, often the amnesty

applicant will not provide cooperation to civil claimants at all unless the claimant also agrees to enter into a settlement agreement to obtain the cooperation.<sup>1/</sup> ACPERA was not written to require civil claimants to settle in order to obtain cooperation -- a settlement that includes cooperation as relief has always been available to civil litigants. As noted by Senator Hatch, ACPERA requires the amnesty applicant to provide full cooperation to civil claimants “as they prepare and pursue their civil lawsuit.” Thus, under ACPERA as currently written, absent the claimants’ agreement to settle with the amnesty applicant, the cooperation usually comes late in the litigation and in our view is not full, complete or timely. Indeed, there have been several instances where an amnesty applicant – in addition to failing to provide timely cooperation -- has affirmatively moved to dismiss claimants’ complaint for failing to state an antitrust violation even though the applicant has admitted the antitrust violation to the DOJ.

COSAL has prepared summary charts describing the status of criminal and civil cases where there has been an amnesty applicant known to us. The charts also set forth the experience of members of COSAL with respect to the timeliness and scope of cooperation provided by amnesty applicants.

Our members’ experience shows that changes need to be made to ACPERA to make it clear that the amnesty applicant is required to provide prompt and full cooperation. We have developed proposed modifications to the existing statute that establish (or clarify) the presiding district court’s authority to promote timely cooperation by the amnesty applicant as part of the court’s case management responsibilities.

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1 Usually, the settlements occur at least one year after the filing of a consolidated amended complaint and the start of full cooperation is delayed until preliminary approval and usually final approval of the settlement -- a process that takes 6-9 months after the settlement agreement is signed, and even longer if a settlement objector appeals. Thus, the type of cooperation contemplated by ACPERA is substantially delayed even when provided as part of a settlement agreement.

Importantly, nothing in the proposed modifications affects existing rights of the Antitrust Division to seek to limit proceedings in the civil litigation or a protective order in the event that the cooperation would impair or impede investigation or prosecution by the Antitrust Division. Similarly, nothing affects in any way the rights of any State Attorney General to prosecute antitrust claims under federal or state law. Those provisions in the statute remain unchanged.

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