

PUBLICATION

Congress Extends Antitrust Civil Liability Leniency

June 24, 2009

Congress has passed, and President Obama has signed into law, an amendment to the Antitrust Criminal Penalties Enhancement and Reform Act of 2004 (ACPERA), which will extend for one year a key leniency provision of that act that would otherwise expire this month.

The original provisions of ACPERA amended the antitrust laws to increase the maximum penalties for each criminal violation. The antitrust laws forbid unreasonable restraints of trade and treat certain hard-core restraints, such as price fixing, bid rigging, and allocating customers among competitors as criminal violations. ACPERA increased the maximum fine for such offenses from \$10 million to \$100 million for corporations, and from \$350,000 to \$1 million for individuals, although a separate provision of the criminal law allows fines to be even higher, as much as twice the gain to the defendant or twice the loss to the victim, if such amounts can be proven. In addition, ACPERA increased the maximum prison term for individuals from three years to 10 years.

ACPERA included a provision to aid in the discovery of criminal antitrust offenses and enforcement of the criminal provisions of the antitrust laws. The US Department of Justice has long encouraged individuals and corporations to self-report criminal violations of the antitrust laws. If a violator reports an offense before the Justice Department otherwise learns of it, and assists the Justice Department in the prosecution of others, the violator can in many circumstances get amnesty and avoid criminal prosecution. Similarly, a violator who reports an offense the Justice Department is already investigating, and agrees to assist in the prosecution of others, can obtain leniency - a significant discount of the fine that it would otherwise pay. The amnesty program has been very successful and has been copied in other jurisdictions, notably the European Union. But the program does nothing to relieve the amnesty or leniency recipient of the crushing civil liability in private actions for treble damages, including class actions, that are allowed under the antitrust laws, and that will surely follow every criminal case. Such liability could be so large that it overwhelms a corporation's incentive to seek amnesty or leniency. See Phillip C. Zane, *The Price Fixer's Dilemma: Applying Game Theory to the Decision of Whether to Plead Guilty to Antitrust Crimes*, 48 *Antitrust Bulletin* 1 (2003).

In 2004, Congress attempted to address this problem with a provision included in ACPERA that allows recipients of criminal leniency or amnesty to limit their civil antitrust liability to single damages rather than treble if, in addition to assisting the government in the criminal investigation, they assist the civil plaintiffs in their cases. Congress set this provision for civil leniency to run for five years to see if it worked. With the provision about to expire, Congress decided to extend the provision for an additional year, and passed an amendment to ACPERA with the support of the Department of Justice and the Antitrust bar. Thus, civil leniency remains in place, and corporations that discover or suspect criminal violations of the antitrust laws should consult counsel promptly about the possibility of pursuing both criminal and civil leniency.

If you have any questions about this or any other antitrust or government investigation issue, please do not hesitate to contact any one of the antitrust attorneys at Baker Donelson.