
July 2011

CRIMINAL CARTEL ENFORCEMENT

Stakeholder Views on
Impact of 2004
Antitrust Reform Are
Mixed, but Support
Whistleblower
Protection

U.S. Government Accountability Office

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ACCOUNTABILITY ★ INTEGRITY ★ RELIABILITY

CRIMINAL CARTEL ENFORCEMENT

Stakeholder Views on Impact of 2004 Antitrust Reform Are Mixed, but Support Whistleblower Protection

Why GAO Did This Study

Criminal cartel activity, such as competitors conspiring to set prices, can harm consumers and the U.S. economy through lack of competition and overcharges. The Department of Justice (DOJ) Antitrust Division's leniency program offers the possibility that the first individual or company that self-reports cartel activity will avoid criminal conviction and penalties. In 2004, the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA) was enacted to encourage such reporting. The 2010 reauthorization mandated that GAO study ACPERA's effect. This report addresses (1) the extent that ACPERA affected DOJ's criminal cartel enforcement, (2) the ways ACPERA has reportedly affected private civil actions, and (3) key stakeholder perspectives on rewards and antiretaliatory protection for whistleblowers reporting criminal antitrust violations. GAO analyzed DOJ data on criminal cartel cases (1993-2010) and interviewed DOJ officials. GAO also interviewed a nongeneralizable sample of plaintiffs' and defense attorneys from 17 civil cases and key stakeholders including other antitrust attorneys selected using a snowball sampling technique whereby GAO identified contacts through referrals.

What GAO Recommends

Congress may wish to consider an amendment to add a civil remedy for those who are retaliated against for reporting criminal antitrust violations. DOJ generally agreed with GAO's findings but did not comment on this matter.

View [GAO-11-619](#) or key components. For more information, contact Eileen Larence at (202) 512-6510 or larencee@gao.gov.

What GAO Found

After ACPERA's enactment, there was little change in the number of wrongdoers applying for leniency, an increase in successful applicants reporting previously unknown criminal conduct, and higher penalties in criminal cartel cases. Analysis of DOJ data indicate ACPERA may have resulted in little change in the number of leniency applications submitted—78 submitted in the 6 years before ACPERA versus 81 in the 6 years after—the most relevant indicator of ACPERA's impact, according to Antitrust Division officials. In addition, most defense attorneys representing leniency applicants in our sample indicated that ACPERA's offer of relief from some civil damages had a slight positive effect on leniency applicants' decisions to apply for leniency, though the threat of jail time and corporate fines were the most motivating factors both before and after ACPERA's enactment. However, after ACPERA's enactment nearly twice as many successful applicants reported criminal cartel activity about which the division had no prior knowledge. In addition, higher fines and jail times were imposed in criminal cartel cases after ACPERA's enactment, though Antitrust Division officials stated that neither trend is primarily attributable to ACPERA. Factors other than ACPERA—such as the increase of leniency programs in other countries—may also have affected the number and types of leniency applications submitted over this time period, making it difficult to isolate ACPERA's impact.

Plaintiffs' attorneys from most of the 17 civil cases in our sample indicated that ACPERA's cooperation provision—which provides the leniency applicant with relief from some civil damages in exchange for cooperation with plaintiffs—has strengthened and streamlined their cases. However, differing views on the timing and amount of ACPERA cooperation have resulted in challenges, such as disputes about delayed cooperation. Some plaintiffs' and defense attorneys for leniency applicants have mitigated these challenges by developing detailed agreements which set forth the timing and extent of cooperation that leniency applicants will provide. In addition, a 2010 amendment to ACPERA provides some clarification that cooperation must be provided in a timely manner, but it is too soon to assess the impact of this amendment because private civil antitrust cases often take years to resolve.

There was no consensus among key stakeholders GAO interviewed—antitrust plaintiffs' and defense attorneys, among others—regarding the addition of a whistleblower reward, but they widely supported adding antiretaliatory protection. Nine of 21 key stakeholders stated that adding a whistleblower reward in the form of a bounty could result in greater cartel detection and deterrence, but 11 of 21 noted that such rewards could hinder DOJ's enforcement program. Currently, whistleblowers who report criminal antitrust violations lack a civil remedy if they experience retaliation, such as being fired, so they may be hesitant to report criminal wrongdoing, and past reported cases suggest retaliation occurs in this type of situation. All 16 key stakeholders who had a position on the issue generally supported the addition of a civil whistleblower protection though senior DOJ Antitrust Division officials stated that they neither support nor oppose the idea. Adding a civil remedy for those who are retaliated against for reporting criminal antitrust violations could help mitigate such retaliation and increase reporting of antitrust violations.

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United States Government Accountability Office
Washington, DC 20548

July 25, 2011

The Honorable Patrick J. Leahy
Chairman
The Honorable Chuck Grassley
Ranking Member
Committee on the Judiciary
United States Senate

The Honorable Lamar Smith
Chairman
The Honorable John Conyers, Jr.
Ranking Member
Committee on the Judiciary
United States House of Representatives

Criminal cartel activity—price fixing, market allocation, and bid rigging, for example¹—can cause tremendous harm to businesses, consumers, and the U.S. economy in the form of lack of competition and overcharges. Criminal cartels are secretive and, therefore, hard to detect. As a result, since 1993 the Department of Justice’s (DOJ) Antitrust Division—the sole enforcer of the criminal federal antitrust laws—has relied heavily upon a leniency program to help the agency uncover and prosecute illegal cartel activity. DOJ’s leniency program provides for the possibility that the first individual or company that reports its involvement in a criminal antitrust conspiracy to the Antitrust Division will avoid criminal conviction, fines, and prison sentences. Under the policy, an individual or company (including its executives) will not be criminally charged, avoiding fines and incarceration, provided they are the first to confess, fully cooperate with DOJ’s investigation of the remaining cartel members, and meet other conditions for the program. However, upon learning of a criminal cartel, those harmed almost always file a civil case seeking damages so companies considering reporting cartel conduct have faced an important

¹Price fixing is an agreement among competitors to raise, fix, or otherwise maintain the price at which their goods or services are sold. Market allocation schemes are agreements in which competitors divide markets among themselves. Bid rigging is the way that conspiring competitors effectively raise prices where purchasers—often federal, state, or local governments—acquire goods or services by soliciting competing bids. Essentially, competitors agree in advance who will submit the winning bid on a contract being let through the competitive bidding process.

disincentive—potential civil liability for three times the total damages caused by the entire conspiracy (treble damages and joint and several liability). In 2004, the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA) was enacted.² The statute included provisions increasing the incentives for individuals and companies to self-report illegal conduct through DOJ’s leniency program. ACPERA:

- increased the maximum fine for antitrust violations from \$10 million to \$100 million for corporations and from \$350,000 to \$1 million for individuals;
- increased the maximum jail time from 3 years to 10 years; and
- provided relief from treble damages and joint and several liability for leniency applicants, in exchange for satisfactory cooperation with the civil claimant.

Legislative history indicates that Members of Congress intended ACPERA to increase the number of companies and individuals applying for antitrust leniency with DOJ—and thus the detection of cartels—while simultaneously benefiting consumers by offering an incentive for leniency applicants to cooperate with plaintiffs in their civil cases. In 2010, ACPERA was reauthorized for 10 years, and was amended to include “timeliness” in the consideration of satisfactory cooperation.³ The 2010 reauthorization included a requirement that GAO report on ACPERA’s effect and the appropriateness of adding informant rewards—such as a bounty or qui tam⁴ provision—and antiretaliation protection for employees who report illegal anticompetitive conduct.⁵ Accordingly, this report addresses the following questions:

² Pub. L. No. 108-237, tit. II, 118 Stat. 661, 665.

³ Pub. L. No. 111-190, 124 Stat. 1275. ACPERA was previously extended for 1 year in 2009. Pub. L. No. 111-30, 123 Stat. 1775 (2009).

⁴ Qui tam is the shortened version of the Latin phrase: *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which means “who as well for the king as for himself sues in this matter.” A qui tam provision is a specific type of informant reward that would allow an individual who sues on behalf of the government or assists in a prosecution to receive a reward or part of a penalty imposed. A key distinction between bounty and qui tam actions is that in qui tam actions, the government is not solely responsible for instituting any enforcement action.

⁵ Pub. L. No. 111-190, § 5, 124 Stat. 1275, 1276.

-
- To what extent has ACPERA affected criminal cartel investigation and enforcement by DOJ's Antitrust Division?
 - In what ways, if any, has ACPERA reportedly affected private civil actions involving leniency applicants?
 - What are the perspectives of key stakeholders regarding the advantages and disadvantages of adding rewards or antiretaliation protection for those who report criminal antitrust violations?

In conducting our work on all three of these questions, we interviewed DOJ Antitrust Division officials and reviewed speeches by division officials on criminal cartel enforcement efforts; academic studies; and articles. We also identified 21 key stakeholders—7 antitrust attorneys who have worked on numerous antitrust cases, 7 additional antitrust attorneys who are representatives of three nongovernmental antitrust organizations (including the American Antitrust Institute, the American Bar Association Section of Antitrust Law, and the Committee to Support the Antitrust Laws), and 7 academics whose work focuses on antitrust law and enforcement issues (including 4 law professors and 3 economists)—using an iterative process often referred to as “snowball sampling,” to identify knowledgeable stakeholders, and select for interviews those who would provide us with a broad range of perspectives on ACPERA. At each interview, we solicited names of additional stakeholders it would be useful to interview until we had coverage of a broad range of perspectives on ACPERA. We selected a nonprobability sample of stakeholders, and while the information gathered is not generalizable beyond the individuals we interviewed, the interviews provided insights into issues pertaining to all three objectives.

To address the first objective, we analyzed Antitrust Division data from August 1993 (the inception of the Antitrust Division's current leniency program) to September 2010 on criminal cartel investigations and enforcement actions.⁶ We used this analysis to discern apparent differences in the Antitrust Division's criminal cartel enforcement efforts

⁶ The data we reviewed were current as of December 8, 2010.

before and after ACPERA went into effect.⁷ Due to numerous confounding variables, we were not able to causally link identified differences between pre-and post-ACPERA criminal cartel investigation and enforcement data to ACPERA. For example, the increase in antitrust enforcement efforts outside the United States and global economic forces beyond ACPERA may be influencing the number of leniency applications submitted to the Antitrust Division before and after ACPERA's enactment. Further, ACPERA could be having a deterrent effect by preventing or destabilizing cartel formation but it is difficult to know the extent, if any, of this effect. We assessed the reliability of the Antitrust Division's criminal cartel investigation and enforcement data by reviewing relevant DOJ documentation and interviewing knowledgeable agency officials. To the extent possible, we compared the data totals the Antitrust Division provided across categories and analyses, and against published data, for obvious errors in accuracy and completeness. We determined that the data were sufficiently reliable for the purposes of our report. In addition we identified a nonprobability sample of 25 publicly disclosed applications to the Antitrust Division's Corporate Leniency Program both before and after ACPERA's enactment and interviewed and analyzed responses from 15 defense attorneys who represented leniency applicants in 18 of the 25 leniency applications.⁸ While our sample is limited to companies that publicly disclosed their participation in DOJ's Corporate Leniency Program and therefore not generalizable to all leniency applicants, the results of these interviews helped inform our analysis.⁹

⁷ We reviewed and analyzed data on Title 15 offenses, specifically 15 U.S.C. §§ 1,3. We did not include cases that only alleged non-Title 15 offenses, such as Title 18 cases—cases that include conduct beyond criminal cartel activity, such as obstruction of justice and fraud—in our analysis. We adjusted all fine data for inflation using fiscal year 2011 dollars based on the Gross Domestic Product deflator. We performed our analysis of the fine data by fiscal year of sentencing (i.e., the fiscal year a court imposed a fine) and not by the fiscal year a fine was obtained.

⁸ We were unable to schedule interviews with defense attorneys for companies in three leniency applications, and defense attorneys for companies in four leniency applications declined to speak with us.

⁹ The Antitrust Division holds the identity of leniency applicants and the information they provide in strict confidence, much like the treatment afforded to confidential informants. Therefore, the Antitrust Division does not publicly disclose the identity of a leniency applicant or information provided by the applicant, unless required to do so by court order in connection with litigation.

To address the second objective, we reviewed court dockets and case filings from relevant federal private civil class action cases that reference ACPERA. In addition, we interviewed and analyzed responses from attorneys in private civil antitrust cases that involved 17 of the 25 publicly disclosed leniency applications discussed above, where ACPERA may have affected the civil process.¹⁰ We interviewed 10 plaintiffs' attorneys who served as class counsel in the 17 private civil antitrust cases, and 11 defense attorneys who represented the publicly disclosed leniency applicants in 14 of the 17 cases.¹¹ We aggregated and analyzed the results of these interviews to determine ACPERA's reported effects on private civil litigation.

To address the third objective, we reviewed relevant literature, conducted a legal review of existing whistleblower protection provisions, and reviewed published legal decisions involving employment retaliation related to an employer's antitrust violations. Additionally, we interviewed the 21 key stakeholders described above as well as others with knowledge of whistleblower reward and protection provisions including the Legal Director of the Government Accountability Project,¹² officials with the Occupational Safety & Health Administration's (OSHA) Office of the Whistleblower Protection Program who administer 21 federal whistleblower protection provisions, members of the Securities and Exchange Commission's (SEC) rulemaking team, and officials responsible for rewards programs administered by the Internal Revenue Service (IRS) and DOJ's Civil Division. These stakeholders represent a variety of interests, and, analyzing their responses to open-ended questions, allowed us to describe key stakeholder perspectives on the advantages and disadvantages of adding informant rewards and antiretaliation protection in the antitrust setting.

¹⁰ We found that ACPERA could have played a role in 17 of the 25 cases because 17 cases were either ongoing or had reached a settlement agreement between plaintiffs and the leniency applicant after ACPERA's enactment in June 2004.

¹¹ Three plaintiffs' attorneys served as class counsel in more than 1 case in our sample of 17. Regarding defense attorneys for leniency applicants, we were unable to schedule a meeting with the defense attorneys who represented publicly disclosed leniency applicants in 1 of the 17 cases, and in 2 of the other cases the defense attorney declined to speak with us.

¹² The Government Accountability Project is a nonpartisan whistleblower protection and advocacy organization.

We conducted this performance audit from October 2010 through July 2011 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. Additional details on our scope and methodology are contained in appendix I.

Background

Criminal Cartel Activity

The Sherman Act, which was originally enacted in 1890, prohibits agreements among competitors that unreasonably restrain trade.¹³ Certain types of agreements—price fixing, bid rigging, and market allocation—have been found by courts to be per se illegal because they are likely to restrict competition and decrease output, and have “manifestly anticompetitive” effects.¹⁴ According to DOJ’s Antitrust Division, these offenses are generally prosecuted criminally because they have been found to be unambiguously harmful.

Criminal enforcement of the Sherman Act is the responsibility of DOJ’s Antitrust Division.¹⁵ Criminal violations of the Sherman Act are subject to substantial penalties. Individuals are subject to a term of imprisonment of up to 10 years and a fine up to \$1 million.¹⁶ Corporations are subject to

¹³ Section 1 of the Sherman Act, as amended, states, “Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . .” 15 U.S.C. § 1; see also *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

¹⁴ *Leegin Creative Leather Prods, Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007).

¹⁵ The DOJ and the Federal Trade Commission are largely responsible for the public enforcement of the antitrust laws. Because the jurisdiction of the two agencies overlaps, they have developed clearance procedures for notifying each other before conducting investigations or filing actions. If the matter involves likely criminal activity, it will be referred to the Antitrust Division.

¹⁶ Prior to June 2004, the maximum term of imprisonment for individuals was 3 years and the maximum fine was \$350,000 under the Sherman Act. See Antitrust Amendments Act of 1990, Pub. L. No. 101-588, § 4, 104 Stat. 2879, 2880.

finances of up to \$100 million.¹⁷ Under the alternative fine provision, corporations and individual defendants may be fined up to twice the gross financial loss or gain resulting from a violation.¹⁸ The alternate fine provision has resulted in corporate fines well exceeding the maximum amount in the Sherman Act.

DOJ's Leniency Program

According to the Antitrust Division, criminal cartel investigations normally develop from one of several sources: proactive efforts by the Antitrust Division or another government agency, complainants, or leniency applicants. The Antitrust Division first implemented a leniency program in 1978 and substantially revised the program with the issuance of a Corporate Leniency Policy in 1993 and a Leniency Policy for Individuals in 1994.¹⁹ Through the Antitrust Division's leniency program, companies and individuals can avoid criminal conviction, prison terms, and fines, by being the first to confess participation in a criminal antitrust violation, fully cooperating with the Antitrust Division, and meeting other specified conditions. Leniency is available for companies and individuals who self-report to DOJ either before or after an Antitrust Division investigation has begun. Only the first qualifying company to self-report may be granted leniency for a particular antitrust conspiracy, creating an incentive for companies to self-report as quickly as possible. The Antitrust Division grants two types of Leniency—Type A and Type B. Type A leniency is granted for applicants reporting illegal antitrust activity before the Antitrust Division has received information about the activity from any other source, and before an Antitrust Division investigation has begun. Type B leniency is available for applicants reporting illegal antitrust activity after the Antitrust Division has received information about the activity, whether this is before or after the division has opened an investigation. In addition, Amnesty Plus leniency may be granted for applicants already under investigation by the Antitrust Division that report involvement in a separate antitrust conspiracy. A leniency applicant who obtains Amnesty

¹⁷ Prior to June 2004, corporations were subject to a maximum fine of \$10 million under the Sherman Act. See id.

¹⁸ 18 U.S.C. § 3571(d).

¹⁹ For more on DOJ's Individual and Corporate Leniency Policies, see the Antitrust Division's November 19, 2008, "Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters," at <http://www.justice.gov/atr/public/criminal/leniency.html>.

Plus may receive either Type A or Type B leniency. For additional information on the criteria for each type of leniency see appendix II.

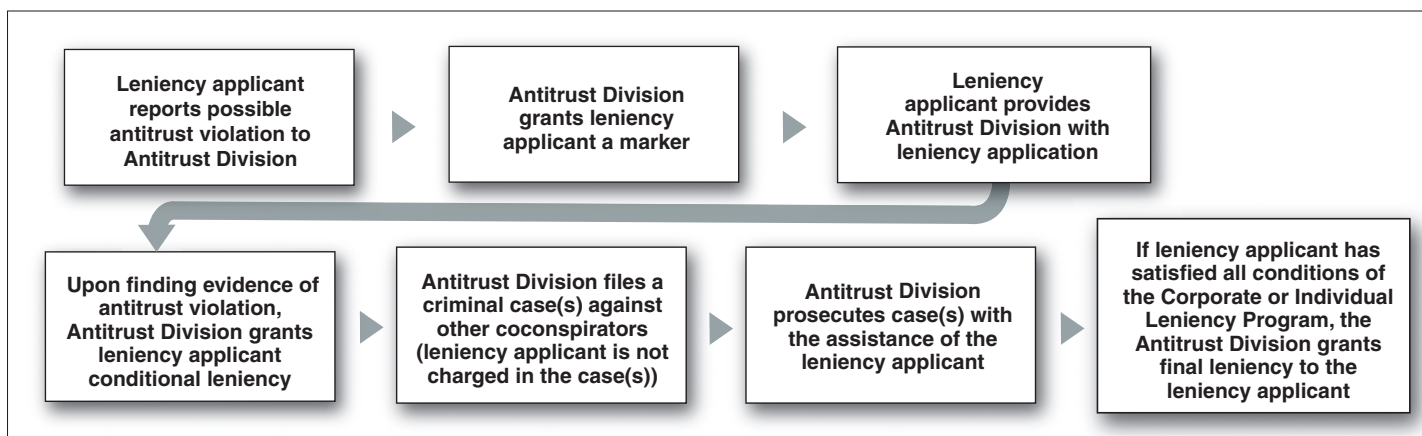
The Antitrust Division frequently gives a leniency applicant a “marker” for a finite period of time (30 days is common) to hold its place at the front of the line for leniency while the company’s legal counsel gathers additional information through an internal investigation to complete the client’s leniency application.²⁰ The conditional leniency letter is the initial leniency letter given to a leniency applicant. The initial grant of leniency is conditional because a final grant of leniency depends upon the applicant performing certain obligations over the course of the criminal investigation and any resulting prosecution of coconspirators, such as establishment of its eligibility; its full, truthful, and continuing cooperation; and its payment of restitution to victims. Before receiving a conditional leniency letter, a leniency applicant must admit to a criminal violation of the antitrust laws.²¹ If any conditions are not met, the Antitrust Division may revoke an applicant’s conditional leniency.²² When the applicant establishes its eligibility to receive leniency, and has provided the required cooperation, the Antitrust Division will notify the applicant in writing that he or she has been granted final, unconditional leniency, which typically occurs after the completion of the investigation and any resulting prosecutions of the applicant’s coconspirators. (No criminal case is filed against the leniency applicant.) Figure 1 depicts the process for a typical criminal case.

