DEPARTMENT OF JUSTICE

Opening Remarks at Roundtable Discussing the Antitrust Criminal Penalty Enhancement & Reform Act

MAKAN DELRAHIM
Assistant Attorney General
Antitrust Division
U.S. Department of Justice

Anne K. Bingaman Auditorium and Lecture Hall
Liberty Square Building
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Good afternoon. I welcome you all here today to the Anne K. Bingaman Auditorium and Lecture Hall to discuss the Antitrust Criminal Penalty Enhancement & Reform Act (ACPERA).[1] It is fitting that we discuss this important legislation here, in our newly-dedicated auditorium, given former AAG Bingaman's contributions to the Antitrust Division's Leniency Program. As most of you know, Anne was the Assistant Attorney General when the Antitrust Division's Corporate Leniency Policy was revised in 1993. In the twenty-five years since, the Leniency Policy has played a crucial role in the Division's ability to detect, disrupt, and deter antitrust crimes. It has resulted in the prosecution of sophisticated international cartels and the collection of billions of dollars in criminal antitrust fines. ACPERA complements the Division's Leniency Program by reducing the civil damages exposure of a company granted leniency if the company provides civil plaintiffs with timely, "satisfactory cooperation."

I was a Deputy AAG at the Division when President Bush originally signed ACPERA into law in June 2004, and I take great pride in its passage. ACPERA not only increased criminal antitrust penalties but promised to bolster the Leniency Program by allowing a company that qualifies for leniency to avoid paying treble damages in follow-on civil lawsuits. This benefit can be substantial. Under ACPERA, a leniency applicant that satisfies ACPERA's cooperation requirements is civilly liable only for the actual damages attributable to its *own* conduct, rather than being liable for three times the damages caused by the *entire* unlawful antitrust conspiracy. While treble damages liability can be an important deterrent for engaging in anticompetitive behavior, such enormous civil exposure can also have the unfortunate consequence of deterring the self-reporting of criminal wrongdoing.

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[1] The Antitrust Criminal Penalty Enhancement and Reform Act, Pub. L. No. 108-237, § 213(a)-(b), 118 Stat. 661, 666-668 (June 22, 2004), as amended by Pub. L. No. 111-190, 124 Stat. 1275 (June 9, 2010), codified as amended at 15 U.S.C. § 1 (notes).

Then-Chairman Orrin Hatch, who I had the privilege of working for on the Senate Judiciary Committee before I came to the Division in 2003, predicted at the time of ACPERA's passage that its "increased self-reporting incentive will serve to further destabilize and deter the formation of criminal antitrust conspiracies. In turn, these changes will lead to more open and competitive markets."[2]

Proponents of ACPERA say that the detrebling provisions have promoted self-disclosure and have streamlined civil antitrust litigation, just as Senator Hatch predicted. Some have recently raised concerns that ACPERA is no longer working as it was intended. That is what we are here to explore.

In my view, tools such as ACPERA's detrebling provisions that have the potential to incentivize leniency and encourage self-reporting are of great value because they help to protect consumers from the significant harm a cartel can cause when it infects a particular industry.

At Congress's request, in 2010, the Government Accountability Office published a report on ACPERA, which I am sure will be discussed today.[3] In reviewing and commenting on the report, the Division recognized then that increased leniency applications since ACPERA's enactment "provide[d] some circumstantial evidence of the value of both ACPERA's increase in penalties and its detrebling relief" to the Leniency Program.

Despite some recent eulogies over the purported death of leniency, the Division's Leniency Program is still alive and well. In fact, the number of leniency applications the Division received in 2018 was on par with our historical averages.

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[2] 150 Cong. Rec. S3614, H6327 (Apr. 2, 2004) (statement of Sen. Hatch).

[3] GAO Report to Congressional Committees, Stakeholder Views on Impact of 2004 Antitrust Reform are Mixed, but Support Whistleblower Protection (July 2011), https://www.gao.gov/products/GAO-11-619.

There's no sign that we've become a victim of our own success and rooted out collusion entirely. Indeed, the Division is vigorously investigating cartel conduct and closed FY 2018 with 91 pending grand jury investigations—the highest total since 2010. So far this month alone, the Division has announced charges in four new investigations. These new investigations relate to anticompetitive conduct in multiple industries taking place in various jurisdictions across the country, including the commercial construction industry in Chicago and New England and various federal programs.

Needless to say, our prosecutors are busy and there's no sign that collusion is on the decline. Cartelists are out there, and it's as important as ever that all of detection tools available to our prosecutors are functioning optimally. Though our cases are generated in a number of ways, for the last twenty five years, leniency applications have been an important tool in our arsenal for detecting, preventing, and prosecuting cartels. Today's roundtable will assist our continuing examination of ACPERA's role in ensuring the Leniency Program's continuing success.

The late Justice Scalia has been quoted numerous times for observing that collusion is the "supreme evil of antitrust."[4] I could not agree more—prosecuting cartels remains our highest priority. I have explained that antitrust violations such as price-fixing, bid rigging, and market allocation unambiguously disrupt the integrity of the competitive process, harm consumers, and reduce faith in the free market system. Our Leniency Program is designed to facilitate and incentivize self-reporting of collusive behavior. Self-disclosure benefits the first-cartelist to report, and cooperation from leniency applicants furthers our investigations and helps remove

[4] *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004).

cartels from the free market. ACPERA should encourage such behavior just as Congress contemplated in 2004.

We are here today to discuss the benefits of ACPERA; whether it is incentivizing self-reporting of cartel activity; and what, if anything, in ACPERA's current framework can be improved. The Division would like to learn from those with experience litigating and studying ACPERA in order to better understand how ACPERA is working to uncover anticompetitive behavior and compensate victims of collusion.

I would like to thank in advance all of the Roundtable's participants, particularly the U.S. Chamber of Commerce, the Honorable Judge Ginsburg and the Global Antitrust Institute, the American Bar Association, and the Business Industry Advisory Committee to the OECD for sharing their views on this important topic. I am also grateful to and very interested to hear views from our experienced individual panelists, including those who represent the many victims, on how ACPERA is operating today.

Now, I will invite our Deputy Assistant Attorney General for Criminal Enforcement, Richard Powers, to provide some brief remarks.