

What Can/Should be Done To Pick Up the Pace of Cartel Investigations?

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In an earlier post I discussed the Fiscal Year 2018 Antitrust Division statistics for criminal cases filed and noted that they were down dramatically ([here](#)). This is not a one year drop off, but a trend since the high water mark of 2015 ([here](#)). It is not just case filings that are down, but also corporate criminal fines are on a significant downward trend.

In a subsequent blog post ([here](#)) I discussed some possible reasons criminal antitrust cases are down. The ideas presented are not all mine, but a compilation of my own thoughts and what I hear from others in and out of government in the cartel bar. Several main themes stood out: Perfecting a leniency marker to conditional leniency letter from the Antitrust Division has become more difficult, expensive and less beneficial, not only for the company but for its current and former executives. A second theme was that perhaps the United States has been too successful at exporting cartel enforcement around the world—the number of jurisdictions a leniency applicant has to face and the potential follow on civil litigation has greatly increased the collateral damage of seeking leniency. A final related thought is that even in the United States, a leniency applicant may have a hard time reducing its civil damages because the promise of single damages under the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (“ACPERA”) has been elusive.

So doctor, what is the cure for declining cartel enforcement in the United States? Below are some potential fixes. Again, not all my own ideas (mangled sentences are my own as I try to finish this in time to watch Monday Night Football (never mind—the Bills are playing)).

A. Make Leniency Great Again

Cartel cases, particularly international cartel cases, are primarily driven by leniency applications. And leniency applications are down. Why? There is no single cause, and as noted, the collateral damages flowing from seeking leniency in the United States is ever increasing; see my article: *Corporate Leniency Should Come With A Warning Label*. There is, however, a widely held view that the Antitrust Division has taken a harder line with leniency applicants, making putting down a “marker” a more risky decision.

1. Antitrust Division Speeches

Speeches by Division officials have changed from the earlier “roll out the red carpet” treatment welcoming amnesty applicants to a much more cautious tone. Here is a typical remark by the father of leniency, then Deputy Assistant Attorney General for Criminal Enforcement, Gary R. Spratling ([here](#)):

A robust, effective international anti-cartel enforcement program depends on cooperation from at least some of those who have engaged in the cartel activity. Prospective cooperating parties come forward in direct proportion to the predictability and certainty of their treatment following cooperation. (emphasis added).

Scott Hammond, who followed Spratling as the Deputy Assistant Attorney General for Criminal Enforcement, gave a speech titled: *“When Calculating the Costs and Benefits of Applying for Corporate Amnesty How do You Put A Price Tag on An Individual’s Freedom?”* in which he said:

We developed a Corporate Leniency Program (“Amnesty Program”) that provides the ultimate prize for companies that choose to self-report — no criminal conviction, no criminal fine, and non-prosecution protection for all officers, directors, and employees — and we made the requirements for entering the program as transparent and attainable as possible.” (emphasis added)

This is just a small sample of the leniency is “Open for Business” attitude of the true believers that leniency for a culpable corporation and its executives was a good bargain—in return for busting up and deterring cartels.

Things took a decidedly tougher tone in the later days of the Obama Administration under Assistant Attorney General for Antitrust Bill Baer. The predictability of “no jail” for corporate individuals became less predictable. Mr. Baer commented in a widely followed speech in 2014 titled Prosecuting Antitrust Crimes:

When companies apply for leniency, their current employees may earn it, too. [emphasis added]. As with employers, however, leniency for employees is not an entitlement; it requires full and timely cooperation. To cooperate fully, individuals must be prepared to admit to all collusive conduct they participated in or know about. They need to be prepared to be candid and credible witnesses in front of a grand jury and at trial.

“May” is not a great word for a program based on predictability and certainty. Corporate applicants also seemed to have a less certain path to pushing a “marker” over the goal line and scoring a conditional leniency letter[1]:

We expect leniency applicants to make those investments, including conducting a thorough internal investigation, providing detailed proffers of the reported conduct, producing foreign-located documents, preparing translations, and making witnesses available for interviews. Companies unwilling or unable to make the investments necessary to meet these obligations, or those that think they can do so on a timetable of their own choosing, will lose their opportunity to qualify for leniency.

The Division added another barrier to a corporation seeking leniency when it required the applicant to fire certain “highly culpable” employees. Hmmm, I wonder who it is that would be in on the decision to seek leniency in the first place? Also, corporations may be handicapped in providing the “full exposition of the facts” under the Leniency Policy if highly culpable executives decide not to cooperate to try to save their jobs. This foray by the Division into corporate governance seems misplaced. On the surface it seems right that highly culpable individuals should be fired. But, the rate of recidivism for individual antitrust

offenders is close to zero. The Division does not require a corporate amnesty applicant to submit to a corporate monitor because it views the act of seeking leniency to have demonstrated rehabilitation. Shouldn't the same consideration be given to a culpable employee? The corporation may elect to clean house, but requiring firings may (has?) lead to fewer leniency applications. It adds another layer of uncertainty and lessens the bargain a corporation may receive from a successful leniency application.

