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The end of ACPERA?

By Brian Whittaker, Gordon Lang, and Alycia Ziarno

The Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA) expired on June 22, 2020, without reauthorization or amendment by Congress. ACPERA was enacted in 2004 to further incentivize companies to self-report collusive conduct. When it was enacted in 2004, ACPERA contained a five-year sunset provision, but Congress later extended the sunset date until June 22, 2020.

ACPERA complements the U.S. Department of Justice (DOJ) Antitrust Division's Leniency Program by limiting a leniency applicant's civil liability in follow-on civil suits to actual damages attributable to its own collusive conduct—that is, on its own sales or purchases, as opposed to treble damages caused by the entire unlawful conspiracy. Other co-conspirators, however, remain jointly and severally liable for all damages, including treble damages in civil suits.

As we previously [reported](#), and as was recently reaffirmed in remarks at the 13th International Cartel Workshop, the Antitrust Division continues to view ACPERA as a valuable tool to encourage self-reporting of collusive conduct. Accordingly, the Antitrust Division supports permanent reauthorization without a sunset provision,¹ and Senate Bill S. 3377, if enacted, would do just that. Many companies also consider ACPERA to be an important inducement to cooperate with the Antitrust Division and civil plaintiffs. Still, many would like to see some changes to clarify the scope of cooperation that must be provided to civil plaintiffs to qualify for ACPERA's benefits.

Reauthorization of ACPERA has bipartisan support in both the House and Senate of Congress, and bills were referred to their respective judiciary subcommittees months ago. Nevertheless, votes have yet to be scheduled, and Sen. Sheldon Whitehouse (D-R.I.), who sits on the Senate Judiciary Committee, warned that he will continue to withhold his consent to any request to expedite consideration of the Senate bill (S. 3377) until DOJ Assistant Attorney General Makan Delrahim provides a "satisfactory" explanation for DOJ's recent, but now closed, investigation into an

¹ Deputy Assistant Attorney General Richard A. Powers Delivers Remarks at the 13th International Cartel Workshop (Feb. 19, 2020), available at <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-richard-powers-delivers-remarks-13th-international>.

agreement on fuel emission standards among four automakers and the State of California.² Critics of that automakers' investigation have suggested that it may have been politically motivated, but Delrahim previously stated in a Senate oversight hearing that the Antitrust Division did not initiate the investigation for political reasons.

Although ACPERA is likely to be reauthorized in the future, in at least some form, an antitrust world without it could be very different. The Antitrust Division could receive fewer leniency applications, with the result of fewer criminal antitrust prosecutions; the cooperation formerly provided to civil plaintiffs by leniency applicants would be gone. We will continue to monitor and report developments related to ACPERA.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

- Gordon Lang at glang@nixonpeabody.com or 202-585-8319
- Alycia Ziarno at aziarno@nixonpeabody.com or 202-585-8265
- Brian Whittaker at bwhittaker@nixonpeabody.com or 202-585-8234

² See Letter from https://www.whitehouse.senate.gov/imo/media/doc/200609_Follow-up%20letter%20to%20Makan%20Delrahim_Final.pdf.