

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 antiretaliation 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.

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CRIMINAL CARTEL ENFORCEMENT

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

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 antiretaliation 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.