²⁰ DOJ introduced the marker system in 2004.

²¹ Prior to November 2008, companies only had to admit to possible involvement in a conspiracy but now must admit to a violation in order to receive conditional leniency.

²² DOJ has revoked the leniency of one applicant due to evidence that it had not terminated its anticompetitive conduct and had not provided full cooperation. However, after DOJ indicted the applicant and two of its executives, the District Court dismissed the indictment and found that the applicant had complied with its leniency agreement. United States v. Stolt-Nielsen S.A., 524 F. Supp. 2d 609 (E.D. Pa. 2007).

Figure 1: Leniency Application and Criminal Antitrust Case Process



Source: GAO analysis of Antitrust Division documents.

Private Civil Antitrust Litigation

Through civil litigation, private citizens or companies are able to seek damages for harms they suffered as a result of criminal antitrust violations. For example, a company involved in a price-fixing conspiracy may face criminal charges brought by DOJ as well as a civil case brought by consumers who were overcharged as a result of the conspiracy. Potential plaintiffs may learn of antitrust violations in a variety of ways, including through DOJ criminal investigations, required disclosures of publicly traded companies, filed cases, or the press.

Federal civil antitrust laws are generally enforced by private persons who are victims of the illegal conduct. They may bring suit under section 4 of the Clayton Act, which provides, “any person...injured in his business or property by reason of anything forbidden in the antitrust laws may sue...and shall recover threefold the damages...sustained and ... a reasonable attorney’s fee.”²³ This provision allows private parties, including state and local governments, that have been injured by an illegal cartel to bring a suit for damages.²⁴ Under the Clayton Act, an

²³ 15 U.S.C. § 15.

²⁴ In those instances when the federal government or its agencies have been the victims of antitrust violations, the Department of Justice may also bring an action for treble damages under the Clayton Act. 15 U.S.C. § 15a.

injured party—generally a competitor or consumer—can recover three times the damages suffered as a result of the violation—known as treble damages—and defendants are subject to joint and several liability for the entire treble damage amount. This means that each party that is found liable for the violation is responsible individually for the entire amount and the plaintiff can decide which party to obtain it from. In addition, defendants that are found liable are not entitled to contribution against fellow conspirators—contribution would give defendants the right to demand that other defendants that are jointly responsible for a third party’s injury pay their proportionate share.²⁵ Antitrust plaintiffs often proceed as a class, aggregating the claims of all those that are harmed into one action.²⁶ However, plaintiffs are also permitted to opt out of the class and proceed against the defendants separately. Private civil class action lawsuits that are able to overcome motions to dismiss are typically resolved through settlements, which specify the amount of damages that the defendants will pay to the plaintiffs.

Federal civil litigation is governed by the Federal Rules of Civil Procedure. In order to institute a civil case, the plaintiff must file a complaint²⁷ which states the wrongdoing showing that the plaintiff is entitled to relief.²⁸ When there has been a successful criminal prosecution of an antitrust conspiracy by DOJ, plaintiffs may use the final judgment to support their civil case and show that collusion has occurred.²⁹ Figure 2 depicts the process for a typical civil antitrust case. The complaints that plaintiffs file may allege a longer time period or larger set of involved products than DOJ’s investigation or case involving the conspiracy. After a complaint is filed, but before plaintiffs have officially begun to collect evidence (a process which is called discovery or conducting discovery), defendants, including the leniency applicant, may file a motion to dismiss the case.

²⁵ Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981).

²⁶ Federal Rule of Civil Procedure 23 allows for plaintiffs to proceed as a class where they can provide the required elements of numerosity, commonality, typicality, adequacy, predominance, and superiority.

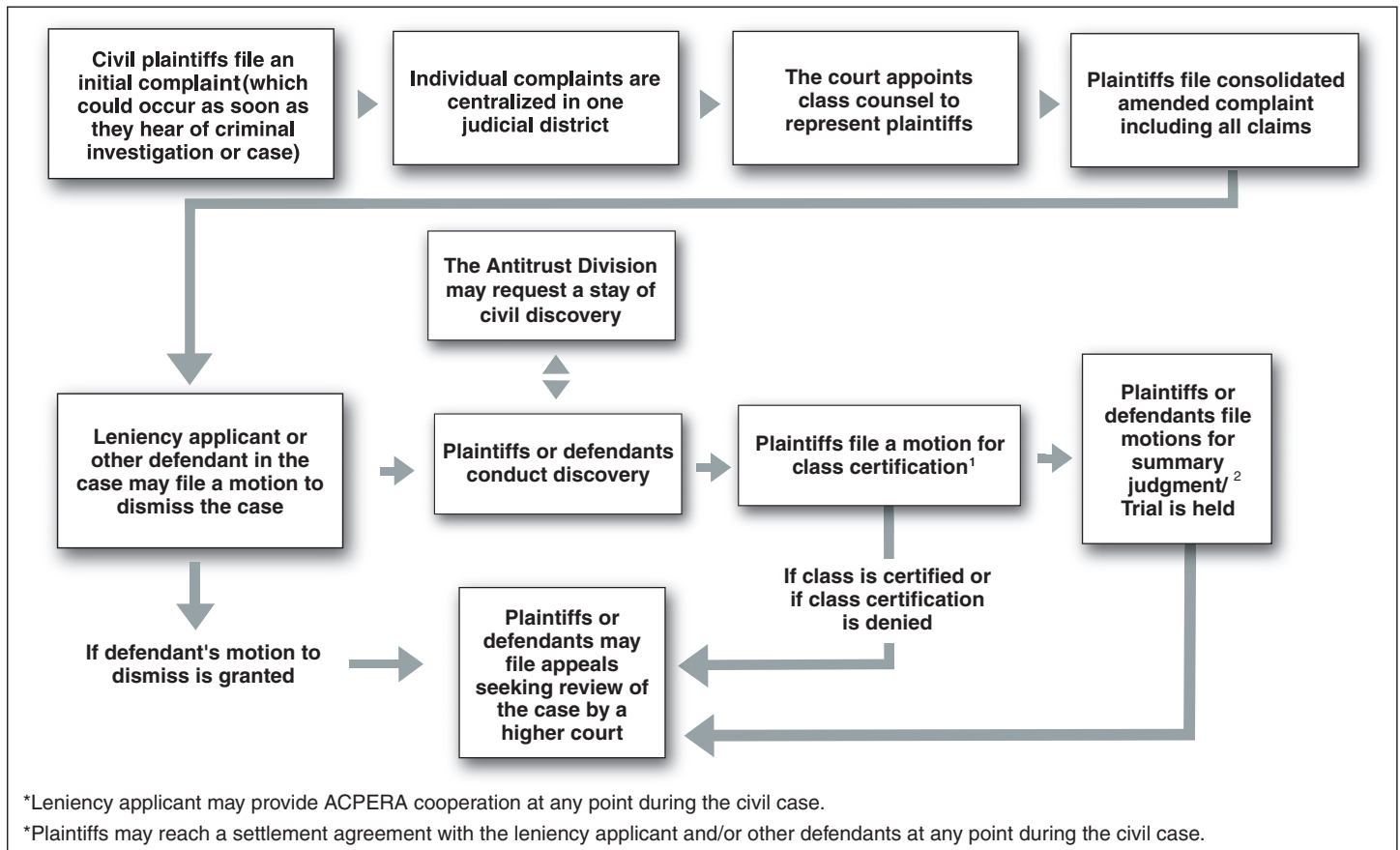
²⁷ FED. R. CIV. P. 3.

²⁸ FED. R. CIV. P. 8(a)(2). There are certain exceptions where plaintiffs are required to plead more specific facts to support the claim.

²⁹ 15 U.S.C. § 16.

Defendants can try to dismiss the action for a variety of reasons, including the plaintiff's "failure to state a claim upon which relief can be granted."³⁰

Figure 2: Typical Private Civil Antitrust Case Process



Source: GAO analysis of court documents and testimonial evidence.

¹Class certification refers to the decision by the court that the issues warrant a class action suit and that the plaintiffs appropriately represent the class.

²Summary judgment is a determination made by the court without a full trial.

³⁰ FED. R. CIV. P.12(b)(6).

A 2007 Supreme Court decision—Bell Atlantic Corp. v. Twombly³¹—affected the amount of evidence that plaintiffs must allege in their complaint at the time they initiate the case and thus increased the chance of a case being dismissed on the ground of plaintiffs’ failure to state a claim upon which relief can be granted. In Twombly, a large antitrust case, the Supreme Court held that to overcome a motion to dismiss, a complaint must contain sufficient factual matter to support a plausible claim that allows the court to reasonably infer that the defendant is liable for the alleged misconduct.³² Among other things, the court cited the likely expense of discovery as justification for the ruling.³³ The Twombly decision effectively made it easier for defendants to win motions to dismiss.

Under ACPERA, leniency applicants who provide satisfactory and timely cooperation to civil plaintiffs may receive relief from treble damages and joint and several liability.

ACPERA

ACPERA was originally enacted in 2004, with strong support from DOJ. In addition to increases in maximum penalties for Sherman Act violations, ACPERA also contained provisions addressing the leniency applicants’ involvement in private civil actions under the Clayton Act.³⁴ Specifically, ACPERA’s provisions provide that in civil actions alleging violations of the Sherman Act—such as price fixing—DOJ leniency applicants are only liable for actual damages caused by their conduct, as opposed to treble damages and joint and several liability, if the leniency applicants provide “satisfactory cooperation” to the plaintiffs. The court determines whether cooperation is satisfactory. According to ACPERA’s provisions, “satisfactory cooperation” includes, among other things:

- providing a full account to the plaintiffs of all facts known to the applicant that are potentially relevant to the civil action;
- furnishing all documents or other items potentially relevant to the civil action; and

³¹ 550 U.S. 544.

³² Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (citing Twombly, 550 U.S. at 556, 570).

³³ See Twombly, 550 U.S. at 559.

³⁴ Pub. L. No. 108-237, §§ 201-215.

-
- making cooperating individuals available for interviews, depositions, or testimony.

In 2010, ACPERA was amended to require explicitly that in determining whether the requirement of satisfactory cooperation had been met, the court consider the “timeliness” of the applicant’s cooperation with the plaintiffs.³⁵

Members of Congress who supported ACPERA stated that it was intended to increase the number of companies and individuals self-reporting anticompetitive behavior as well as benefit consumers by encouraging leniency applicants to cooperate with plaintiffs in their civil cases.³⁶ To date, there has been no comprehensive study of ACPERA’s effect.

Other Incentives to Report Criminal Cartel Activity

While DOJ’s Antitrust Division has implemented a leniency program to encourage those participating in illegal cartels to report violations, in other contexts the federal government offers different incentives to report wrongdoing. For example, under the False Claims Act,³⁷ which is administered by DOJ’s Civil Division, a person with evidence of fraud against the federal government, also known as a whistleblower or relator, is authorized to file a qui tam case in federal court. A qui tam case allows the whistleblower to sue, on behalf of the government, persons engaged in the fraud and to share in money the government may recover. DOJ has the responsibility to decide on behalf of the government whether to join the whistleblower in prosecuting these False Claims Act cases. In contrast, other agencies that administer whistleblower reward programs, such as the IRS and the SEC, rely on statutes that do not provide whistleblowers with a private right of action to sue on behalf of the government where there is potential wrongdoing, but instead offer a reward—or bounty—when whistleblowers provide information leading to a

³⁵ Pub. L. No. 111-190, § 3.

³⁶ E.g., 150 Cong. Rec. S3610, S3614 (Apr. 2, 2004) (statement of Senator Hatch); 150 Cong. Rec. H3654, H3657 (June 2, 2004) (statement of Rep. Sensenbrenner).

³⁷ 31 U.S.C. §§ 3729-3733.

successful prosecution.³⁸ Existing reward provisions vary in terms of the duties of the whistleblowers, the discretion of the agency, and how much money whistleblowers may be awarded.

In addition, various laws protect whistleblowers who report wrongdoing without providing them with a financial reward for reporting illegal conduct. These laws generally protect whistleblowers by providing them a remedy if they are fired from their job or otherwise retaliated against by their employers for reporting wrongdoing.

³⁸ The IRS administers a bounty program under 26 U.S.C. § 7623, which provides for two types of awards. If the taxes, penalties, interest, and other amounts in dispute exceed \$2 million, and a few other qualifications are met, the IRS will pay 15 percent to 30 percent of the amount collected. § 7623(b) (enacted in 2006). Under the second type of award, whistleblowers who do not meet these thresholds may still be eligible for a lesser award of 15 percent up to \$10 million; these awards are discretionary. § 7623(a). The SEC previously administered a bounty program under section 21A(e) of the Securities and Exchange Act of 1934 (codified at 15 U.S.C. 78u-1(e)), which allowed the SEC to make awards to persons who provided information leading to the imposition of a penalty for insider trading offenses. The statute allowed awards of up to 10 percent of the penalty imposed. This provision was repealed in 2010. Pub. L. No. 111-203, § 923(b)(2), 124 Stat. 1376, 1850. The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922 (codified at 15 U.S.C. § 78u-6) requires the SEC to pay awards to whistleblowers who provide information to the SEC that leads to successful enforcement actions resulting in monetary sanctions exceeding \$1million. The award is to be between 10 percent and 30 percent of the total monetary sanctions collected in the actions. The statute also contains antiretaliation provisions, protecting those who provide certain information to the SEC, among other things.

After ACPERA, There Was Little Change in the Number of Wrongdoers Applying for Leniency, a Shift in the Types of Successful Applications, and Higher Penalties in Criminal Cartel Cases

Analysis of DOJ's Antitrust Division data indicates that after ACPERA's enactment there was little change in the number of leniency applications submitted by individuals and companies—the most relevant indicator of ACPERA's impact, according to Antitrust Division officials. However, there was a shift in the type of successful applications, with nearly twice as many applicants successfully applying for Type A leniency after ACPERA's enactment. The division values this type of leniency application the most because these applicants are reporting criminal cartel activity about which the division had no prior knowledge. Our interviews with defense attorneys representing 18 leniency applicants who came forward to the Antitrust Division both before and after ACPERA indicate ACPERA's offer of relief from civil damages had a slight positive effect on leniency applicants' decisions to apply for leniency, though the threat of jail time and corporate fines were the most motivating factors both before and after ACPERA's enactment.³⁹ In addition, higher fines and jail times were imposed in criminal cartel cases after ACPERA's enactment, though division officials report that neither trend is primarily attributable to ACPERA.

³⁹ Due to the confidentiality of leniency applicant identities, we were unable to compile a complete list of all criminal cases involving leniency applicants and instead identified a nonprobability sample of 25 leniency applicant companies that had publicly disclosed their participation in the Antitrust Division's Corporate Leniency Program, and we were able to interview defense attorneys for 18 of the 25 leniency applicants. See app. I for additional details of our scope and methodology.

After ACPERA, There Was Little Change in the Number of Leniency Applicants but an Increase in Successful Applicants Reporting Previously Unknown Criminal Conduct

Analysis of Antitrust Division data indicates there was little difference in the total number of leniency applications⁴⁰ submitted in the 6 years before and after ACPERA's enactment in fiscal year 2004—78 and 81, respectively, as shown in figure 3 below.⁴¹ There was also little change in the number of leniency applications withdrawn or rejected⁴² before and after ACPERA so the number of successful leniency applications—applications not withdrawn or rejected—also remained nearly the same with 54 in the 6 fiscal years prior to ACPERA and 56 in the 6 fiscal years after ACPERA's enactment.⁴³ Figure 3 also shows that ACPERA was enacted during a peak in the number of applications, with the highest numbers of applications (25 per year) submitted in fiscal years 2003, 2004, and 2005. Senior Antitrust Division officials stated that they did not know the reasons why the number of applications increased to 25 in fiscal

⁴⁰ These data include both corporate and individual leniency applications though the vast majority of applications submitted both before and after ACPERA were corporate leniency applications.

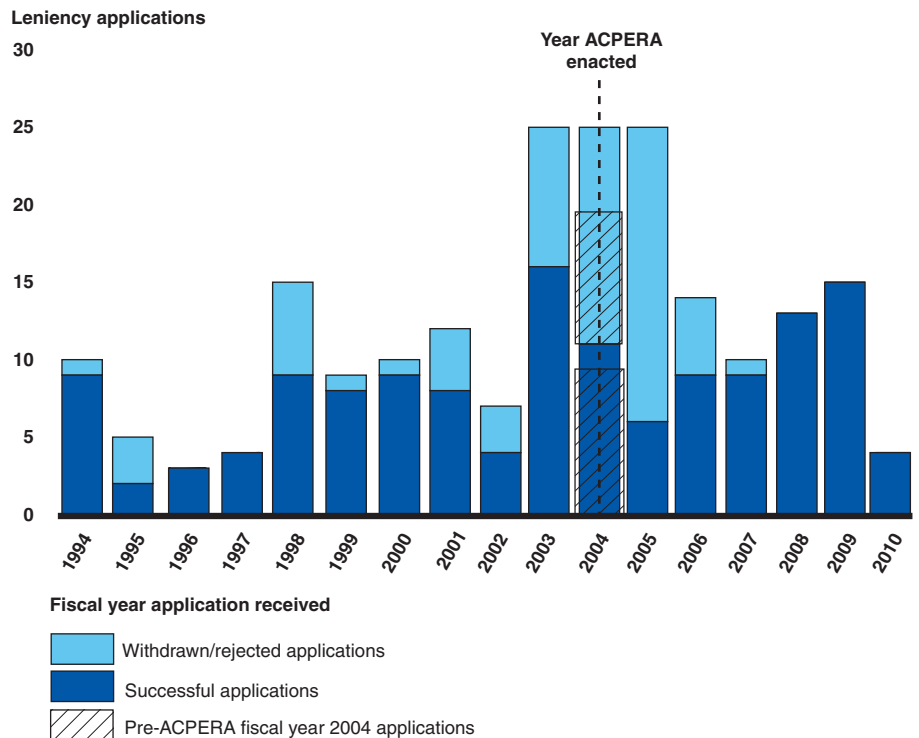
⁴¹ The numbers of leniency applications received each year are small so these data are sensitive to fluctuations over time. Therefore, we obtain different percent changes if we compare the 3, 4, 5, or 6 years before and after ACPERA's enactment. A comparison of the 3 year periods before and after ACPERA's enactment yields an 11 percent increase in total leniency applications received, a 4 year comparison yields a 15 percent increase, and a 5 year comparison yields a 22 percent increase. We chose to compare the 6 year periods before and after ACPERA's enactment to capture the broadest and most recent data available; this yielded a smaller increase in applications (4 percent) due, in part, to the relatively high number submitted in fiscal year 1998 (15) and the low number submitted in fiscal year 2010 (4).

