

## Antitrust Law Blog

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### Obama Signs Legislation Extending Limitations On Civil Liability For Amnesty Applicants

On June 19, President Barack Obama signed legislation extending provisions of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 ("ACPERA") that allow successful amnesty applicants under the Department of Justice Antitrust Division's corporate leniency program who provide "satisfactory cooperation" to private plaintiffs to avoid the treble damages and joint and several liability typically available in private antitrust suits. These provisions were originally scheduled to sunset on June 22, 2009, but will now be available to all applicants who enter into amnesty agreements with the Antitrust Division on or before June 22, 2010.

Both the House and Senate sponsors of the legislation—entitled the "Antitrust Criminal Penalty Enhancement and Reform Act of 2004 Extension Act" (H.R. 2675)—hailed ACPERA's limitations on civil liability as providing strong incentives for potential amnesty applicants to cooperate with the Antitrust Division's leniency program. "ACPERA provides important tools used by the Justice Department to prosecute and detect price-fixing cartels," said Senator Herb Kohl (D-Wis), who sponsored a Senate version of the bill. "Without the incentives to encourage participation in the Antitrust Division's leniency program – which has proven remarkably effective – we would leave the Department short-handed and that is not acceptable."

"The positive impact of this law cannot be overstated," said Representative Henry Johnson (D-Ga), the House sponsor. "In the first half of this year, ACPERA has aided the Antitrust Division in securing jail sentences in 85 percent of its individual prosecutions, and more than \$900 million in criminal fines."

Despite ACPERA's new lease on life, however, there are indications that substantive changes to the statute may be in store. In a May 8 letter, James A. Wilson, Chair of the Antitrust Section of the American Bar Association, urged leaders of the House and Senate Judiciary Committees to extend ACPERA's limitations on civil liability for five years, arguing that more time was needed to evaluate ACPERA's efficacy in facilitating criminal investigations. "While the Section is inclined to believe that [ACPERA's] detrebling provision has made an important contribution to the overall effectiveness of the government's leniency program, with no discernable ill effect on the deterrent and remedial objectives of enforcement," Wilson wrote, "it also recognizes that legitimate questions have been raised by those who hold a differing view and we note that there has been insufficient time under the ACPERA regime to permit a full evaluation of the benefits

and costs of the provision.”

In enacting only a one-year extension, lawmakers appear to have concluded that any revisions to ACPERA should be made on a shorter time frame. "This 1-year extension preserves the penalties and incentives currently in place," said Representative Johnson, "while affording Congress time to explore possible improvements to the 2004 act."

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