It Is Time for an Antitrust Whistleblower Statute–Part 3

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This is Part Three of a four-part series of posts by myself and colleague Kimberly Justice on "*It Is Time for an Antitrust Whistleblower Statute."* Parts 1 and 2 can be found here and here.

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Note: If the Grassley/Leahy Anti-Retaliation Act is passed, that protection would be part of the whistleblower statute. Ms. Justice and I are advocating that an antitrust whistleblower statute should go farther and provide a reward for actionable cartel-busting information.

The SEC whistleblower statute is a very successful model to be followed for a potential antitrust whistleblower statute. There should be differences in some areas (discussed below), but the SEC program has shown to be an effective tool in preserving the integrity of the nations' securities market while conserving the investigative resources of the SEC. But, it took a severe financial crisis to overcome the objections to an SEC whistleblower statute. Many of the stakeholders, such as the Chamber of Commerce that opposed allowing a whistleblower award as part of the Dodd-Frank Act are likely to oppose an antitrust whistleblower statute. But in November 2016, then SEC chair Mary Jo White said: "The whistleblower program has had a transformative impact on enforcement and that impact will only increase in the coming years."

The success of the SEC whistleblower statute, at least from an enforcement perspective, is one reason why we think the time has come for a similar antitrust whistleblower statute. It works. The SEC, which pays the whistleblower 10-30% of the sanctions collected in successful actions, has rewarded 46 whistleblowers with approximately $158 million for information that has led to successful enforcement actions.

The SEC statute, like the antitrust statute we propose, is different than a typical False Claims Act-type whistleblower claim where the relator (whistleblower) brings an action in the name of the United States alleging the government has been the victim of fraud. The SEC statute basically provides an informant with a reward (bounty) for coming forward with actionable information where the SEC obtains monetary sanctions. The SEC, however, is precluded from making monetary awards "to any whistleblower who is convicted of a criminal violation related to the judicial or administrative action for which the whistleblower otherwise could receive an award."

While the SEC statute provides a model, there are areas where adjustments for the nature of cartel violations may be made in an antitrust whistleblower statute. The full SEC legislation can be found here, but below are a couple of key provisions and our suggestions about how they might be modified.

Payment of Award

The SEC whistleblower program allows for a reward, "*In any covered judicial or administrative action, or related action.*"

The Antitrust Division does not have administrative actions. An antitrust whistleblower would be eligible for an award, in our view, only based on original information that led to criminal Sherman Act convictions and the imposition of fines based on a conviction.

Amount of Award

The SEC provides for a whistleblower award only where the penalties exceed $1 million. In such cases the reward is an aggregate amount [if more than one whistleblower] equal to—

‘‘(A) not less than 10 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions; and

‘‘(B) not more than 30 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions.

In our view, this may not be an appropriate award schedule for an antitrust whistleblower. At a minimum, the $1 million threshold should be eliminated. A whistleblower statute may be particularly effective in construction-type contracts where the loss to the victim is acute. For example, a rigged electrical contract at a local hospital that would have been $750,000 with competitive bidding but has a low fixed bid of $1 million is as worthy of a whistleblower award as an international cartel where each consumer suffers a relatively small loss, but cumulatively the loss will easily exceed $1 million.

Also, the 10 to 30 percent award range may be excessive in a large cartel case. The impetus behind our proposed legislation is not so much to make a whistleblower a mega-lottery winner, but to provide a way to help the whistleblower pay for what could be substantial attorney fees, and to compensate the whistleblower for what may be a long period of unemployment or underemployment, regardless of anti-retaliation protection. Therefore, we would eliminate the minimum award of 10%, leave the maximum of 30% and perhaps require that in making the award the Antitrust Division consider a) the attorney fees incurred; and b) the likely or actual loss of income over a period of time, as well as the value of the information provided, the level of cooperation and the amount of the recovery.

No Recovery for One Convicted of the Violation

No SEC whistleblower award can be made to *‘‘to any whistleblower who is convicted of a criminal violation related to the judicial or administrative action for which the whistleblower otherwise could receive an award under this section.”*

An antitrust whistleblower statute should certainly retain this provision. It is our sense that the most likely potential antitrust whistleblowers will be lower-level employees who know about a conspiracy and take some action in furtherance of it—thus creating criminal liability for themselves. This will give the Antitrust Division much control over who can become a whistleblower. The Division retains the discretion whether to give non-prosecution protection, a necessary first step before an insider can become a whistleblower. If the

potential whistleblower has a level of culpability such that the Antitrust Division is not comfortable accepting as a whistleblower, the simple answer is to not grant non-prosecution protection. Another possible scenario is that the Antitrust Division grant non-prosecution protection to a highly culpable individual (making them eligible for an award because no conviction) but write into the cooperation agreement that the cooperator waive the right to a potential "bounty."

There may be, and hopefully will be, some whistleblowers who do not need non-prosecution protection (customers, administrative staff or others who learn of a cartel but have no role in it). But, in practice, the Antitrust Division would have significant control over the whistleblower program because it is likely that many potential whistleblowers would have to take as a first step, negotiating non-prosecution agreements.

Office of the Whistleblower

A key aspect behind the success of the SEC whistleblower provision is that the SEC actively promotes the program. The SEC established an Office of the Whistleblower. This is an excerpt from the office's home page:

Assistance and information from a whistleblower who knows of possible securities law violations can be among the most powerful weapons in the law enforcement arsenal of the Securities and Exchange Commission. Through their knowledge of the circumstances and individuals involved, whistleblowers can help the Commission identify possible fraud and other violations much earlier than might otherwise have been possible.

The level to which the Antitrust Division promotes a new whistleblower statute will determine its level of success. When the Division first began the revised leniency program, it rolled it out like a new iPhone. The Division went to great lengths to advertise the program and make the program successful in practice by working with companies to help them qualify if at all possible. The flexibility and discretion built in to an SEC style whistleblower statute will give the Antitrust Division the ability to accentuate the features the whistleblower provisions that work best for law enforcement while mitigating any possible downside (such as very culpable people getting awards).

Miscellaneous

We've only touched on the most significant feature of the SEC whistleblower program that

may be mimicked in an antitrust whistleblower statute. There would be more "sausage making" into creating actual legislation. Other features of the SEC program worth noting are the reporting requirements to Congress and the Inspector General review and report on the program. If an antitrust whistleblower statute is nearly as effective as the SEC statute, law enforcement and consumers will be the winners. But, if an antitrust whistleblower statute is a bad idea, it can be a short-lived bad idea. In light of the success of the SEC program, it is prudent to give it a chance.

Thanks for reading

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