⁴² The data we reviewed were current as of December 8, 2010, but Antitrust Division officials informed us on June 28, 2011, that one additional leniency application submitted after ACPERA's enactment (in fiscal year 2009) has since been withdrawn. Antitrust Division officials reported that an applicant can withdraw its application, or the division can reject an application. Typically, there is a mutual understanding between Antitrust Division officials and the applicant when an application is withdrawn or rejected. For example, an application can be withdrawn or rejected due to a lack of criminal antitrust violation after the Antitrust Division and/or the leniency applicant conducts an investigation or internal review and determines there is a lack of evidence to prove an antitrust violation. Antitrust Division officials said this typically occurs when an actual anticompetitive agreement was never reached or when the conduct did not impact U.S. markets. In one instance, the division revoked a leniency application.

⁴³ We compared the number of successful leniency applications submitted in 6 years before and after ACPERA's enactment; this yielded a 4 percent increase in successful applications. However, a comparison of successful applications submitted in the 3 year periods before and after ACPERA's enactment yields a 14 percent decrease in successful leniency applications received, a 4 year comparison yields no change, and a 5 year comparison yields a 16 percent increase.

year 2003—the year prior to ACPERA’s enactment—from an average of about 11 applications submitted per year in the prior 5-year period. The fact that this spike started before ACPERA’s enactment may indicate that ACPERA did not cause the high level of applications in fiscal year 2005, the fiscal year immediately following ACPERA’s enactment.

Figure 3: The Number of Corporate and Individual Leniency Applications Received by DOJ’s Antitrust Division, by Fiscal Year of Application



Source: GAO analysis of Antitrust Division data.

Note: Of the applications withdrawn or rejected in this time period, about 61 percent were withdrawn or rejected in the same fiscal year in which they were received, about 25 percent were withdrawn or rejected in the next fiscal year, and the remaining about 14 percent were withdrawn or rejected in later periods.

Additionally, the highest proportion of leniency applications (19 of 25) that were withdrawn or rejected were submitted in fiscal year 2005—the first full fiscal year following ACPERA’s enactment. Antitrust Division officials reported that for a short time after ACPERA’s enactment, applicants were rushing to report even borderline conduct possibly in order to take advantage of ACPERA’s potential relief from civil damages. This led to a short-term increase in leniency applications that the Antitrust Division

ultimately found lacked evidence of a criminal antitrust violation, meaning that there may have been no evidence of an agreement to collude between competitors. According to Antitrust Division officials, 17 of the fiscal year 2005 applications were withdrawn or rejected due to a lack of criminal antitrust violation.⁴⁴ Two defense attorneys among the 21 key stakeholders we identified told us that in some instances ACPERA's potential civil relief motivated companies to seek leniency from the Antitrust Division even though there was not a clear criminal antitrust violation. According to senior Antitrust Division officials, the decline in the number of applications withdrawn or rejected in the years following ACPERA—with no application withdrawn or rejected that was submitted in fiscal years 2008, 2009, or 2010—may largely be the result of the increasing use of the marker system⁴⁵ as well as a natural learning curve for defense attorneys regarding the circumstances under which they should apply for leniency, among other factors.⁴⁶

Furthermore, though there was little change in the total number of leniency applications, including successful applications, submitted in the 6 years before and after ACPERA, there was a shift in the type of successful leniency applications. As shown in figure 4 below, in the 6 fiscal years prior to ACPERA's enactment, Type B applications—those related to criminal cartel activity the Antitrust Division was already aware of at the time the application was submitted—comprised the largest share

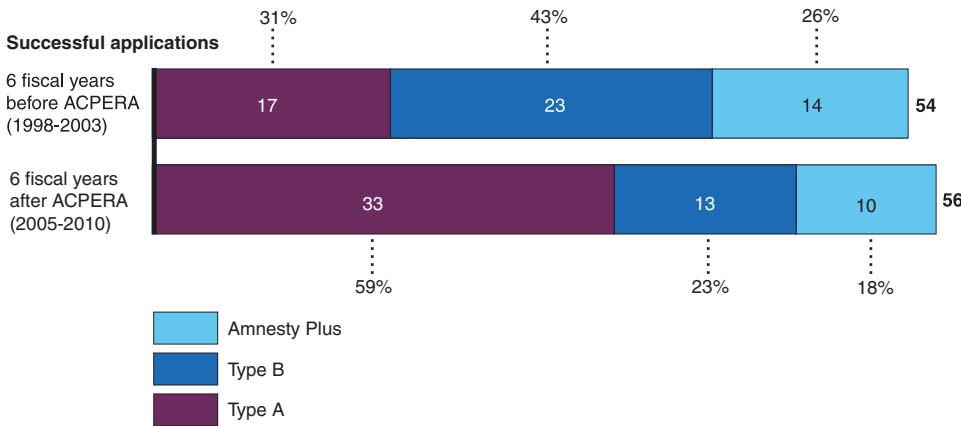
⁴⁴ One of the remaining withdrawn or rejected applications from fiscal year 2005 was due to a lack of a prosecutable case against others, and the other was rejected because the applicant also requested coverage for Title 18 conduct, but the Antitrust Division issued a joint nonprosecution letter with the U.S. Attorney to cover both Title 15 and Title 18 conduct.

⁴⁵ DOJ officials also told us they believe the change in their leniency practice to use markers has likely resulted in fewer applications being made post-ACPERA than would have been made without the marker system. They stated that if reported conduct does not actually rise to the level of a criminal antitrust violation, the lack of a violation is frequently discovered during the marker phase with the result that no application is subsequently made.

⁴⁶ Antitrust Division officials also stated that in November 2008, they published a "Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters (November 19, 2008)," and in March 2009, the Antitrust Division's Deputy Assistant Attorney General for Criminal Enforcement delivered a speech before the American Bar Association's Criminal Justice Section on recent developments in the division's Corporate Leniency Program. Both the Frequently Asked Questions and the speech clarified that a criminal antitrust violation was required in order for an applicant to receive conditional leniency.

(about 43 percent) of successful applications. However, in the 6 years after ACPERA's enactment, there were nearly twice as many successful Type A applications—33 compared to 17—as in the 6-year period prior to ACPERA and these applications accounted for the largest share (about 59 percent) of successful applications.⁴⁷ The Antitrust Division's Deputy Assistant Attorney General for Criminal Enforcement and other senior division officials regard Type A applications as the most valuable because they are those in which the division had no prior knowledge of the criminal cartel activity. These officials stated that they are not certain what, if any, impact ACPERA had on the increase in Type A applications. See appendix II for additional information on the criteria for Type A and B leniency and appendix III for additional analysis of Antitrust Division data on leniency applications.

Figure 4: The Number and Percentage of Successful Type A, Type B, and Amnesty Plus Leniency Applications in the 6 Fiscal Years Before and After ACPERA's Enactment



Source: GAO analysis of Antitrust Division data.

⁴⁷ Amnesty Plus leniency applications are also categorized as either Type A or Type B but are not included in the analysis in this section because Amnesty Plus leniency applicants are already under investigation by the Antitrust Division for their involvement in a separate antitrust conspiracy. Antitrust Division officials report that Type A applications and Type A Amnesty Plus applications, together, account for 73 percent of all successful applications in the 6 years after ACPERA's enactment, compared to 50 percent in the 6-year period pre-ACPERA.

Our interviews with attorneys representing leniency applicants indicate ACPERA's offer of relief from civil damages had a slight positive effect on leniency applicants' decisions to apply for leniency, though the threats of jail time and corporate fines were the most motivating factors both before and after ACPERA's enactment.⁴⁸ We spoke with 15 defense attorneys who represented clients in 18 successful applications for leniency both before and after ACPERA about the factors that motivated their clients to seek leniency.⁴⁹ All of the defense attorneys for the 4 post-ACPERA leniency applicants told us that ACPERA's benefit of relief from treble damages and joint and several liability motivated the company to apply for leniency, but reported this benefit was less important than the threat of jail time and/or corporate fine in the company's decision to apply for leniency. Similarly, a majority of the defense attorneys representing the pre-ACPERA leniency applicants (for 9 of 14 applicants) told us that the threat of civil treble damages and joint and several liability was slightly or moderately important in the company's decision to apply for leniency.⁵⁰ However, as with the defense attorneys for the post-ACPERA leniency applicants, all 14 of these defense attorneys for pre-ACPERA leniency applicants reported that the threat of jail time and corporate fines were the most important factors in their clients' decision to seek leniency.

⁴⁸ This finding is based on our analysis of responses to three questions we posed to defense attorneys who represented clients in 18 successful applications for leniency. We asked defense attorneys who represented 14 applicants prior to ACPERA's enactment whether the threat of civil damages and joint and several liability was a factor in their client's decision to seek leniency, and, if so, whether they would characterize it as a slightly, moderately, or greatly important factor in their client's decision. In addition, we asked them to rank the threat of corporate fine, individual fine, and jail time in order of importance. We asked defense attorneys who represented 4 applicants after ACPERA's enactment to rank the benefit of relief from joint and several liability and treble damages in exchange for satisfactory cooperation with plaintiffs in order of importance against the threat of corporate fine, individual fine, and jail time.

⁴⁹ Of these 18 corporate leniency applications, 14 were submitted to the division prior to ACPERA's enactment. The pre-ACPERA applicants included 4 Type A applicants, 4 Type B applicants, 5 Amnesty Plus applicants, and 1 applicant where the attorney did not recall the type of leniency received. Four of the 18 corporate leniency applications were submitted after ACPERA's enactment. The post-ACPERA applicants included 2 Type A applicants, 1 Type B applicant, and 1 Amnesty Plus applicant.

⁵⁰ Specifically, defense attorneys for seven leniency applicants told us the threat of civil treble damages and joint and several liability was a slightly important factor in their clients' decisions to seek leniency, defense attorneys for two applicants told us this was a moderately important factor, defense attorneys for three leniency applicants told us this was a greatly important factor, and defense attorneys for the remaining two applicants said this factor had no impact on their clients' decisions.

Factors other than ACPERA may also have affected the number and types of leniency applications submitted to the Antitrust Division over this time period, making it difficult to isolate ACPERA's impact. For example, the increase of leniency programs in other countries has made it more attractive for companies to simultaneously seek leniency in multiple countries where they have criminal exposure. The Antitrust Division's Deputy Assistant Attorney General for Criminal Enforcement has noted that because effective international leniency programs create a race among conspirators to disclose their conduct to enforcers, in some instances even before an investigation has begun, this possibly contributed to an increase in the number of leniency applications, and specifically Type A applications. In addition, cartels are more likely to form during recessions as businesses try to limit the intense competition, so economic forces beyond ACPERA may also be influencing the pool of potential leniency applicants. Despite these and other limitations in isolating ACPERA's impact—such as the fact that ACPERA could be having a deterrent effect by preventing or destabilizing cartel formation but it is difficult to know the extent, if any, of this effect—senior Antitrust Division officials stated that the number of leniency applications received by the Antitrust Division is the most relevant indicator of ACPERA's impact, and that they will continue to monitor these data over time.

After ACPERA, Higher Penalties Were Imposed in Criminal Cartel Cases

After ACPERA's increase in maximum fines under the Sherman Act—from \$10 million to \$100 million for corporations, and from \$350,000 to \$1 million for individuals—higher fines were imposed in criminal cartel cases, though senior Antitrust Division officials primarily attribute this trend to the division's efforts to pursue larger multistate and international cases.⁵¹ Total fines imposed in criminal cartel cases increased about 51 percent in the 6 fiscal years after ACPERA's enactment, compared with the 6 fiscal

⁵¹ As previously discussed, we analyzed data on fines and jail time associated with criminal cartel cases for Title 15 offenses, including cases that have both Title 15 and non-Title 15 offenses. We did not include cases that only alleged non-Title 15 offenses, such as Title 18 cases—cases that include conduct beyond criminal cartel activity, such as obstruction of justice and fraud—in our analysis. In addition, we adjusted all fine data for inflation using fiscal year 2011 dollars based on the Gross Domestic Product deflator. We performed our analysis of the fine data by fiscal year of sentencing (i.e., the fiscal year a court imposed a fine) and not by the fiscal year a fine was obtained. For these reasons, our reported data may differ from data previously reported by the Antitrust Division on their criminal cases and penalties associated with these cases.

years prior to ACPERA.⁵² This trend is illustrated in figure 5 below. In addition, the Antitrust Division's criminal cartel cases generally resulted in higher fines per case in the 6 years after ACPERA's enactment—median fines increased about 81 percent between the same periods.⁵³ Antitrust Division officials attributed the increase in fines imposed largely to the Antitrust Division's policy shift beginning in the mid 1990s toward prosecuting larger multistate and international cartels—which generally involve a larger volume of commerce in the United States and, therefore, result in larger criminal fines.⁵⁴

In addition, Antitrust Division officials reported that, while they have not had a post-ACPERA trial in which they sought a fine above the previous Sherman Act maximum, ACPERA's increase in maximum fines would make it somewhat easier to obtain higher fines in the 10 percent of cases that go to trial. Antitrust Division officials explained that the pre-ACPERA maximum fines did not inhibit the agency from negotiating fines in excess of the Sherman Act maximums in the 90 percent of cases that result in plea agreements, because the division has relied on a provision of federal law allowing a fine up to either twice the gain from the illegal activity or twice the loss to the victims.⁵⁵ However, Antitrust Division officials reported that ACPERA's increase in maximum fines would make it somewhat easier to seek higher fines in cases that go to trial because the Antitrust Division could obtain higher fines without having to prove the

⁵² From fiscal year 1998 through 2003, total fines imposed were about \$2.5 billion. From fiscal year 2005 through 2010, total fines imposed were about \$3.8 billion, an increase of about 51 percent. Between the same periods, the proportion of fines in cases assisted by a leniency applicant to overall fines imposed was close to 100 percent (94 and 99 percent respectively).

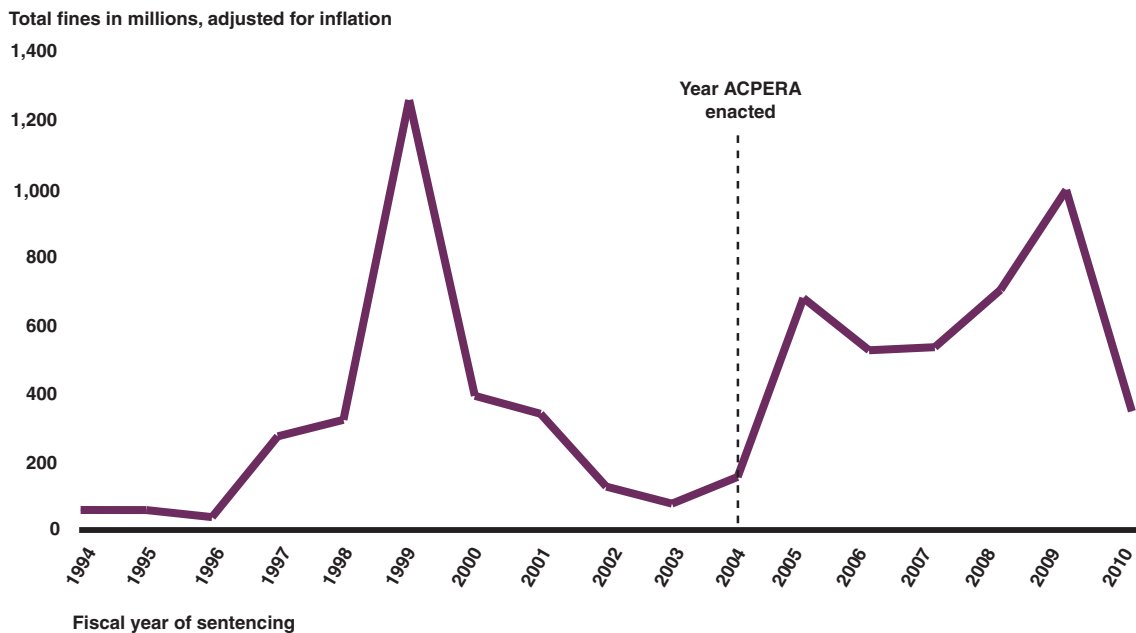
⁵³ Average fines increased about 60 percent between the same periods.

⁵⁴ Based on our analysis of Antitrust Division data, it appears that the total volume of commerce impacted by criminal cartel cases sentenced in the 6 fiscal years after ACPERA was higher than in the prior 6 fiscal years. However, inconsistencies in the information available on volume of commerce prevent a more definitive analysis. See app. III for additional analysis of the Antitrust Division's criminal cartel enforcement data.

⁵⁵ In 1990, the maximum corporate fine for a Sherman Act violation was increased from \$1 million to \$10 million. Antitrust Amendments Act of 1990, Pub. L. No. 101-588, § 4. The maximum corporate fine was increased again under ACPERA to \$100 million. Pub. L. No. 108-237, § 215. The division has sought higher fines under 18 U.S.C. § 3571(d), which allows for fines that exceed the Sherman Act maximum.

gain or loss attributable to the illegal activity in court, a very resource-intensive process.⁵⁶

Figure 5: Total Fines Imposed in Criminal Cartel Cases, by Fiscal Year of Sentencing



Source: GAO analysis of Antitrust Division data.

Note: Trends in yearly total fines are sensitive to fluctuations from fiscal year to fiscal year in part because of the number of cases sentenced each year. For example, Antitrust Division officials reported that the peak in fiscal year 1999 is due in part to fines of \$725 million imposed against members of the international vitamins cartels. These officials stated that the decrease in fiscal year 2010 could be an anomaly and that they would continue to monitor these trends.

ACPERA's increase in maximum jail time for antitrust violations—from 3 to 10 years—may have contributed to higher jail time imposed in criminal

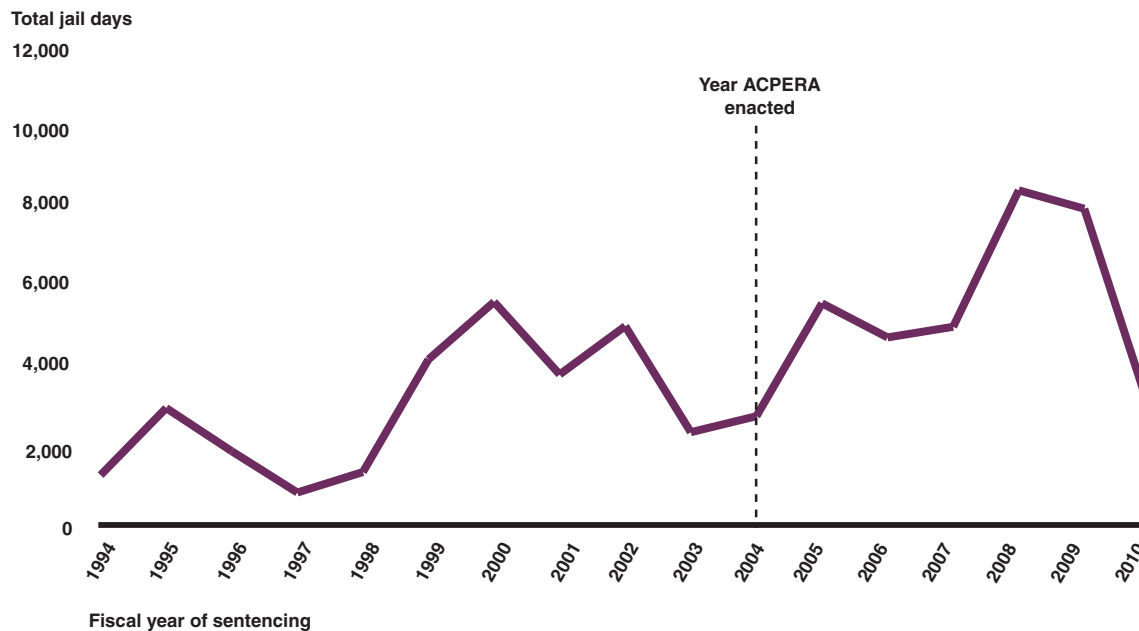
⁵⁶ See Scott Hammond, Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division, Department of Justice, "Antitrust Sentencing In The Post-Booker Era: Risks Remain High For Non-Cooperating Defendants," (speech at the American Bar Association Section of Antitrust Law Spring Meeting, Washington, D.C.: Mar. 30, 2005). In order to obtain a fine under the alternative fine provision, the division may have to prove the amount of gain or loss attributable to the entire cartel; whereas for a fine under the Sherman Act maximum, once the elements of the crime are proved, the fine may be imposed.

cartel cases sentenced after ACPERA's enactment.⁵⁷ In the 6 years after ACPERA's enactment, total jail time imposed in criminal cartel cases increased about 56 percent compared with the 6 fiscal years prior to ACPERA. This trend is illustrated in figure 6 below. In addition, Antitrust Division data show that the median jail sentence for individual cases increased about 86 percent in the 6 fiscal years after ACPERA's enactment, compared with the prior 6 fiscal years.⁵⁸ Additionally, since ACPERA's enactment, a higher proportion of defendants in criminal cartel cases have been sentenced to jail. Specifically, in the 6 fiscal years before ACPERA about 44 percent of defendants in criminal cartel cases were sentenced to jail, and in the 6 fiscal years after ACPERA about 74 percent of defendants were sentenced to jail.

