

Antitrust Law Blog

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[Bill Introduced To Secure Reduced Civil Liability For Amnesty Applicants](#)

Three U.S. senators have introduced a bill that would make permanent provisions of the Antitrust Criminal Penalties Enforcement and Reform Act of 2004 (ACPERA) granting reduced civil liability to companies who successfully apply for criminal amnesty under the U.S. Department of Justice's antitrust leniency program and subsequently provide "satisfactory cooperation" to civil plaintiffs.

Under ACPERA, a cooperating amnesty applicant may be held liable in a civil action only for the actual damages caused by its own conduct, thus avoiding the joint and several liability and treble damages typically available in antitrust conspiracy cases. This reduced civil liability was intended to provide an additional incentive for whistleblowers to apply to DOJ's leniency program.

The current bill is co-sponsored by Senators Patrick Leahy (D-VT) and Orrin Hatch (R-UT). In introducing the bill, Senator Herb Kohl (D-Wis.) hailed ACPERA's role in promoting the ongoing success of DOJ's leniency policy. "For more than 15 years, this policy has allowed the division to uncover cartels affecting billions of dollars worth of commerce here in the United States, which has led to prosecutions resulting in record fines and jail sentences," said Kohl. "The changes we made to this program six years ago [in enacting ACPERA] have proven successful and it's time we give the Justice Department a permanent fix so it can continue the good work it has done detecting and prosecuting price fixing cartels."

Despite these glowing statements, however, the bill would continue Congress's cautious approach in exploring possible improvements to ACPERA. The law's civil liability provisions were originally slated to sunset in June 2009, giving Congress an opportunity to assess whether the provisions were having the desired effects in facilitating criminal antitrust investigations, or whether refinement of the statutory scheme was necessary. Congress enacted a one-year extension of the provisions to June 2010, noting the paucity of case law interpreting or applying the statute, and concluding that still more time was needed to evaluate the law. The current bill would make ACPERA's existing civil liability provisions permanent, but would require the Government Accountability Office to conduct a study of the effectiveness of the law and present its conclusions to the Senate and House judiciary committees within one year after the bill takes effect. Specifically, the GAO's study would be required to address ACPERA's "effectiveness...both in criminal investigation and enforcement by the Department of Justice and

in private civil actions...[and] shall consider, inter alia, the effectiveness of incentives for cooperation, and the timeliness of that cooperation, in private civil actions."

"When we receive the study, we will review it and act accordingly, changing the law if necessary," said Herb Kohl (D-Wis.), a sponsor of the bill.

Thus, while it appears that a reduced civil liability scheme is set to become a permanent fact of life for amnesty applicants, the specifics of that scheme are hardly set in stone.

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