⁵⁷ As previously discussed, we analyzed data on jail time associated with criminal cartel cases for Title 15 offenses, including cases that have both Title 15 and non-Title 15 offenses. We did not include cases that only alleged non-Title 15 offenses, such as Title 18 cases—cases that include conduct beyond criminal cartel activity, such as obstruction of justice and fraud—in our analysis.

⁵⁸ From fiscal year 1998 through 2003 total jail time was about 21,951 days. From fiscal year 2005 through 2010, total jail time was about 34,171 days, about a 56 percent increase. Average jail time increased about 135 percent, minimum jail time increased about 146 percent, and maximum jail time increased about 92 percent in the 6 fiscal years after ACPERA's enactment, compared with the prior 6 fiscal years.

Figure 6: Total Days of Jail Time Imposed in Criminal Cartel Cases, by Fiscal Year of Sentencing



Source: GAO analysis of Antitrust Division data.

Note: Trends in yearly total jail time are sensitive to fluctuations from fiscal year to fiscal year in part because of the number of defendants sentenced each year. Antitrust Division officials noted the decrease in fiscal year 2010 could be an anomaly and that they would continue to monitor these trends.

Antitrust Division officials reported that ACPERA's increase in maximum jail time was one of several reasons for the increase in total and median jail times imposed in criminal cartel cases.⁵⁹ Antitrust Division officials also identified other factors that have contributed to the increase, including:

- the Antitrust Division's stronger cooperative relationships with foreign governments improved its ability to obtain jail time for foreign nationals;⁶⁰

⁵⁹ In response to ACPERA's increase in maximum jail time, the U.S. Sentencing Guidelines were similarly updated in 2005.

⁶⁰ See Belinda Barnett, Senior Counsel to the Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division, Department of Justice, "Criminalization of Cartel Conduct – The Changing Landscape," (speech at the Joint Federal Court of Australia/Law Council of Australia (Business Law Section) Workshop, Adelaide, Australia: Apr. 3, 2009).

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- a policy shift toward prosecution of additional culpable individuals from each corporate defendant rather than only the single most culpable employee from foreign companies in international cartel cases;
 - elimination of “no-jail” deals for any defendant, meaning the Antitrust Division no longer agreed to recommend a no-jail sentence for any defendant; and
 - judges imposing tougher sentences since 2005.

Plaintiffs’ Attorneys Reported that ACPERA Has Helped Advance Civil Cases, but Differing Views on Timing and Amount of Cooperation Have Posed Challenges

Plaintiffs’ attorneys from most of the cases in our sample reported that ACPERA’s cooperation provision has generally helped advance their civil cases by improving the cases’ strength and efficiency. In addition, most plaintiffs’ and defense attorneys for leniency applicants noted differing views on certain aspects of ACPERA cooperation—namely the timing and amount of cooperation—which have resulted in challenges. A 2010 amendment to ACPERA provides some clarification that cooperation must be provided in a timely manner, but it is too soon to assess the impact of this amendment. Additionally, some plaintiffs’ and defense attorneys for leniency applicants have developed detailed agreements which set forth the timing and extent of cooperation that leniency applicants will provide.

Plaintiffs’ Attorneys We Interviewed Reported that Information Gained through ACPERA Cooperation Strengthened and Streamlined Their Cases

In order to obtain the civil benefits of ACPERA—relief from treble damages and joint and several liability—leniency applicants must cooperate with civil plaintiffs in private civil antitrust litigation. Specifically, under ACPERA, leniency applicants are required to provide to plaintiffs a full account of all facts that are potentially relevant to the civil action and provide all relevant documents or other items that are in the possession of the applicant. Plaintiffs’ attorneys in our sample reported that information gained through ACPERA cooperation both strengthened and streamlined their cases. Specifically, plaintiffs’ attorneys for 12 of the 17 cases in our sample⁶¹ reported that information shared by the leniency applicant through ACPERA cooperation was greatly valuable. Moreover, 10 of these 12 plaintiffs’ attorneys explained that the information was

⁶¹ We talked with 10 class counsel (plaintiffs’ attorneys) who served as class counsel in 17 private civil antitrust cases involving publicly disclosed leniency applicants. Three plaintiffs’ attorneys served as class counsel in more than 1 case in our sample of 17 cases.

valuable because it helped to strengthen their cases.⁶² The types of information that leniency applicants shared with plaintiffs have included attorney proffers (which provide a chronological overview of the conspiracy), witness interviews, e-mails and other documentary evidence of the companies and individuals who participated in the conspiracy, the product market and geographic area covered by the conspiracy, and the pricing structure for the relevant products. Plaintiffs' attorneys we interviewed stated that such information strengthened their cases in the following ways:

- **ACPERA cooperation helps plaintiffs overcome motions to dismiss the case:** Because evidence of criminal cartel activity is secretive and difficult to discover, plaintiffs whose cases are assisted by a cartel insider—the leniency applicant—are able to build stronger cases. Strong evidence at the complaint phase became more important to plaintiffs' ability to overcome motions to dismiss, particularly in light of a 2007 Supreme Court case—Bell Atlantic Corp. v. Twombly.⁶³ The Twombly decision requires plaintiffs to allege enough facts to support a plausible claim for relief—before they have the opportunity to conduct civil discovery—or risk having the case dismissed.⁶⁴ Plaintiffs' attorneys for all four cases in our sample which occurred after the Twombly decision reported that ACPERA cooperation was greatly or moderately valuable to their cases. Of the three plaintiffs' attorneys who said ACPERA cooperation was greatly valuable, two stated that ACPERA cooperation provided plaintiffs with the early evidence they needed to support their case, thereby helping plaintiffs survive defendants' motions to dismiss the case.
- **ACPERA cooperation helps plaintiffs reach higher settlements with nonleniency defendants:** Plaintiffs' attorneys for 6 of the 14 cases in our sample that reached settlements with nonleniency defendants reported that ACPERA cooperation provided by a leniency applicant increased the amount of the settlement with these other

⁶² Plaintiffs' attorneys for 2 of the 12 cases who stated that ACPERA cooperation was greatly valuable did not provide a reason why they gave this response. Plaintiffs' attorneys for 4 cases said ACPERA cooperation was moderately valuable, and a plaintiffs' attorney in 1 case said it was not valuable at all.

⁶³ 550 U.S. 544 (2007).

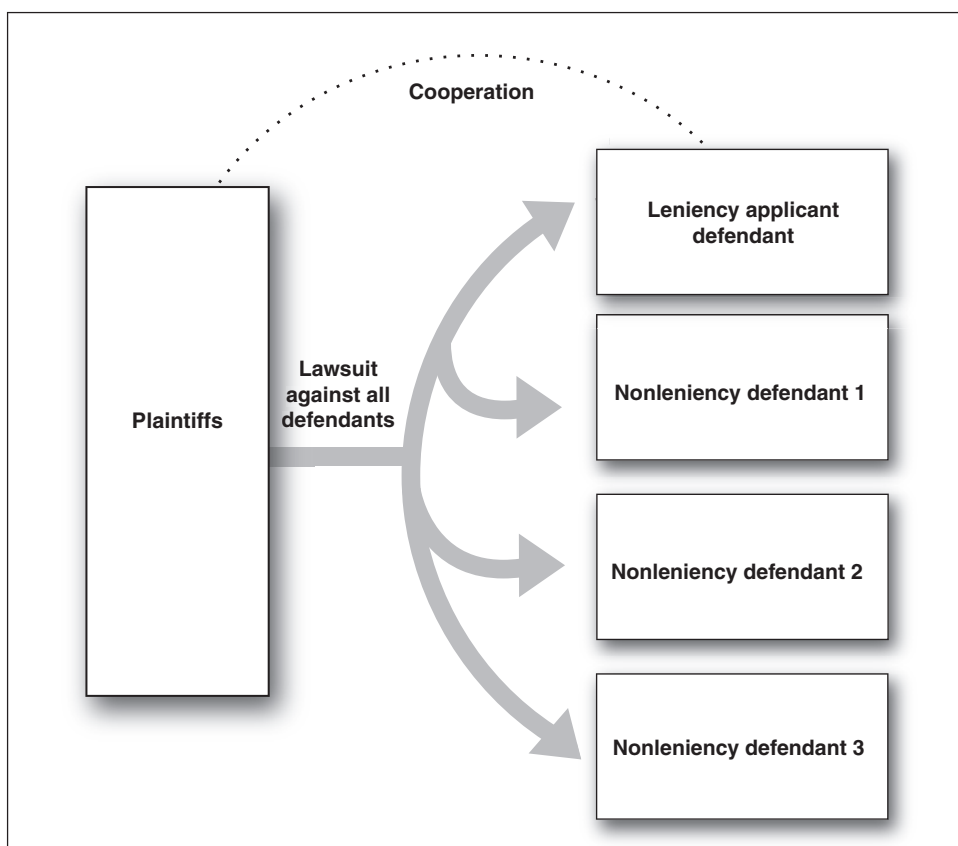
⁶⁴ This standard requires a more rigorous analysis of the complaint than was previously undertaken by courts. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

defendants.⁶⁵ Specifically, plaintiffs' attorneys from 5 of these 6 cases stated that their cases against nonleniency applicants were stronger because plaintiffs had the cooperation of a cartel insider—the leniency applicant. For example, 2 plaintiffs' attorneys stated that when nonleniency defendants know that a leniency applicant is supplying plaintiffs with insider evidence of cartel activity, nonleniency defendants acknowledge that the plaintiffs' case is probably strong. Plaintiffs' attorneys from 4 (of 14) cases in our sample that reached settlements said that ACPERA had no effect on their settlements with other defendants⁶⁶ because, for example, plaintiffs were already in negotiations with other defendants when the leniency applicant first provided cooperation and key witnesses were unavailable for interview. Figure 7 depicts the three parties to private civil antitrust lawsuits involving leniency applicants—the plaintiffs, leniency applicant, and other (nonleniency) defendants.

⁶⁵ Defense attorneys representing leniency applicants also generally reported favorable effects on settlements as a result of ACPERA cooperation. Defense attorneys for 10 of the 13 cases in our sample where the leniency applicant reached a settlement with plaintiffs reported that they believed ACPERA's cooperation provision decreased the amount of the settlement with the plaintiffs in the case, meaning that their clients had to pay less to settle the case. In 3 of the 13 cases, defense attorneys stated that ACPERA had no effect on the settlement amount with plaintiffs. In 1 additional case, the leniency applicant had not yet reached a settlement with plaintiffs at the time of our interview.

⁶⁶ Plaintiffs' attorneys who stated that ACPERA cooperation had no effect on settlements with other defendants provided other reasons as well. For example, they said that a standard combination of factors (including products involved, market size, and geographic area) was used to determine an appropriate settlement and that no ACPERA cooperation was provided. Additionally, the plaintiffs' attorneys from 1 of 14 cases that reached settlement said ACPERA cooperation decreased the settlement with other defendants. Plaintiffs' attorneys in 3 of the 14 cases did not provide a response to this question. Three of our 17 total cases did not—or had not at the time of our interviews—reached a settlement with other defendants.

Figure 7: Various Parties in a Private Civil Antitrust Case



Source: GAO analysis of testimonial evidence from plaintiffs' and defense attorneys for leniency applicants.

In addition to strengthening cases, plaintiffs' attorneys for 10 of 17 cases in our sample reported that information gained through ACPERA cooperation helped them to streamline their cases by reducing the burden of long and costly civil discovery because leniency applicants provided a roadmap to the conspiracy.⁶⁷ For example, the plaintiffs' attorney in 1 case said that the information shared by the leniency applicant as a result of ACPERA was less expensive, more focused, and more helpful in

⁶⁷ Of the remaining 7 (of 17) attorneys, 4 found ACPERA to be more valuable than civil discovery but did not provide a reason for this response and 3 found ACPERA cooperation to be equally valuable compared to regular civil discovery.

comparison to regular civil discovery. Plaintiffs' attorneys in 3 cases stated that ACPERA cooperation also reduced gamesmanship, which can extend the length of civil discovery.⁶⁸

Differing Views on the Timing and Amount of ACPERA Cooperation Have Posed Challenges

Both plaintiffs' attorneys and leniency applicants' defense attorneys we spoke with had differing views (between and within the groups) of precisely how much ACPERA cooperation leniency applicants must provide, and when, to ensure that they would qualify for ACPERA's civil relief. While attorneys' perceptions differed with regard to ACPERA, it should be noted that plaintiffs' and defendants' interests are often in opposition and differing views of legal requirements are typical. However, information sharing by a defendant (the leniency applicant) with the plaintiffs, as ACPERA requires, creates a unique situation in this typically adversarial relationship. While plaintiffs and defendants may have similar interests and may work toward a mutually acceptable resolution of claims, a defendant under normal circumstances is not obligated to help a plaintiff prove its case against the defendants.

Specifically, plaintiffs' and defense attorneys for leniency applicants differed in their views of when ACPERA cooperation should begin and end, and the amount of information the leniency applicant should provide to plaintiffs. The statute does not provide a definition of "satisfactory cooperation," nor does it provide specific guidance on the amount of cooperation required and exactly when ACPERA cooperation must begin and end.⁶⁹ ACPERA provides that in order to receive relief from treble damages and joint and several liability, the leniency applicant must provide "satisfactory" cooperation to plaintiffs in prosecuting their case. The statute states that a judge may rule on whether the leniency applicant has provided satisfactory cooperation. However, plaintiffs' and defense attorneys for leniency applicants reported that private civil antitrust cases

⁶⁸ Plaintiffs' attorneys also noted that discovery with a foreign company can also provide complications in the discovery process; for example, plaintiffs may have to request documents under Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231.

⁶⁹ In general, the law requires that cooperation includes the leniency applicant (1) providing a full account to the plaintiffs of all facts known or that are potentially relevant to the civil action; (2) furnishing all documents or other items potentially relevant to the civil action; and (3) using best efforts to make individuals available for interviews, depositions, or testimony as the plaintiffs reasonably require. Pub. L. No. 108-237, § 213(b), as amended.

The timing of ACPERA cooperation

typically reach a settlement and thus a judge seldom has the opportunity to rule on ACPERA cooperation. Attorneys also cited advantages of differing views as well as a strategy for addressing challenges as discussed below.

Plaintiffs' and defense attorneys for leniency applicants reported differing views about when ACPERA cooperation should start and end in private civil cases. Seven of 10 plaintiffs' attorneys we interviewed explained why ACPERA cooperation should begin early in the case and last through trial if necessary; however, 8 of 11 defense attorneys for leniency applicants we interviewed explained why they may delay providing cooperation or their concerns about how long leniency applicants must provide cooperation. These differing perspectives may give rise to frustrations from both plaintiffs' and defense attorneys regarding ACPERA cooperation in civil proceedings.

The start of cooperation: Leniency applicants are not required to provide ACPERA cooperation in civil cases and, therefore, some leniency applicants determine that it is in their best interest to wait to provide cooperation—and accept the possibility of paying treble damages—before divulging incriminating information to plaintiffs. Leniency applicants may decide to hold off on cooperation until they see whether the civil case will be dismissed or if their risk of civil damages is relatively minor. For example, one defense attorney stated that if his client sells most of his products overseas, making the threat of civil damages in the United States relatively minor, he may counsel the leniency applicant to wait to provide ACPERA cooperation until after the court decides on whether to dismiss the case. Plaintiffs' attorneys told us that when leniency applicants wait to provide cooperation plaintiffs are often left with insufficient evidence to establish a claim (i.e., prove that illegal conduct occurred) or survive defendants' motions to dismiss the case. Additionally, if cooperation occurs late in the case, plaintiffs may already be in settlement negotiations with other defendants and thus unable to use the leniency applicants' information as leverage in those discussions.

Stays of civil discovery requested by the Antitrust Division may also keep some leniency applicants from providing early ACPERA cooperation and plaintiffs' attorneys report that this hurts their cases. Criminal investigations and cases take precedence over civil proceedings and, therefore, the Antitrust Division may ask the court to issue a stay of civil discovery which, if granted, essentially halts certain or all aspects of civil discovery such as, for example, witness interviews or document sharing. Stays of civil discovery constrain how much information a leniency

applicant provides to plaintiffs because information plaintiffs are seeking from the leniency applicant may be the type of information that could adversely impact the Antitrust Division's criminal investigation or case. For example, when the Antitrust Division's criminal case is still ongoing, prosecutors may object to plaintiffs interviewing any witnesses who have not yet testified for the criminal case. Antitrust Division officials told us that if a witness testifies more than once it increases the odds of inconsistency in their statements so permitting a criminal case witness to be deposed in a civil case puts their criminal cases at some risk. Since ACPERA's enactment in June 2004, Antitrust Division officials report that they have obtained stays in 15 criminal cartel actions. These officials stated that the Antitrust Division considers several factors⁷⁰ when deciding whether to request a stay, such as whether information provided in the civil case will jeopardize the criminal case or prematurely reveal information from the Antitrust Division's investigation, and the length of time that the Antitrust Division's criminal investigation has been ongoing.⁷¹ Plaintiffs' attorneys told us that stays can hurt their cases by precluding early ACPERA cooperation from the leniency applicant, prolonging victims' wait for compensation, and compromising their attorneys' ability to gather relevant information to the case.

All defense attorneys for leniency applicants in our sample of 14 cases stated that the applicants they represented elected to provide ACPERA cooperation, to varying extents, at different stages throughout the case, beginning as early as before the consolidated complaint was filed or as late as discovery.⁷² For example, in 1 case in our sample, the leniency

⁷⁰ Two plaintiffs' attorneys told us they were not clear on the factors the Antitrust Division considers when requesting a stay of civil discovery. When we raised this issue with the Antitrust Division, officials said that in their stay motions they have articulated the factors relevant to those cases, but will also add these factors to the Antitrust Division manual to enhance the transparency of the Antitrust Division's process for requesting stays.

⁷¹ Antitrust Division officials told us that the division monitors each stay until it is lifted and continually assesses whether civil discovery would have an adverse impact on the Antitrust Division's investigation and whether the stay is impacting the civil case. ACPERA cooperation requirements are one of the variables in this assessment.

⁷² In the course of our review, due to the confidentiality of leniency applicant identities, we were only able to identify 17 publicly disclosed leniency applicants out of a total of 58 successful leniency applicants since ACPERA was enacted in 2004 through fiscal year 2010. We were unable to obtain the perspective of attorneys for leniency applicants who have not been publicly disclosed and these applicants may have elected not to provide ACPERA cooperation.

applicant provided an initial chronology of the conspiracy after the complaint was filed and then provided the bulk of cooperation, including interviews with witnesses, during civil discovery. In another case, the leniency applicant began to provide cooperation during civil discovery.

Two published court decisions discuss the issue of timing with regard to ACPERA cooperation, but in general there is little case law to provide guidance on how to resolve differing interpretations of ACPERA's provisions. In one case we reviewed, the court ruled that ACPERA does not compel a leniency applicant to identify itself and cooperate with plaintiffs.⁷³ In another case we reviewed, the court ruled plaintiffs must provide reasonable notice to the leniency applicant when requesting depositions of key witnesses.⁷⁴ See appendix IV for a description of judicial decisions which involve ACPERA's cooperation requirement.

ACPERA'S 2010 amendment provides some clarification that cooperation must be provided in a timely manner and, in the case of a stay of civil discovery, as soon as the stay is lifted.⁷⁵ At the time of our interviews with plaintiffs' attorneys, little time (about 9 months) had passed since the amendment's enactment. Seven of the 10 plaintiffs' attorneys we interviewed reported having evidence of the amendment's effect on ACPERA cooperation. Three of these 7 attorneys reported that in their experience after the amendment, leniency applicants are providing ACPERA cooperation earlier, and another attorney stated that the amendment had reduced tensions between the leniency applicant and the

⁷³ *In re TFT-LCD Antitrust Litig.*, 618 F. Supp. 2d 1194 (N.D. Cal. 2009).

⁷⁴ *In re Sulfuric Acid Antitrust Litig.*, 2005 U.S. Dist. LEXIS 18265 (N.D. Ill. Aug. 26, 2005).

⁷⁵ Pub. L. No. 111-190, § 3, 124 Stat. 1275, 1276. The amendment explicitly directs the court to consider, in making the determination concerning satisfactory cooperation, the timeliness of the leniency applicant's cooperation. The amendment also provides that if the Antitrust Division obtains a stay, once the stay, or a portion of it, expires or is terminated, the leniency applicant must provide cooperation without unreasonable delay.

plaintiffs' attorney.⁷⁶ Because private civil antitrust cases often take years to resolve, it is too soon to assess the impact of this amendment.

The end of cooperation: Seven of 11 defense attorneys for leniency applicants expressed concerns about how long leniency applicants must provide ACPERA cooperation. Four of these 7 defense attorneys stated that it was unclear how long the leniency applicant would need to cooperate with plaintiffs in order to receive ACPERA's benefits of civil relief. However, a plaintiffs' attorney told us that he interpreted ACPERA's cooperation requirements to mean that leniency applicants must continue to cooperate through trial and appeal (or settlement) of the plaintiffs' cases with all defendants involved in the case, if the case proceeds that far. The plaintiffs' attorney described a dispute with the defense attorney for the leniency applicant over how long ACPERA cooperation would continue in a case. In this case, it was determined through negotiations between attorneys that cooperation would continue until all claims against all defendants were resolved. A plaintiffs' attorney from another case in our sample stated that plaintiffs' attorneys are generally reluctant to tell the leniency applicant that they have provided sufficient cooperation because plaintiffs' attorneys want to leave the door open should they need to ask the leniency applicant for more information.

The amount of information provided to plaintiffs by the leniency applicant

Attorneys have differing views on the required scope of ACPERA cooperation. The statute requires "satisfactory cooperation to the [plaintiffs] with respect to the civil action," but attorneys' interpretations of this requirement vary. One way different perspectives on the required amount of ACPERA cooperation is manifested is in civil cases that allege a longer period of time for the conspiracy or may include more products than what the leniency applicant admitted to and sought leniency for from the Antitrust Division during the criminal proceedings. For example, a leniency applicant may provide information to the Antitrust Division during

⁷⁶ Of the other 3 plaintiffs' attorneys who had evidence of the effect of the timeliness amendment, 1 attorney stated that stays requested by the Antitrust Division still constrain leniency applicant efforts to be timely, 1 attorney said that the impact was mixed, and 1 attorney said the amendment had no effect. Of the 3 defense attorneys for leniency applicants who had evidence of the effect of the timeliness amendment, 2 attorneys stated that the amendment had no effect, and 1 attorney stated that the amendment made it difficult to cooperate early without endangering leniency status with foreign authorities. Three of the 10 plaintiffs' attorneys and 8 of the 11 defense attorneys for leniency applicants we spoke with stated that they did not have any evidence on how the timeliness amendment was affecting ACPERA cooperation.

Advantages of differing views
and strategies for addressing
challenges

the criminal investigation about a certain time period of misconduct involving a defined set of products, but civil plaintiffs may allege a longer period of misconduct and a greater number of products involved. This causes a challenge because plaintiffs may press leniency applicants for cooperation pertaining to a wider scope of conspiracy than for which they sought criminal leniency.

Some attorneys have noted potential advantages to these differing views on ACPERA's cooperation requirements.⁷⁷ For example, two key stakeholders (the Chair of the American Bar Association Section of Antitrust Law and a defense attorney) and three attorneys from our sample of cases involving leniency applicants (two plaintiffs' attorneys and one defense attorney) stated that the statute's room for interpretation encourages defendants to be more cooperative because they do not want to risk being denied relief from treble damages and joint and several liability. According to the defense attorney from our sample, the possibility that a leniency applicant could provide cooperation but, due to the insufficiency or lateness of the cooperation, be denied civil relief, makes early settlements more attractive to both the leniency applicant and the claimants. Early settlements are generally regarded by attorneys as good for both parties because plaintiffs get the ACPERA cooperation they need to build a strong case, leniency applicants are able to resolve the claim as swiftly as possible, and both parties are able to save legal fees associated with prosecuting and defending the case.

One way attorneys have navigated the challenges presented by differing views on exactly when ACPERA cooperation should end and the amount of ACPERA cooperation a leniency applicant should provide is by developing detailed cooperation agreements. According to plaintiffs' attorneys in 5 of 17 cases in our sample, they entered into cooperation agreements that dictated the form, scope, and timing of ACPERA cooperation. For example, in 1 case, the settlement agreement set forth the types of cooperation and information that was expected—from the availability of documents and witnesses to the requirement that the leniency applicant be present for trial.⁷⁸ The agreement also included a

⁷⁷ E. Mahr and P.A. Lange. "ACPERA – Glass Half Full" Law 360 (Oct. 25, 2010).

⁷⁸ Settlement Agmt. Between Air Cargo Pls. and Defs. Deutsche Lufthansa AG, Lufthansa Cargo AG & Swiss Int'l Air Lines Ltd., In re Air Cargo Shipping Servs. Antitrust Litig., No. 06-1775, docket. no. 493, ex.2 (E.D.N.Y. July 13, 2007) (approved Sept. 25, 2009).

paragraph specifically stating that the cooperation provided for in the agreement would satisfy the leniency applicant's ACPERA cooperation requirements. The plaintiffs' attorney in this case noted that because the details of cooperation were agreed upon in writing, ACPERA cooperation occurred without the delays that he found to be typical without such an agreement.

No Consensus Among Key Stakeholders on Adding Whistleblower Reward, but Wide Support for Adding Antiretaliatory Protection

Nine of 21 key stakeholders⁷⁹ we interviewed and DOJ officials stated that incentives such as a whistleblower reward might motivate more whistleblowers to report criminal cartel activity to DOJ which, in turn, could result in greater cartel detection by the agency.⁸⁰ However, 11 of 21 key stakeholders and DOJ officials noted disadvantages that could hinder DOJ's enforcement program by jeopardizing witness credibility, undermining companies' internal compliance programs, generating more claims that do not result in prosecutions, or requiring additional DOJ resources to administer.⁸¹ Program officials responsible for existing whistleblower reward programs at the IRS and DOJ's Civil Division, as well as members of the SEC's rulemaking team provided their perspectives on some of these potential disadvantages. In contrast, all key stakeholders who had a position on the issue (16 of 21)⁸² generally

⁷⁹ To determine key stakeholder perspectives on the potential advantages and disadvantages of adding rewards and antiretaliatory provisions for those who report criminal antitrust violations, we asked open-ended questions of the 21 key stakeholders described in app. I as well as others with knowledge of whistleblower programs and existing bounty provisions, including the Legal Director of the Government Accountability Project (a whistleblower advocacy group), officials with OSHA's Office of the Whistleblower Protection Program who administer 21 federal whistleblower protection provisions, members of the SEC's rulemaking team, and program officials who administer existing bounty provisions administered by the IRS and DOJ's Civil Division.

⁸⁰ These nine key stakeholders included three plaintiffs' attorneys, three law professors, and three economics professors.

⁸¹ These 11 key stakeholders include 3 defense attorneys, 2 plaintiffs' attorneys, 2 representatives of the ABA Section of Antitrust Law, 2 economics professors, and 2 law professors, though each of these key stakeholders did not necessarily note more than one of the listed disadvantages.

⁸² This includes the perspective of the Chair and Chair's Assistant of the ABA Section of Antitrust Law but they stated that their views do not represent the position of the ABA. The five key stakeholders who did not have a position on the issue were the President of the American Antitrust Institute and four representatives of the Committee to Support Antitrust Laws, all of whom stated that their organizations have no formal position on the addition of a whistleblower protection provision though representatives of both organizations told us that they favored the idea.

supported the addition of a civil whistleblower protection provision for those who report criminal antitrust violations, though senior DOJ Antitrust Division officials stated that they neither support nor oppose the idea. Currently, whistleblowers who report criminal antitrust violations lack a civil remedy if they experience retaliation, such as being fired, and past reported cases suggest retaliation occurs in this type of situation.

Stakeholders stated that a new whistleblower reward could result in greater cartel detection and deterrence but noted that a reward could hinder DOJ's enforcement program

DOJ's leniency program offers incentives for wrongdoers to report criminal cartel activity to the agency, but there is currently no incentive or protection to encourage innocent third-party informants, or whistleblowers, to report suspected wrongdoing to DOJ. A bounty provision typically allows the government to provide a portion of a recovery (fine or penalty)⁸³ to individuals who provide information leading to the enforcement action.⁸⁴ While DOJ already provides incentives for cartelists to self-report criminal activity by providing protection from criminal conviction through its leniency program, a bounty provision in the criminal antitrust setting could mean that innocent whistleblowers who are not part of the criminal conspiracy would be eligible for reward—they could receive some percentage of the fine imposed by DOJ or a court if they provide information that results in a successful enforcement action. Nine of 21 key stakeholders we interviewed—3 law professors, 3 economics professors, and 3 plaintiffs' attorneys—as well as Antitrust Division officials stated that incentives such as a whistleblower reward might motivate more whistleblowers to report criminal cartel activity to DOJ which, in turn, could result in greater cartel detection by the agency.⁸⁵ Further, 2 of these law professors and 1 of these economics professors maintain that merely offering a whistleblower reward could destabilize cartels by increasing uncertainty and fear of detection among cartel members. This could result in the weakening of some existing cartels and the deterrence of cartel formation.

⁸³ Currently, fines are deposited into the Crime Victims Fund, 42 U.S.C. § 10601, which provides grants for federal, state, and tribal victim assistance programs, among other things.

⁸⁴ Some bounty programs require the government to provide a bounty, whereas others provide discretion to the government to decide whether to pay the whistleblower.

⁸⁵ Later in the report we discuss potential disadvantages of a bounty provision noted by DOJ officials and others.

It is important to note the distinction between a whistleblower reward in the form of a qui tam provision and a bounty provision. A qui tam provision in the criminal antitrust setting would allow for a whistleblower to pursue a criminal lawsuit against cartel members on behalf of the government and be rewarded with a portion of any resulting penalties. However, DOJ has the sole authority to prosecute federal criminal cases, so a private right of action in the criminal context would conflict with this authority.⁸⁶ The Antitrust Division's Deputy Assistant Attorney General for Criminal Enforcement maintains that that this type of reward provision works in the civil setting where nongovernment entities can bring civil lawsuits but is unworkable in the criminal setting because DOJ has the sole authority to prosecute federal criminal cases. Almost all key stakeholders who had a position on the addition of a qui tam provision (11 of 12) and Antitrust Division officials stated that a whistleblower reward in the form of a qui tam provision would not be appropriate in the criminal antitrust setting.⁸⁷ In contrast, a bounty provision would allow the government to maintain control over the action, while providing a reward to the whistleblower for assistance.

DOJ Antitrust Division officials and 11 other key stakeholders⁸⁸ we interviewed stated that a whistleblower reward could hinder DOJ's enforcement program in the following ways, though views were mixed about the impact of these potential disadvantages.

- **A whistleblower reward could jeopardize DOJ criminal cases:** DOJ Antitrust Division officials and 5 of 21 other key stakeholders⁸⁹ we interviewed explained that a whistleblower reward could jeopardize DOJ's existing criminal cases, many of which are already assisted by a leniency applicant. These stakeholders stated that

⁸⁶ See 28 U.S.C. §§ 516, 533; *In re Persico*, 522 F.2d 41, 54 (2nd Cir. 1975).

⁸⁷ These 11 key stakeholders include 4 plaintiffs' attorneys, 3 defense attorneys, 2 law professors, and 2 representatives of the ABA Section of Antitrust Law. Nine key stakeholders had no position or elected not to comment. One law professor supported the idea of a qui tam provision noting that the monetary incentive could motivate informants to come forward as soon as possible, which may end cartel activity sooner.

⁸⁸ These 11 key stakeholders included 3 defense attorneys, 2 plaintiffs' attorneys, 2 representatives of the ABA Section of Antitrust Law, 2 economics professors, and 2 law professors.

⁸⁹ The five key stakeholders include the Chair and Chair's Assistant of the ABA Section of Antitrust Law, two defense attorneys, and one plaintiffs' attorney.

cases could be jeopardized because a paid whistleblower might not be regarded as a credible witness if the case went before a jury. The Antitrust Division's Deputy Assistant Attorney General for Criminal Enforcement explained that this was his primary concern about a potential whistleblower reward provision. He stressed that jurors may not believe a witness who stands to benefit financially from successful enforcement action against those he implicated. He also noted that DOJ has received some tips from third party informants whom the department has not rewarded and he expressed concern that if a bounty provision were added, such unpaid informants would require payment which could jeopardize their credibility.

Even in the civil context, where the government's burden of proof at trial is lower than in the criminal context,⁹⁰ DOJ's Civil Division and IRS officials have concerns about witness credibility and generally do not use whistleblowers to substantiate their cases because of these concerns. DOJ's Antitrust Division officials say these concerns are heightened in the criminal context where the government must prove its case beyond a reasonable doubt, and even more so in the criminal antitrust context where reliance on cartel insiders is almost always necessary to prove the case. In addition, the Antitrust Division's Deputy Assistant Attorney General for Criminal Enforcement explained that even if criminal cartel cases involving a whistleblower did not go before a jury, the fact that DOJ may be less able to prove its case because of whistleblower credibility issues would affect leverage in obtaining plea agreements and deter companies from settling with DOJ.

Four of 21 key stakeholders countered these concerns about whistleblower credibility jeopardizing DOJ's criminal cartel cases, and DOJ officials provided their views on these differing perspectives. For example, 1 law professor noted that rewarded whistleblowers would be no less credible than witnesses who have received the "reward" of criminal leniency (avoided jail/fines) as a result of their cooperation in DOJ's criminal cartel case against their coconspirators. In addition, 3 law professors noted the perception that criminal cartel cases are generally resolved by plea agreement and, even when cases proceed

⁹⁰ One procedural difference between civil and criminal trials is the difference in the burden of proof. Criminal cases require proof beyond a reasonable doubt whereas civil cases require a preponderance of evidence, a lower threshold.

to trial, witnesses do not generally take the stand so there is little risk that witness credibility would negatively impact DOJ's criminal cases. DOJ Antitrust Division officials dismissed both of these arguments.⁹¹ To the first point, DOJ officials noted that the issue of witness credibility is more of a problem for witnesses who receive a monetary reward than witnesses who receive criminal leniency because at least witnesses who receive leniency have to publicly admit criminal wrongdoing and subject their company to civil liability. To the second point, DOJ officials stated that while about 90 percent of cases are settled by plea agreements, about 10 percent of their cases go to trial and in those cases they almost always have the leniency applicant testify.

Both DOJ Civil Division and IRS officials explained that they can, in the context of their programs, mitigate to some extent the challenges to whistleblower credibility by corroborating the whistleblower-provided evidence. For example, an IRS official stated that they do not use whistleblower-provided information as the basis for an assessment of wrongdoing, but rather try to obtain corroborating information from another source because the whistleblower has a personal interest in the success of the case and his or her credibility may be questioned in litigation.⁹² In addition, DOJ Civil Division officials responsible for administering the False Claims Act explained that they also try to corroborate their relators' testimony due to concerns about witness credibility. However, according to DOJ officials, in the criminal cartel cases it may be very difficult to find a second witness because knowledge of the wrongdoing tends to be limited to those actually implicated in the crime.

- **A whistleblower reward could result in claims that do not lead to criminal prosecution:** Eight of 21 key stakeholders,⁹³ the Legal Director of the Government Accountability Project, and DOJ officials

⁹¹ In addition, one plaintiffs' attorney stated that a witness of questionable credibility is better than no witness at all.

⁹² This IRS official also explained that I.R.C. § 6103 generally prohibits the disclosure of taxpayer information, which also prevents them from sharing information with the whistleblower.

⁹³ These eight key stakeholders include two defense attorneys, two representatives of the ABA Section of Antitrust Law, one plaintiffs' attorney, two economics professors, and one law professor.

noted that the prospect of a reward could increase the number of claims from whistleblowers who either lack sufficient information to be useful to a criminal case or are making fraudulent claims.⁹⁴ DOJ officials reported that because cartel activity is so secretive, typically only insiders—those who are criminally involved in the conspiracy—have sufficient knowledge to be of assistance in a criminal investigation and the agency’s existing leniency program already provides incentives for wrongdoers to self-report to DOJ. Thus, DOJ officials maintain that whistleblower tips pertaining to criminal cartel activity would require substantial investigation and, potentially, a leniency applicant to substantiate the claims. In addition, one attorney we interviewed cited a case where, in his view, a whistleblower was motivated by the prospect of a qui tam reward and provided a falsified document to implicate a company. This whistleblower has since been charged by DOJ in connection with making false statements to the Antitrust Division.⁹⁵

Staff of the SEC, IRS, and DOJ Civil Division’s whistleblower reward programs reported that they mitigate the risk of fraudulent claims in several ways. For example, the SEC whistleblower statute makes ineligible for reward any whistleblower who knowingly and willfully makes any false, fictitious, or fraudulent statement or representation and the agency’s rules implementing the program contain certain procedural requirements designed to deter false submissions.⁹⁶ Similarly, the Director of the IRS Whistleblower Office explained that the IRS requires whistleblower information to be submitted with a penalty of perjury statement, and that their process for evaluating and acting on whistleblowers’ information is designed to test its accuracy

⁹⁴ The Legal Director of the Government Accountability Project, a nonpartisan whistleblower protection and advocacy organization, stated that a whistleblower reward could result in some increase in unfounded claims but he did not regard this as a legitimate disadvantage of such a program because he did not believe that it should be difficult to separate meritless from legitimate claims.

⁹⁵ United States v. Burch, No. 11-0334 (E.D. Pa. Jun. 21, 2011).

⁹⁶ 15 U.S.C. § 78u-6(i). The SEC’s final rules impose certain procedural requirements designed to deter false submissions, including a requirement that the information be submitted under penalty of perjury, and requiring an anonymous whistleblower to be represented by counsel who must certify to the Commission that he or she has verified the whistleblower’s identity. 17 C.F.R. § 240.21F-9.

and obtain independent corroboration.⁹⁷ In addition, DOJ Civil Division officials explained that two features of their program have the effect of deterring frivolous claims, to some extent—their whistleblowers must have legal representation to file a claim⁹⁸ and a provision of the False Claims Act permits defendants to sue whistleblowers for their attorneys' fees if the whistleblower is found to have filed a clearly frivolous claim.⁹⁹

- **A whistleblower reward could undermine internal compliance programs:** One defense attorney we interviewed as a key stakeholder noted that there is a risk that a whistleblower reward program could undermine internal compliance programs by offering an incentive for employees to report suspected wrongdoing directly to the federal government rather than pursue it internally. In addition, the impact of a whistleblower program on companies' internal compliance processes was a significant issue addressed in the SEC's proposed rules for implementing that agency's bounty program. In the proposed rules, the SEC requested comment on whether to include a requirement that whistleblowers report the violation internally and its final rules included several elements designed to encourage potential whistleblowers to

⁹⁷ He further explained that the penalty of perjury statement is a deterrent to false statements, as is the knowledge that the IRS will seek corroboration before any assessment and collection of tax. He stated that discovery of material false statements during the IRS's evaluation of the submission may be a factor in determining whether commitment of audit or investigative resources is warranted, and may affect an award determination if the submission results in collected proceeds.

⁹⁸ Lawyers are subject to Federal Rule of Civil Procedure 11, which subjects them to sanctions for submitting a claim for an improper purpose, such as to harass, among other things.

⁹⁹ If the defendant prevails in the action and the court finds that the claim of the relator was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment, the court may award attorneys' fees and expenses to the defendant. 31 U.S.C. § 3730(d)(4).

utilize internal compliance.¹⁰⁰ The Legal Director of the Government Accountability Project also acknowledged this concern and added that it is much more efficient and effective for companies to address problems internally; companies are more likely to take broader corrective action more quickly when they do it of their own accord rather than as a result of a lawsuit.

The Sarbanes-Oxley Act of 2002 generally requires the internal audit committee of each public company to establish procedures for employees to confidentially and anonymously submit concerns regarding questionable accounting or auditing matters.¹⁰¹ In issuing rules to implement changes mandated by Sarbanes Oxley, the SEC stated that establishing procedures for receiving and handling complaints should serve to facilitate disclosures, encourage proper individual conduct, and alert the audit committee to potential problems before they have serious consequences.¹⁰² The SEC's final rules have included provisions intended to encourage whistleblowers who work for companies that have robust compliance programs to also report the violation to appropriate company personnel, while at the same time preserving the whistleblower's status as an original source of the information and eligibility for a reward. The rules also provide an additional financial incentive for whistleblowers to report violations internally. These rules have not yet become effective so it is too soon to tell whether and how such language would motivate whistleblowers to pursue their claims.¹⁰³

¹⁰⁰ SEC staff explained that many commenters recommended that the commission require whistleblowers to report violations of the securities laws through their employers' internal compliance and reporting systems because of a belief that the proposed rules would, among other things: encourage whistleblowers to bypass internal compliance programs; undermine entities' ability to detect, investigate, and remediate securities violations, particularly as to those complaints over which the commission has no jurisdiction or which are too small for the commission to investigate; and create adverse incentives for whistleblowers to see their companies sanctioned or to delay reporting potential violations; however, the staff expressed the view that these concerns were speculative and not supported by any data.

¹⁰¹ Pub. L. No. 107-204, § 301, 116 Stat. 745, 775-76 (codified at 15 U.S.C. § 78j-1).

¹⁰² Standards Relating to Listed Company Audit Committees, 68 Fed. Reg. 18788, 18798 (2003).

¹⁰³ The SEC's final rules will be effective August 12, 2011.

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- **A whistleblower reward could require additional resources to administer:** Officials responsible for administering the IRS and DOJ Civil Division's bounty and qui tam provisions as well as three other key stakeholders¹⁰⁴ noted that administration of a rewards program would require additional resources. For example, it would take additional time and effort to process tips, communicate with whistleblowers, and administer rewards. Officials responsible for administering DOJ Civil Division's qui tam provision highlighted the administrative burden and expense of handling whistleblower claims that do not result in cases. They stated that they investigate 100 percent of the claims but actually pursue only 20 to 25 percent of them. Therefore, they report that they are devoting a fair amount of investigative resources to claims that are not pursued.

A reward program could net enough gain (successful new cartel cases and fines imposed) to justify the additional resource requirements but senior DOJ officials maintain that innocent third parties are of limited value in cartel cases and the agency already has a leniency program that motivates cartel insiders to self-report wrongdoing. More specifically, two of DOJ's criminal cartel investigations that were initiated by False Claims Act qui tam relators have, together, resulted in approximately \$153.6 million in criminal fines and \$10.9 million in restitution.¹⁰⁵ In addition, DOJ Civil Division officials report that the False Claims Act's qui tam provision has resulted in \$9.6 billion in federal recoveries from fiscal year 2005 through 2010 and IRS officials responsible for administering that agency's whistleblower program report that it has resulted in just over \$1 billion in collections from fiscal year 2003 through 2009 that it would not have recouped without the program. However, Senior Antitrust Division officials noted a key difference between bounty

¹⁰⁴ These three key stakeholders include two economics professors and one plaintiffs' attorney.

¹⁰⁵ We identified these two cases by searching for published cases involving a qui tam action under the False Claims Act that alleged violations of the Sherman Act, and then additionally confirming through published judicial opinions that the cases were initiated by a relator and subsequently led to criminal antitrust prosecutions. However, DOJ Civil Division officials reported that other cases may exist. These officials were not able to provide a list of cases where a False Claims Act qui tam complaint resulted in a criminal antitrust indictment because of limitations in the way they keep and search their case data.

provisions in the civil setting and a potential new bounty provision in the criminal antitrust setting. They explained that tips from innocent third parties are more valuable to investigations of civil violations, such as fraud against the government or tax fraud, than criminal antitrust violations which typically involve a high degree of secrecy and coordination among a small number of insiders. DOJ Antitrust Division officials stressed the importance of a cooperating cartel insider to the success of their cases and noted that their leniency program already provides incentives for cartel insiders to self-report wrongdoing and cooperate with DOJ. Therefore, a whistleblower reward in the criminal antitrust setting may not result in as big a net gain (successful new cases and fines) as the Civil Division and IRS whistleblower rewards have.

DOJ Antitrust Division officials acknowledge that a whistleblower reward could increase the number of whistleblowers reporting criminal cartel activity to DOJ and, therefore, the number of cartels detected. However, these officials maintain that the potential benefits would be outweighed by all of the above noted disadvantages, most importantly the threat to witness credibility. In addition, other stakeholders—including program officials responsible for reward provisions at the IRS and DOJ Civil Division and members of the SEC’s rulemaking team—acknowledge these disadvantages, though they have mixed perspectives on the extent to which they can be mitigated in a criminal antitrust setting. Therefore, it is difficult to determine whether the benefits of a whistleblower reward provision in the antitrust setting would outweigh the disadvantages.

Whistleblowers Lack a Civil Remedy for Retaliation; Stakeholders Support the Addition of a Whistleblower Protection Provision

It is widely regarded as good public policy to protect those who take risks to expose illegalities. Over the last 35 years, Congress has passed numerous laws providing protections for whistleblowers. For example, in passing the Whistleblower Protection Act of 1989 (which protects federal employees) Congress found that protecting employees who disclose government illegality, waste, and corruption is a major step toward a more effective civil service.¹⁰⁶ There is no comprehensive federal whistleblower protection; rather, Congress has typically passed whistleblower protection

¹⁰⁶ Pub. L. No. 101–12, § 2, 103 Stat. 16.

provisions specific to industries and types of illegality reported.¹⁰⁷ Officials with OSHA's Office of the Whistleblower Protection Program agree that it is good public policy to protect those who take risks to expose illegalities, noting that employees who fear that they will be discharged or otherwise retaliated against for reporting unsafe working conditions or other illegalities are unlikely to do so. In addition, the Legal Director of the Government Accountability Project stated that the first principle for any effective law enforcement program is protecting witnesses.

All key stakeholders who had a position on the issue (16 of 21)¹⁰⁸ generally supported the addition of a civil whistleblower protection provision for those who report criminal antitrust violations, though senior DOJ Antitrust Division officials stated that they neither support nor oppose the idea. The 5 key stakeholders who did not have a position on the issue were the President of the American Antitrust Institute and 4 representatives of the Committee to Support Antitrust Laws, all of whom stated that their organizations have no position on the addition of a whistleblower protection provision though representatives of both organizations told us that they personally favored the idea. In addition, officials with OSHA, the SEC, and the IRS as well as the Legal Director of the Government Accountability Project stated that they generally supported the idea of whistleblower protection for those who report criminal violations. The 16 key stakeholders who had a position on the issue generally explained that assurance of protection against retaliation could motivate additional individuals to come forward to DOJ with evidence of criminal cartel activity, resulting in the prosecution of more criminals and the disruption of more cartels. In addition, an IRS official and the Legal Director of the Government Accountability Project also noted the benefit that existing whistleblowers (those who are willing to report suspected wrongdoing even without an antiretaliation provision) would obtain some assurance of protection for their efforts. Officials from OSHA's Office of the Whistleblower Protection Program noted that in the antitrust setting which involves secret deals or arrangements and a great

¹⁰⁷ Various forms of comprehensive whistleblower protection have been proposed in prior Congresses, for example the Paul Revere Freedom to Warn Act, H.R. 4925, 109th Cong. (2006), and the Private Sector Whistleblower Protection Streamlining Act of 2007, H.R. 4047, 110th Cong., but have not been passed.

¹⁰⁸ As previously noted, this includes the perspective of the Chair and Chair's Assistant of the ABA Section of Antitrust Law; however, they stated that their views do not represent the position of the ABA.

deal of pressure not to speak up about wrongdoing, a whistleblower protection provision would likely make more people willing to report wrongdoing. The Antitrust Division's Deputy Assistant Attorney General for Criminal Enforcement said he does not oppose a new antiretaliation provision but questioned whether there was a need for such a provision and whether it makes sense to create an antitrust-specific civil remedy. In addition, Senior DOJ officials stated that it is not their role to propose legislation to Congress.

Whistleblowers who report criminal antitrust violations currently lack a civil remedy for retaliation, though there is some criminal protection for retaliatory conduct in the workplace.¹⁰⁹ An existing criminal statute provides for penalties (fines and up to 10 years imprisonment) for retaliation—including interference with employment—for providing information to law enforcement related to the commission of any federal offense.¹¹⁰ However, this antiretaliation provision does not provide for any remedy for the negative effects experienced because of the retaliatory conduct, i.e., a means to pursue reinstatement at their job or monetary damages or a means for individual whistleblowers to independently pursue their cases. Instead, it is incumbent upon DOJ to pursue whistleblowers' criminal retaliation cases and DOJ officials report that, to

¹⁰⁹ There is no comprehensive federal whistleblower protection but, rather, existing statutes cover some whistleblowers in some situations. For example, 41 U.S.C. § 4705 (formerly 41 U.S.C. § 265) contains protections for employees of federal contractors who are retaliated against for reporting information relating to substantial violation of law related to a contract to a Member of Congress or an authorized official of an executive agency. Accordingly, a whistleblower in this context who reports a criminal antitrust violation—for example, bid-rigging—could have some protections from retaliation.

¹¹⁰ 18 U.S.C. § 1513(e). Section 1513 of title 18 provides for criminal penalties for various types of witness intimidation, including killing a witness and threatening bodily harm to a witness, among other things. As part of the Sarbanes-Oxley Act of 2002, this section was amended to prohibit retaliation generally. In particular, it makes punishable by 10 years imprisonment the taking of any action harmful to any person—including interference with lawful employment—for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any federal offense. Pub. L. No. 107-204, § 1107, 116 Stat. 745, 810 (codified at 18 U.S.C. § 1513(e)).

date, they have not investigated or prosecuted any cases involving employment retaliation against a cartel whistleblower under this statute.¹¹¹

While all key stakeholders who had a position on the issue agreed that antiretaliation protection for whistleblowers would be beneficial, it is difficult to determine the extent to which retaliation against cartel whistleblowers has occurred. DOJ Antitrust Division officials said they were not aware of any evidence that antitrust whistleblowers have been particularly vulnerable and they could only recall one instance of alleged retaliation. In searches of published decisions, we found one recent legal action relating to employment retaliation based on an employee's reporting of or refusal to participate in criminal cartel conduct. The attorney who represented this whistleblower filed a complaint alleging that the whistleblower was terminated from his job because of his refusal to cooperate with his employer's antitrust conspiracy.¹¹² This attorney also stated that his small firm had seen other cases of this type of retaliation, but that without an available cause of action, there would be few published decisions involving these issues. In addition, past cases reveal that retaliation has occurred in this setting. We identified several published decisions from the 1980s and 1990s involving such employee whistleblower retaliation suits. For example, we found one case involving the gas industry where an executive alleged he was fired and blacklisted for refusing to participate in a conspiracy to fix prices, impose conditions of sales on customers, and allocate customers.¹¹³ In another case we

¹¹¹ Officials from DOJ's Criminal Division found no cases that relate to this provision and officials with the Executive Office of the United States Attorneys were unable to identify any cases prosecuted based on retaliation in the employment context because they are not able to disaggregate U.S.C. § 1513 cases by subsection. They said that U.S. Attorney's Offices are not required to enter the subsections when they open a file and enter case data and, as such, even where subsections are used, they are not reliable and not verified. In addition, DOJ Antitrust Division officials reported that they had never investigated or prosecuted cases involving employment retaliation against a cartel whistleblower under this statute.

¹¹² According to the attorney, after his client was fired, the client indicated that he planned to speak to the authorities, leading his former employer to offer him large sums of money if he returned to work and did not follow through with his plan to cooperate with authorities. Because of his cooperation with authorities, the client alleges that he was blackballed by the industry. According to this attorney, his client was socially isolated, unemployed for several months, and was eventually forced to take a lower-paying job in another industry. The client eventually lost his house to foreclosure, and has suffered through difficult times for himself and his family.

¹¹³ In re Indus. Gas Antitrust Litig., 681 F.2d 514 (7th Cir. 1982).

found, two employees of a paper company alleged they were discharged because they exposed, objected to, and made efforts to eliminate unlawful price discounts and promotional allowances granted by their employer to certain customers and not others.¹¹⁴ However, while some plaintiffs were successful, the means by which plaintiffs attempted to bring these cases in the past has generally not provided a basis for relief.¹¹⁵ Without an available protection provision, it is difficult to know how many cases of retaliation are occurring.

Officials with OSHA's Office of the Whistleblower Protection Program who administer 21 federal whistleblower protection provisions noted that a new whistleblower protection provision would require resources to administer and enforce. They explained that whistleblower claims are difficult matters to investigate because they require a particular kind of expertise, trained personnel, administrative support, a travel budget to support thorough investigation, program audits, equipment, supplies, and costs associated with managing a data processing system. These officials noted that none of the 20 whistleblower statutes delegated to OSHA since 1982 has been enacted with appropriated funding.¹¹⁶ In addition, any cases filed in court would also necessitate judicial resources. While a new whistleblower protection provision would likely require additional federal

¹¹⁴ Callahan v. Scott Paper Co., 541 F.Supp. 550 (E.D. Pa. 1982).

¹¹⁵ In the 1980s and 1990s some courts interpreted Section 4 of the Clayton Act to provide protection for whistleblowers in this context. See, e.g., Ostrofe v. H.S. Crocker Co., 740 F.2d 739 (9th Cir. 1984). Section 4 of the Clayton Act provides that "any person...injured in his business or property by reason of anything forbidden in the antitrust laws may sue...and shall recover threefold the damages...sustained and ... a reasonable attorney's fee." 15 U.S.C. § 15. Whistleblowers who were terminated because they refused to participate in or reported illegal cartel conduct argued that they were injured *by reason of* the antitrust violation. In some cases, these whistleblowers were successful. However, judicial decisions have clarified that employees who are fired because of their employers' antitrust violations generally cannot bring suit under the Clayton Act because they either do not have antitrust injury or antitrust standing, or both. See, e.g., In re Indus. Gas Antitrust Litig., 681 F.2d 514; Haigh v. Matsushita Elec. Corp., 676 F. Supp. 1332 (E.D. Va. 1987). A whistleblower protection provision would provide a civil remedy distinct from existing antitrust laws, particularly the Clayton Act, which provides remedies for victims of conspiracies, generally consumers and competitors.

¹¹⁶ For related GAO work on OSHA, see GAO, *Whistleblower Protection Program: Better Data and Improved Oversight Would Help Ensure Program Quality and Consistency*, [GAO-09-106](#) (Washington, D.C.: Jan. 27, 2009) and *Whistleblower Protection: Sustained Management Attention Needed to Address Long-standing Program Weaknesses*, [GAO-10-722](#) (Washington, D.C.: Aug. 17, 2010).

resources to administer it—whether it be administered by DOJ, OSHA, or designed such that claimants may proceed directly to court without first filing their claim with an administrative body—these additional resources could be recouped if the added protection results in more whistleblowers reporting criminal cartel activity to DOJ, more prosecutions, and more fines. In addition, ultimately, if cartel activity is reduced, the benefits to the U.S. economy could outweigh the costs of administering the program.

Conclusions

Criminal cartel activity can harm businesses, consumers, and the U.S. economy in the form of lack of competition and overcharges. For the last 17 years, DOJ has relied heavily on its corporate and individual leniency programs to encourage wrongdoers to self-report such activity. However, innocent third parties may also report illegalities and in so doing may expose themselves to risk of retaliation. Without a civil remedy for those who are retaliated against as a result of reporting criminal antitrust violations, whistleblowers are currently unprotected and may therefore be hesitant to report wrongdoing to DOJ. It is widely accepted as good public policy to protect those who take risks to report crime and Congress has passed numerous laws providing protection for whistleblowers reporting various types of illegalities in various industries. By considering a civil remedy for whistleblowers who are retaliated against for reporting criminal antitrust violations, Congress could provide existing whistleblowers an assurance of protection for their efforts and, further, could motivate additional individuals to come forward with evidence of criminal cartel activity.

Matter for Congressional Consideration

To protect those who take risks to report criminal antitrust violations and help motivate others to do the same, Congress may wish to consider an amendment to add a civil remedy for those who are retaliated against for reporting criminal antitrust violations.

Agency Comments and Our Evaluation

We provided copies of a draft of this report to DOJ, the Department of Labor, SEC, and the IRS for their review and comment. The SEC provided technical edits, which we incorporated, and the IRS and Department of Labor, representing OSHA, provided no comments. DOJ provided technical edits, which we incorporated, as appropriate, as well as written comments which are reproduced in full in appendix V.

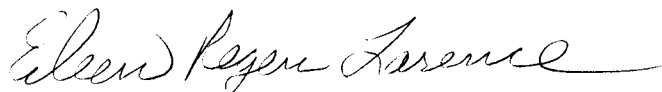
In their written comments, DOJ noted that the rate of increase in post-ACPERA applications depends upon the time period considered. As we note in our report, the numbers of leniency applications received each

year are small so these data are indeed sensitive to fluctuations over time. Therefore, as we and DOJ both note, we obtain different percent changes if we compare the 3, 4, 5, or 6 years before and after ACPERA's enactment—for example, we report that the change in successful applications ranged from a 14 percent decrease, to no change, to a 16 percent increase. However, we chose to compare the number of leniency applications received in the 6-year periods pre- and post-ACPERA to capture the broadest and most recent data available. This 6-year comparison shows a 4 percent increase in successful applications post-ACPERA. We also looked at 6-year trends in the total number of leniency applications received and this too yields a 4 percent increase.

DOJ also noted that the Antitrust Division's views on whistleblower rewards are based on years of substantial practical experience in prosecuting and trying criminal antitrust cases and questioned whether all of the key stakeholders we interviewed had prior criminal antitrust trial experience. We agree that the Antitrust Division's perspective on this issue is very important and we thus included Antitrust Division officials' perspectives on key issues related to whistleblower rewards. However, we also purposely sought the diverse perspectives of numerous other key stakeholders who we selected based on their significant antitrust experience, such as economists who have extensively researched and published on criminal cartel enforcement efforts.

We are sending copies of this report to the Department of Justice and other interested parties. The report will also be available at no charge on the GAO Web site at <http://www.gao.gov>.

If you or your staff have any questions about this report, please contact me at (202) 512-8777, or at larencee@gao.gov. Contact points for Office of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made major contributions to this report are listed in appendix VI.



Eileen Regan Larence
Director
Homeland Security and Justice Issues

Appendix I: Objectives, Scope, and Methodology

The 2010 Reauthorization of the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA)¹ directs GAO to report to the House and Senate Judiciary Committees, no later than 1 year after the date of enactment, on the effectiveness of ACPERA, both in criminal investigation and enforcement and in private civil actions as well as the appropriateness of the addition of qui tam and antiretaliatory protection provisions for employees who report illegal anticompetitive conduct.² To address this mandate, this report answers the following questions:

- To what extent has ACPERA affected criminal cartel enforcement by the Department of Justice's (DOJ) Antitrust Division?
- In what ways, if any, has ACPERA reportedly affected private civil actions involving leniency applicants?
- What are the perspectives of key stakeholders regarding the advantages and disadvantages of adding rewards or antiretaliatory protection for those who report criminal antitrust violations?

To inform our analysis of all three objectives, we interviewed DOJ Antitrust Division officials and reviewed speeches by division officials, which described the division's enforcement efforts from fiscal year 1993—the fiscal year in which the division implemented its revised leniency program—through fiscal year 2010—the last fiscal year included in our review; academic studies; and articles prepared by economists and attorneys on the Antitrust Division's criminal cartel enforcement efforts. We also identified 21 key stakeholders—7 antitrust plaintiffs' and defense attorneys who have worked on numerous antitrust cases, 7 additional antitrust attorneys who are representatives of three nongovernmental antitrust organizations (including the American Antitrust Institute, the American Bar Association Section of Antitrust Law, and the Committee to Support the Antitrust Laws), and 7 academics whose work focuses on antitrust law and enforcement issues (including 4 law professors and 3 economists)—using an iterative process, often referred to as “snowball sampling,” to identify knowledgeable stakeholders, and select for interviews those who would provide us with a broad range of perspectives

¹ Pub. L. No. 111-190, § 5, 124 Stat. 1275, 1276.

² Qui tam is the shortened version of the Latin phrase: *qui tam pro domino rege quam pro se ipso in hac parte sequitur* “who as well for the king as for himself sues in this matter.” A qui tam provision would allow an individual who sues on behalf of the government or assists in a prosecution to receive a reward or part of a penalty imposed.

on ACPERA. At each interview, we solicited names of additional stakeholders it would be useful to interview until we had coverage of a broad range of perspectives on ACPERA. We selected a nonprobability sample of stakeholders to interview and, therefore, the information gathered from key stakeholders is not generalizable beyond the individuals we interviewed; however the interviews provided insights into issues pertaining to all three objectives.

To address the extent to which ACPERA has affected criminal cartel enforcement by DOJ we analyzed DOJ's Antitrust Division data on their criminal cartel investigation and enforcement actions for the period August 1993 (the inception of the Antitrust Division's current leniency program) to September 2010.³ We analyzed data on, for example, the number of leniency applications that the Antitrust Division received and granted, the number of leniency applications withdrawn or rejected, the number of criminal cartel cases assisted by leniency applicants compared to those that were not, and the fines and jail time imposed on convicted cartelists, among other things.⁴ We used this analysis to discern apparent differences in the Antitrust Division's criminal cartel enforcement efforts before and after ACPERA went into effect. Due to numerous confounding variables, we were not able to causally link identified differences between pre-and post-ACPERA criminal cartel investigation and enforcement data to ACPERA. For example, the increase in antitrust enforcement efforts outside the United States and global economic forces beyond ACPERA may be influencing the number of leniency applications submitted to the Antitrust Division before and after ACPERA's enactment. Further, ACPERA could be having a deterrent effect by preventing or destabilizing cartel formation but it is difficult to know the extent, if any, of this effect. To assess the reliability of the Antitrust Division's criminal cartel investigation and enforcement data, we reviewed relevant Antitrust Division documentation and interviewed knowledgeable agency officials

³ We reviewed and analyzed data on Title 15 offenses, specifically 15 U.S.C. §§ 1,3 criminal cases. We did not include cases that only alleged non-Title 15 offenses, such as Title 18 cases—cases that include conduct beyond criminal cartel activity, such as obstruction of justice and fraud—in our analysis. The data we reviewed were current as of December 8, 2010.

⁴ We adjusted all fine data for inflation using fiscal year 2011 dollars based on the Gross Domestic Product deflator. We performed our analysis of the fine data by fiscal year of sentencing (i.e., the fiscal year a court imposed a fine) and not by the fiscal year a fine was obtained.

about the source of these data and the controls the Antitrust Division had in place to maintain the integrity of these data. To the extent possible, we compared the data totals the Antitrust Division provided across categories and analyses, and against published data, for obvious errors in accuracy and completeness. We determined that the data were sufficiently reliable for the purposes of our report.

To assess ACPERA's impact on wrongdoers' decision to seek leniency, we identified a nonprobability sample of 25 publicly disclosed applications to the Antitrust Division's Corporate Leniency Program both before and after ACPERA's enactment and interviewed and analyzed responses from 15 defense attorneys who represented leniency applicants in 18 of the 25 leniency applications. Due to the confidentiality of leniency applicant identities, we were unable to compile a complete list of all criminal cartel cases involving leniency applicants and instead identified our sample of publicly disclosed leniency applicants involved in 25 applications using Securities and Exchange Commission (SEC) filings, annual reports, or court documents.⁵ Because our sample was limited to publicly disclosed leniency applicants, we excluded the perspectives of defense attorneys for leniency applicants whose identities were not publicly disclosed as well as the perspectives of defense attorneys for clients who considered but decided not to seek leniency, or were unsuccessful in seeking leniency. We mitigated this limitation by interviewing 3 defense attorneys (recommended to us using the snowball method) who had represented numerous leniency applications, both publicly disclosed and not. While our sample of defense attorneys is not generalizable beyond the individuals we interviewed, the results of these interviews helped inform our analysis of the extent to which ACPERA has affected the Antitrust Division's efforts to combat criminal cartel activity.

To determine in what ways, if any, ACPERA has reportedly affected private civil actions involving leniency applicants, we reviewed court dockets and case filings from relevant federal private civil class action

⁵ In order to identify the defense attorneys who represented these leniency applicant companies during their applications for leniency, we identified the civil class action cases filed against these companies and contacted the leniency applicants' defense attorneys in those cases. We then confirmed whether the defense attorney in the civil case also represented the company when it applied for leniency, or were referred to the correct defense attorney. We were unable to schedule interviews with defense attorneys representing companies in two leniency applications, and defense attorneys declined to speak with us regarding five leniency applications.

cases to describe court decisions related to and which reference ACPERA. We also reviewed available literature from economic and legal experts on the impact of leniency programs in general and ACPERA specifically on private civil actions. In addition, we interviewed and analyzed responses from attorneys in private civil antitrust cases that involved 17 of the 25 publicly disclosed leniency applications discussed above, where ACPERA may have affected the civil process. We found that ACPERA could have played a role in 17 of the 25 cases because 17 cases were either ongoing or had reached a settlement agreement between plaintiffs and the leniency applicant after ACPERA's enactment in June 2004. We interviewed and analyzed responses from 10 plaintiffs' attorneys who served as class counsel in the 17 private civil antitrust cases, and 11 defense attorneys who represented the publicly disclosed leniency applicants in 14 of the 17 cases about how, if at all, ACPERA affected these private civil actions involving leniency applicants.⁶ Due to the confidentiality of leniency applicant identities, and the fact that there is no national repository of private civil cases with these data, we were unable to compile a complete list of all federal private civil cases involving leniency applicants from 2004 to early 2010 and thus were only able to interview attorneys involved in the 25 cases with publicly disclosed leniency applicants. Because our sample is necessarily small and limited to cases involving publicly disclosed leniency applicants, we are not able to generalize our findings. Instead, our sample provides examples of ACPERA's reported effect on private civil litigation.

To determine stakeholder perspectives on the potential advantages and disadvantages of adding rewards and antiretaliation provisions for those who report criminal antitrust violations, we reviewed relevant literature and interviewed the 21 key stakeholders described above as well as others with knowledge of whistleblower programs and existing bounty provisions including the Legal Director of the Government Accountability Project (a whistleblower advocacy group), officials with the Occupational Safety & Health Administration's (OSHA's) Office of the Whistleblower Protection Program who administer 21 federal whistleblower protection provisions, program officials responsible for existing bounty provisions

⁶ Three plaintiffs' attorneys served as class counsel in more than 1 case in our sample of 17. Regarding defense attorneys for leniency applicants, we were unable to schedule a meeting with the defense attorneys who represented publicly disclosed leniency applicants in 1 of the 17 cases, and in 2 of the other cases the defense attorney declined to speak with us.

administered by the Internal Revenue Service (IRS) and DOJ Civil Division, and members of the SEC's rulemaking team. We asked these officials open-ended questions about their perspective on the advantages and disadvantages of adding informant rewards and antiretaliation protection in the antitrust setting and analyzed their responses to determine the extent of support for such provisions. The perspectives of these stakeholders are not generalizable beyond this sample of key stakeholders and officials but do represent a variety of opposing interests, including both plaintiffs' and defense attorneys. We also conducted a legal review of existing whistleblower protection provisions and interviewed OSHA officials and others to determine whether whistleblowers in the antitrust setting are currently protected by any existing antiretaliation provisions. In addition, we reviewed evidence of legal actions relating to employment retaliation based on an employee's reporting of or refusal to participate in criminal cartel conduct to help us determine the extent of retaliation in this setting. We also reviewed relevant statutes, case law, and literature to identify four informant rewards provisions that could be informative in the antitrust setting, because they involve corporate wrongdoing. We then interviewed the IRS and DOJ Civil Division officials responsible for administering these provisions as well as members of the SEC's rulemaking team who were establishing the agency's new whistleblower program and reviewed data on each program (i.e., number of whistleblower claims and statistics on claim outcomes).⁷

We conducted this performance audit from October 2010 through July 2011 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

⁷ These four provisions include the False Claims Act, 31 U.S.C. §§ 3729-3733; Internal Revenue Code § 7623; section 21A(e) of the Securities and Exchange Act of 1934, previously codified at 15 U.S.C. § 78u-1(e); and section 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1841-49 (codified at 15 U.S.C. § 78u-6).

Appendix II: Additional Information on the Criteria for Different Types of Leniency Applications

The Antitrust Division grants individual leniency and two types of corporate leniency, Type A and Type B.¹ The criteria for each type of leniency are as follows:

Individual Leniency

The Antitrust Division grants leniency to individuals reporting illegal antitrust activity before an investigation has begun, if the following three conditions are met:

1. At the time the individual comes forward to report the illegal activity, the Antitrust Division has not received information about the illegal activity being reported from any other source;
2. The individual reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation; and
3. The individual did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity.

Type A Leniency (Leniency Before an Investigation Has Begun)

The Antitrust Division grants leniency to companies reporting illegal antitrust activity before an investigation has begun if the following six conditions are met:

1. At the time the company comes forward, the Antitrust Division has not received information about the activity from any other source.
2. Upon the company's discovery of the activity, the company took prompt and effective action to terminate its participation in the activity.
3. The company reports the wrongdoing with candor and completeness and provides full, continuing, and complete cooperation to the Antitrust Division throughout the investigation.
4. The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials.
5. Where possible, the company makes restitution to injured parties.
6. The company did not coerce another party to participate in the activity and clearly was not the leader in, or the originator of, the activity.

¹ The Antitrust Division first set forth these criteria in its 1993 corporate leniency policy and 1994 individual leniency policy. Most recently, the Antitrust Division discussed these criteria in the "Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters (Nov. 19, 2008)," see <http://www.justice.gov/atr/public/criminal/239583.htm>.

Cooperating employees of a leniency applicant may also receive protection under the division's Corporate Leniency Policy. If the company does not meet all six of the Type A Leniency conditions, it may still qualify for leniency if it meets the conditions of Type B Leniency.

**Type B Leniency
(Alternative Requirements
for Leniency)**

The Antitrust Division may grant leniency to companies even after the Antitrust Division has received information about the illegal antitrust activity, whether this is before or after an investigation is formally opened, if the following conditions are met:

1. The company is the first to come forward and qualify for leniency with respect to the activity.
2. At the time the company comes in, the Antitrust Division does not have evidence against the company that is likely to result in a sustainable conviction.
3. Upon the company's discovery of the activity, the company took prompt and effective action to terminate its part in the activity.
4. The company reports the wrongdoing with candor and completeness and provides full, continuing, and complete cooperation that advances the Antitrust Division in its investigation.
5. The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials.
6. Where possible, the company makes restitution to injured parties.
7. The Antitrust Division determines that granting leniency would not be unfair to others, considering the nature of the activity, the confessing company's role in the activity, and when the company comes forward.

Cooperating employees of a leniency applicant may also receive protection under the division's Corporate Leniency Policy.

Amnesty Plus

The Antitrust Division may grant leniency to companies or individuals for reporting involvement in a separate antitrust conspiracy. If a company is under investigation for one antitrust conspiracy but is too late to obtain leniency for that conspiracy, it can receive benefits in its plea agreement for that conspiracy by reporting its involvement in a second antitrust conspiracy and also receive leniency for the second conspiracy if it meets the criteria for Type A or Type B leniency.

Appendix III: Additional Information on the Antitrust Division's Criminal Cartel Enforcement Efforts During FY 1994 - 2010

After the Antitrust Criminal Penalty Enhancement and Reform Act's (ACPERA) enactment in June 2004, cases assisted by leniency applicants increased significantly, even though the Department of Justice's (DOJ) Antitrust Division's overall criminal cartel caseload decreased significantly, as shown in figure 8.¹ In the 6 fiscal years after ACPERA's enactment, there was a 42 percent increase in criminal cartel cases filed in which the Antitrust Division was assisted by a leniency applicant, compared with the 6 fiscal years prior to ACPERA.² The overall number of criminal cartel cases filed by the Antitrust Division—including both those assisted and not assisted by a leniency applicant—decreased about 30 percent between the same time periods.³ Therefore, cases assisted by a leniency applicant made up a larger share of the Antitrust Division's total criminal cartel caseload after ACPERA's enactment.⁴ Antitrust Division officials explained that one key reason for the decrease in the number of criminal cartel cases after ACPERA's enactment is a policy shift from investigating and prosecuting a large number of cartels to focusing on a smaller number of larger cartels, including international cartels.⁵

¹ We reviewed and analyzed data on Title 15 offenses, specifically 15 U.S.C. §§ 1,3 criminal cases. We did not include cases that only alleged non-Title 15 offenses, such as Title 18 cases—cases that include conduct beyond criminal cartel activity, such as obstruction of justice and fraud—in our analysis.

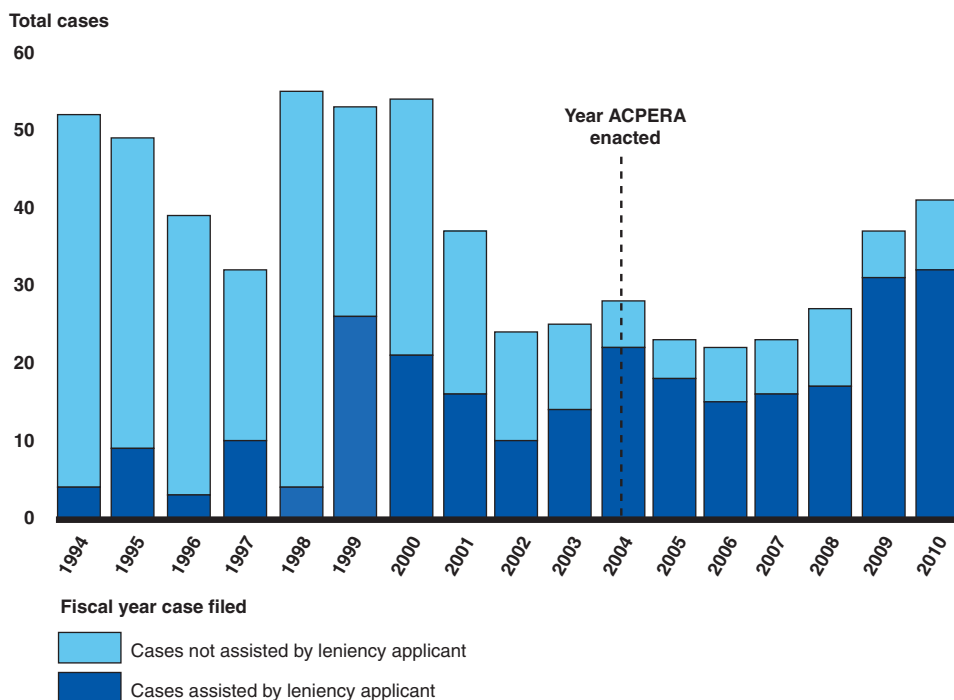
² In the 6 fiscal years prior to ACPERA's enactment, the Antitrust Division filed 91 criminal cartel cases that were assisted by a leniency applicant. In the 6 fiscal years after ACPERA, the Antitrust Division filed 129 criminal cartel cases assisted by a leniency applicant.

³ In the 6 fiscal years prior to ACPERA's enactment the Antitrust Division filed a total of 248 criminal cartel cases. In the 6 fiscal years after ACPERA, the Antitrust Division filed 173 cases.

⁴ The proportion of the Antitrust Division's total criminal cartel cases that were assisted by a leniency applicant increased from about 37 percent in the 6 fiscal years before ACPERA to about 75 percent in the 6 fiscal years after ACPERA.

⁵ Antitrust Division officials explained that they brought a high number of small bid-rigging cases on school milk and foreclosure auctions in the late 1980s and late 1990s, for example. Those cartels had a large number of participants and resulted in a large number of cases that were small in scope. According to Antitrust Division officials, in recent years, the division has been more focused on larger cartels impacting a higher volume of commerce.

Figure 8: Number of Criminal Cartel Cases Filed Each Fiscal Year, Broken Out by Those Assisted and Not Assisted by a Leniency Applicant



Source: GAO analysis of Antitrust Division data.

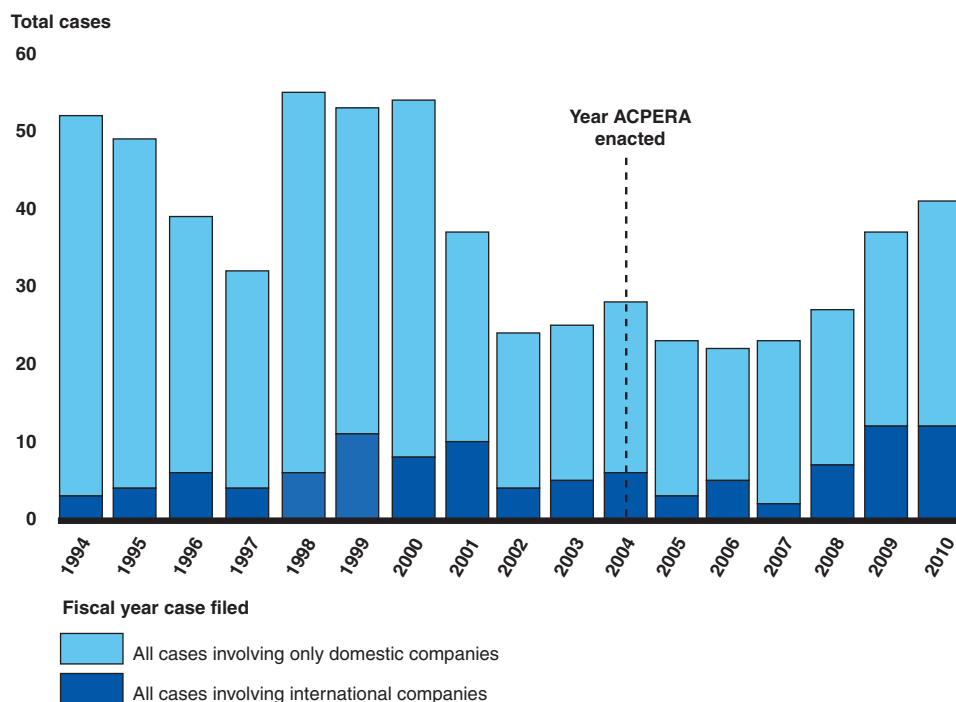
Antitrust Division officials reported that since the mid-1990s, the division made the prosecution of international cartels that impact commerce in the United States one of its highest priorities. As shown in figure 9, the number of criminal cartel cases involving international companies⁶ in the 6 fiscal years after ACPERA decreased slightly compared with the prior 6 fiscal years, which may be due, in part, to the overall decrease in the criminal cartel caseload discussed above.⁷ However, a larger share of the division's criminal cartel cases involved international companies in the 6-

⁶ The Antitrust Division identifies a company as international if the company's address, incorporated address, or principal address is located in a foreign country.

⁷ In the 6 fiscal years prior to ACPERA's enactment, 44 of the Antitrust Division's 248 total criminal cartel cases involved international companies compared with 41 of 173 total cases in the 6-year period after ACPERA.

year period after ACPERA. Specifically, the proportion of total cases that involved international companies increased from about 18 percent in the 6 fiscal years prior to ACPERA to about 24 percent in the 6 fiscal years after ACPERA. While the number of cases involving international companies in any given year has consistently been fewer than those involving domestic companies, Antitrust Division officials reported that international cases tend to be larger (affecting a higher volume of commerce), more complex, and more resource intensive to investigate and prosecute.

Figure 9: Number of Criminal Cartel Cases Involving International Companies Compared to Cases Involving Domestic Companies, by Fiscal Year Filed



Source: GAO analysis of Antitrust Division data.

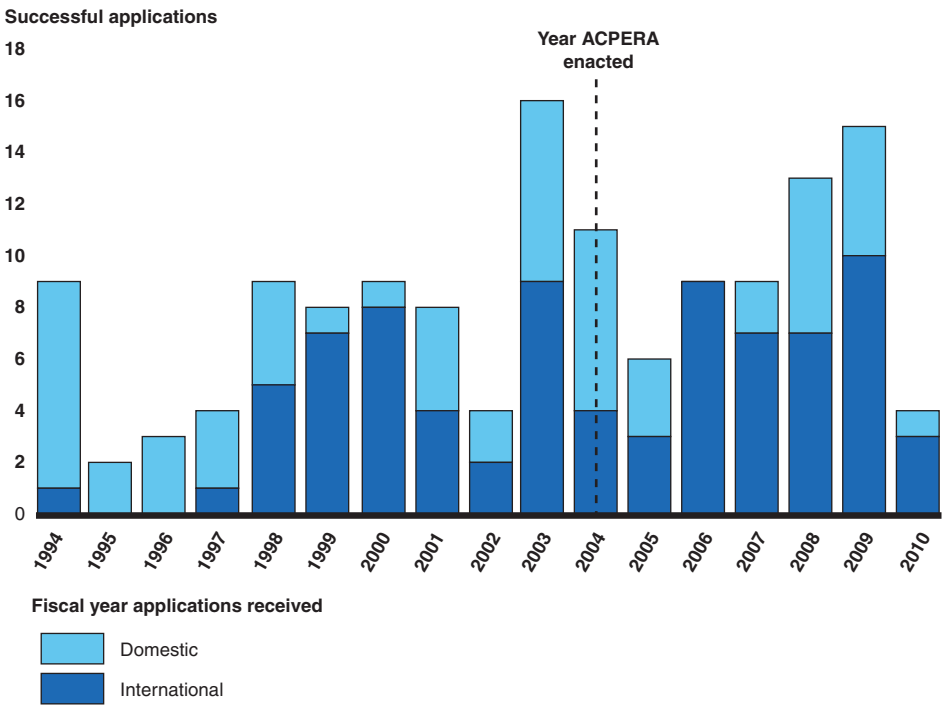
While criminal cartel cases involving international companies comprised a relatively low share of the Antitrust Division's total criminal cartel caseload for the period fiscal years 1994 through 2010—about 17 percent—

successful international leniency applicants⁸ comprised a relatively large share of total successful leniency applications granted over the same period—about 58 percent.⁹ Successful international leniency applications have outnumbered successful domestic applications in 9 of the last 17 fiscal years, as shown in figure 10. Antitrust Division officials explained that international cartel cases are more likely to involve a leniency applicant than domestic cases because members of international cartels have more tenuous personal connections than members of domestic cartels. Antitrust Division officials reported that the leniency program may also be more attractive to international leniency applicants because of the increasing number of leniency programs in foreign countries.

⁸ The Antitrust Division considers a leniency applicant to be international when the applicant reports involvement in international cartel offenses. Successful applications are applications which were not subsequently withdrawn or rejected.

⁹ During the 17-year period from fiscal years 1994 through 2010, 108 of the Antitrust Division's 621 total criminal cartel cases involved international companies. Over the same period, 80 of the Antitrust Division's 139 total successful leniency applications were international.

Figure 10: Successful International Leniency Applicants as a Proportion of All Successful Leniency Applicants, by Fiscal Year of Application



Source: GAO analysis of Antitrust Division data.

Appendix IV: Published Federal Judicial Decisions Involving the Antitrust Criminal Penalty Enhancement and Reform Act

This appendix describes the four published judicial decisions we identified in which the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA) cooperation requirement is mentioned or discussed. In one case, the court explicitly dealt with the defendant's duty to cooperate. In the other three cases, aspects of ACPERA's cooperation requirement were referenced in other contexts.

In re TFT-LCD Antitrust Litig., 618 F. Supp. 2d 1194 (N.D. Cal. 2009).

This is the only reported case dealing explicitly with the leniency applicant's duty to cooperate. In this case the plaintiffs, who were direct purchasers, brought a motion to compel the leniency applicant to comply with ACPERA by disclosing its identity and providing cooperation to the plaintiffs. The plaintiffs argued that if the leniency applicant did not comply, it should be required to forfeit any right it may have for reduced civil liability. The lead attorney from the Department of Justice's (DOJ) Antitrust Division confirmed that DOJ had entered into a conditional leniency agreement with a company that had manufactured and sold TFT-LCD panels.¹ The plaintiffs argued that the leniency applicant should be required to disclose itself and cooperate with the plaintiffs because cooperation is only satisfactory if provided early in the litigation and the fact that the applicant has not done so had adversely impacted the plaintiffs.

Both DOJ and the defendant² argued that ACPERA does not authorize the court to compel an applicant to identify itself and cooperate with the plaintiffs, but it is up to the applicant when to come forward. They further argued that the court should only evaluate the adequacy of an applicant's cooperation when the applicant seeks a limitation on civil liability.

The court agreed with the defendant and DOJ. The court noted that while the value of cooperation diminishes over time, "the language of ACPERA suggests that the Court's assessment of an applicant's cooperation occurs at the time of imposing judgment or otherwise determining liability and damages."

¹ DOJ officials also confirmed that the leniency applicant had to date satisfied its obligations under the leniency agreement to cooperate with DOJ, which had helped DOJ successfully prosecute several others for their role in the conspiracy.

² Samsung responded to the motion without admitting whether it was the leniency applicant.

**In re Air Cargo Shipping
Servs. Antitrust Litig., 2009
U.S. Dist. LEXIS 88404,
2009 Westlaw 3077396
(E.D.N.Y. Sept. 25, 2009).**

This decision involved the court's approval of a settlement agreement between the plaintiffs and certain related defendants, which were the Antitrust Division's leniency applicants—collectively, Lufthansa. The agreement called for Lufthansa to pay \$85 million, in return for release from all claims. In addition, Lufthansa agreed to provide extensive cooperation to the plaintiffs relating to the conduct at issue in the litigation.

In reviewing the settlement agreement, the court examined nine factors that relate to the substantive fairness of the settlement. In the context of one factor, the court noted that the bargained for cooperation with Lufthansa may facilitate a more expeditious outcome of the remaining claims and advance the final resolution of the litigation. The court also made several statements with respect to ACPERA. In examining the factor related to the risk of establishing liability and damages, and of maintaining the class action through the trial, the court noted that the plaintiffs were continuing to litigate against the nonsettling defendants and questioned whether Lufthansa, as a leniency applicant, could even effectively contest its liability at trial. With respect to examining the reasonableness of the settlement fund in light of the best possible recovery in litigation and the risks of litigation, the court took ACPERA into account. Specifically, the court stated that Lufthansa's exposure would be limited by ACPERA to a measure of its own sales, without regard to the rest of the air cargo industry. The court also noted that the agreement to cooperate with plaintiffs added significant value to the settlement, which had not been factored into the overall value of the agreement. After discussing several other issues, the court went on to approve the settlement.

**In re Mun. Derivatives
Antitrust Litig., 252 F.R.D.
184, 2008 U.S. Dist. LEXIS
61005 (S.D.N.Y. Aug. 1,
2008).**

This decision involved the court's approval of interim class counsel to represent the plaintiffs. Various plaintiffs were requesting that their respective attorneys be appointed as interim class counsel. In background, the court noted that Bank of America had entered into DOJ's corporate leniency program under ACPERA. Subsequently, the first set of attorneys that had been making efforts on behalf of potential class members entered into an agreement with Bank of America under which they had agreed not to seek treble damages from Bank of America in exchange for Bank of America providing information and evidence pertaining to the alleged conspiracy for the purpose of settlement negotiations.

The second set of attorneys made several arguments as to why they were appropriate to represent the class. One of the arguments they made was that the first set of attorneys had improperly exchanged the plaintiffs' right to recover treble damages against Bank of America, which would lessen the recovery available from Bank of America. The court disagreed because it found that the reduction from Bank of America was already contemplated by ACPERA as an incentive to encourage cooperation with the government. In addition, the court found that the agreement allowed plaintiffs to recover treble damages from the other defendants, which remained jointly and severally liable. Accordingly, the court appointed the first set of attorneys as interim class counsel.

**In re Sulfuric Acid
Antitrust Litig., 231 F.R.D.
320, 2005 U.S. Dist. LEXIS
18265 (N.D. Ill., Aug. 26,
2005).**

This decision involved the plaintiffs' motion to compel certain discovery. In this case, the plaintiffs had not obtained all of the answers to their discovery requests from the defendants before the discovery deadline, and wanted the court to require the defendants to provide more information. In the context of going through the plaintiffs' numerous requests, the court referenced both the cooperation agreement signed between the plaintiffs and the leniency applicant defendant as well as the court's decision as to whether the leniency applicant had provided satisfactory cooperation.

One of the items that the plaintiffs had requested was that representatives from the leniency applicant corporation be made available for depositions. The plaintiffs also brought up that they had a cooperation agreement with this corporation that required "full cooperation" and by not providing the depositions, the defendants were in violation of that agreement. The court disagreed, finding that the plaintiffs had waited until the very last minute to make their request and it was too late to complain about it. The court also looked at the agreement and found that it said the defendant would provide depositions with "reasonable notice" and here the plaintiffs were too late, which was not reasonable. The court said that this agreement tracked ACPERA, which also required that the cooperation must be "reasonably require[d]." Lastly, the court said only the day before the plaintiffs came into court complaining that the defendants had not been made available for depositions, the plaintiffs had filed a motion agreeing that the leniency applicant had provided satisfactory cooperation for purposes of ACPERA; now the plaintiffs were saying the opposite. The court had already made a determination that the leniency defendants had satisfactorily cooperated, which the plaintiffs had not sought to overturn. Thus, the plaintiffs could not now argue that the cooperation, including the availability of employees for depositions, had not been satisfactory.

Appendix V: Comments from the Department of Justice



U.S. Department of Justice

Antitrust Division

Office of the Deputy Assistant
Attorney General

Washington, D.C. 20530

July 8, 2011

Ms. Eileen Regan Larence
Director
Homeland Security and Justice Issues
U.S. Government Accountability Office
441 G Street
Washington, D.C. 20548

Dear Ms. Larence:

The Antitrust Division ("Division") appreciates the opportunity to respond to the Government Accountability Office's ("GAO") draft report on the impact of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 ("ACPERA"). We ask that this letter be appended to GAO's final report.

Number of Leniency Applications Pre- and Post-ACPERA

The draft report concludes that there has been little change in the number of leniency applications after the enactment of ACPERA when the two six-year periods before and after ACPERA are compared. It is true that a comparison of the number of applications made during the six-year period from fiscal year 1998 through fiscal year 2003 to the number of applications made from fiscal year 2005 through fiscal year 2010 reveals only a 3.8 percent increase in leniency applications. However, statistics obviously depend on the period of time considered and can fluctuate over time. As the GAO report points out, the rate of increase in post-ACPERA applications has fluctuated during different post-ACPERA periods. In the first three fiscal years after ACPERA, the leniency application rate rose 11 percent, and the rate increased almost 15 percent in the first four fiscal years after ACPERA. In the first five fiscal years post-ACPERA, the rate increased 22 percent.

In addition, as the GAO report notes, the change in our leniency practice to use markers has likely resulted in fewer applications being made post-ACPERA than would have been made without the marker system. Because time is of the essence in making a

leniency application, the Division uses a marker system to hold a potential applicant's place in line for leniency while it gathers additional information to support its leniency application.¹ The increasing use of the marker system post-ACPERA has likely resulted in fewer applications being made post-ACPERA than would have been made without a marker system. If reported conduct does not actually rise to the level of a criminal antitrust violation, the lack of a violation is frequently discovered during the marker phase with the result that no application is subsequently made.² The GAO report notes the decline in the number of applications withdrawn or rejected in the years following ACPERA, which is likely largely attributable to the increasing use of markers.³

Although there have been periods post-ACPERA with appreciable increases in leniency applications, it is difficult to isolate the cause of the increased applications. The increased applications provide some circumstantial evidence of the value of both ACPERA's increase in penalties and its detrebling relief in incentivizing leniency applications. Multiple additional factors also continue to provide strong motivations to seek leniency in the United States, including the routine imposition of prison sentences, the transparency and predictability in the operation of the leniency program, strong investigative powers that create a high risk of detection, the Division's close coordination

¹ Scott D. Hammond & Belinda A. Barnett, Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters 2-4 (Nov. 19, 2008), <http://www.justice.gov/atr/public/criminal/239583.pdf>.

² The GAO report states that before November 2008, companies only had to admit to possible involvement in a criminal cartel conspiracy to receive conditional leniency and now must admit to a criminal cartel violation. The model leniency letter issued by the Division in November 2008 accurately reflected the evolution in our practice to use markers by including an explicit admission of a criminal antitrust violation in the conditional leniency letter rather than a reference to a possible violation. Before the Division began using markers, companies received a conditional letter far earlier in the leniency process, sometimes before the company had the opportunity to conduct an internal investigation and before it was able to confirm definitively that it had committed a criminal antitrust violation. Through the use of the marker system, which allows a company to investigate its conduct more thoroughly before receiving a conditional leniency letter, a company should be in a position to admit its participation in a criminal antitrust violation before receiving a conditional leniency letter.

³ No or only one application that was submitted in fiscal years 2007 through 2010 was subsequently withdrawn or rejected. We view the high number of withdrawals of applications in fiscal year 2005 as an aberration that distorts the percentage of successful post-ACPERA applications. The high number of withdrawals in 2005 was likely due to applicants attempting, as an initial reaction to ACPERA, to obtain detrebling relief for conduct that did not rise to the level of a criminal antitrust violation. While the success rate of leniency applications was roughly the same for the six years pre- and post-ACPERA (69 versus 68 percent), if fiscal year 2005 is subtracted, the percentage of successful post-ACPERA applications rises to 87.5 percent. Again, this large percentage is likely due to the use of the marker system and it is difficult to attribute this percentage specifically to ACPERA.

in evidence gathering with non-U.S. enforcers, and the increasing number of non-U.S. leniency programs.

Stays of Civil Discovery

The GAO report discusses the timing of ACPERA cooperation and the impact on civil discovery of stays requested by the Antitrust Division. As noted in the report, criminal antitrust convictions establish prima facie evidence of a violation in a private civil case.⁴ Civil cases, however, are typically filed at very early points in the Division's grand jury investigations, often as soon as any news article or securities statement is released relating to the Division investigation. The leniency program was established because antitrust conspiracies are complex and difficult to prove, and the early filing of civil cases creates substantial risks of interference with leniency applicants' cooperation with the Division and the Division's grand jury investigations. Thus, the Division has an obligation to seek stays of civil discovery when necessary to prevent interference with the progress of its grand jury investigations and resulting criminal cases. The Division typically considers factors such as the following in assessing this potential interference and in deciding whether to seek a stay of civil discovery: whether civil discovery will lead to the disclosure of secret grand jury material or covert aspects of an investigation including spinoff investigations; whether civil discovery will expose the identities of government cooperators and lead to witness intimidation; whether civil discovery will give non-cooperating companies and individuals a roadmap to the grand jury investigation; whether civil discovery will allow grand jury targets or defendants to use civil tools improperly to subvert the limited discovery rules of the Federal Rules of Criminal Procedure to obtain material in defense of a criminal investigation or case; and whether potential government witnesses will be deposed before the witness has been interviewed by the Division or testified before the grand jury or at trial. Thus, while stays constrain a leniency applicant's cooperation with civil plaintiffs, stays are often necessary to preserve the integrity of grand jury investigations and criminal cases.

Whistleblower Rewards

The Division's views on the impact of whistleblower rewards on the litigation of antitrust cases are based on years of substantial practical experience in prosecuting and trying criminal antitrust cases. Conversely, it is not clear whether the plaintiff attorneys or academic stakeholders who commented on the whistleblower reward provision have any prior criminal antitrust trial experience, or if so, the extent of that experience. It is noteworthy that four of the academics interviewed countered our concerns about the credibility of a rewarded whistleblower, including three who expressed the mistaken view that "[W]hen cases proceed to trial, witnesses do not generally take the stand." This perception is at odds with the Antitrust Division's criminal prosecutorial experience where leniency applicants and other whistleblowers routinely testify at trial. In evaluating views on the impact of whistleblower rewards on the litigation of criminal antitrust cases, we believe that the practical experience of various stakeholders in litigating criminal antitrust cases is highly significant.

⁴ 15 U.S.C. § 16(a).

Thank you for the opportunity to respond to GAO's draft report. As always, we look forward to working with you in the future to ensure effectiveness in enforcement actions against cartels. Please contact me or Belinda Barnett if you need further assistance.

Sincerely,



Scott D. Hammond
Deputy Assistant Attorney General
Antitrust Division

Appendix VI: GAO Contact and Staff Acknowledgments

GAO Contact

Eileen R. Larence, 202-512-6510 or LarenceE@gao.gov

Staff Acknowledgments

In addition to the contact named above, Maria Strudwick, Assistant Director, and Claudia Becker, Analyst-in-Charge, managed this assignment. Robyn English, Michele Fejfar, Sarah Kaczmarek, John Karikari, Jessica Orr, Meghan Squires, and Janet Temko made significant contributions to this report.

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