2. New Antitrust Division FAQ's

It is widely believed that the Antitrust Division contributed to uncertainty and diminished transparency when it issued revised "Frequently Asked Questions about the Antitrust Division's Leniency Program and Model Leniency Letters" on January 17, 2017, just days before President Trump was inaugurated.^[2] If certainty and transparency are the hallmarks of a successful leniency program, the Division surely took its success rate down a notch or two with the treatment of current and former employees in the new FAQ.

When the Division already has an investigation of the alleged illegal conduct, Type B leniency will be available to the first qualifier. The new FAQ added this statement for Type B leniency for current employees: "[T]he Division may exercise its discretion to exclude from the protections that the conditional leniency letter offers those current directors, officers, and employees who are determined to be highly culpable." This new FAQ solidifies the uncertainty created in speeches. It is a huge obstacle for a potential leniency applicant. As mentioned above, who makes, or at least greatly influences, the decision to seek leniency? Well, usually highly culpable (i.e. senior executives) who may now not be covered. Also as mentioned, even if the company wants to go forward and risk the senior level managers getting "carved out" of the leniency, these are the guys who may be necessary to provide the "full exposition of the facts" the Division demands. In any event, corporate counsel's job is significantly complicated when she can only tell current executives they maybe covered if they cooperate: "Probably you'll be covered" "pretty good chance, in my experience, but..."

The revised FAQs also solidified the shift in the attitude towards former employees. The original FAQs stated that the policy "does not refer to former directors, officers or employees, so the Division is under no obligation to grant leniency" The revised FAQs states: "Former directors, officers, and employees are presumptively

excluded from any grant of corporate leniency.” Corporations may feel some sense of loyalty or guilt in cutting formers loose from the leniency process, especially if there was little antitrust training or the fired were “just following orders” from superiors who effectively insulated themselves from being charged. Of course, some companies may gladly throw a former employee an anchor. Depends why he is a former employee, I suppose.

Overall, recent speeches, the new FAQs, and anecdotal reports about actual Antitrust Division practice, indicate that the Antitrust Division intends for leniency to become less certain and more difficult to obtain. Apparently, it has worked. Leniency applications and case filings are on a steady downward trend.

Suggestion: The current administration should discuss whether they agree with the FAQs issued in the final days of the Obama Administration and whether they want to signal a more inviting attitude towards leniency applicants. A crucial step would be to consult with cartel bar defense attorneys to try to get a fuller picture of the current attractiveness of, or hurdles to, potential leniency whistleblowers. Richard Powers is fairly new in his position as Deputy Assistant Attorney General for Criminal Enforcement. It may be that the internal discussions at the Antitrust Division are ongoing. But, whether the current administration wants to keep the policy/FAQs/speeches as they stand or chart a revised direction, it would be helpful if more consultation with and guidance to the defense bar was given.

B. Make ACPERA Great Again

ACPERA was designed to further encourage corporate whistleblowers (i.e. leniency applicants), with the promise of single damages if they also “provided substantial” cooperation to the plaintiffs in follow-on class actions. ACPERA may be falling short of its intended goal because of frequent disagreements between an ACPERA applicant and the plaintiffs about what constitutes “substantial cooperation” and when a company should be found to have earned the reward of single damages.

Suggestion: It would take legislation to amend ACPERA, but a case could be made that, like leniency, the ACPERA applicant should get a free pass—no damages, instead of single damages. There may also be ways to determine with more certainty whether the ACPERA applicant has earned the “substantial cooperation” designation.

C. Cartel Whistleblower Legislation

Perhaps the Antitrust Division does want to take a harder line with leniency applicants and make them work harder for leniency with more proffers, witness interviews, greater document production, and a detailed evidentiary road map to the cartel before issuing a conditional leniency letter. There could be a reason for the Division to have such an attitude. The leniency applicant has every incentive to admit to cartel conduct and make it as broad as possible when seeking leniency. Once the conditional leniency letter is issued, however, the incentives change. The leniency applicant now worries about limiting civil private damage exposure. Broad conspiracies become more narrow. Sharp memories fade from a “Yes” to “I think so” and most deadly to the prosecution “I know I said that, but now I can’t be sure.” Many applicants are as truthful as they can be throughout the process, but it would be naïve to think this scenario doesn’t happen. Maybe the Antitrust Division does want to squeeze every drop of information they can while the incentives are still in their favor, even if it means fewer applicants. Likewise, discretion to carve out current and former employees from coverage may be warranted if leniency has been too generous in the past, losing the moral high ground for the Division in prosecuting other (perhaps less culpable) actors. Perhaps the Division has given considered thought to the current policy and is comfortable with it.

Suggestion: Making leniency more attractive to applicants by lowering the bar to “win” the prize isn’t the only way to boost cartel investigations. It is past time for Congress to pass a criminal antitrust whistleblower statute. In 2011, the SEC adopted their widely successful whistleblower program. The SEC’s latest whistleblower award was to an overseas whistleblower for nearly \$4 million (wonder if there might be any potential overseas cartel whistleblowers?)[3] I’ve written extensively on Cartel Capers[4] about why a criminal antitrust whistleblower statute is the logical addition to a criminal antitrust enforcement program, so I won’t belabor the point here except to say that at one point it was thought (wrongly) that a whistleblower statute might undermine the leniency program. I co-authored an article with a former Division colleague, Kimberly Justice, that outlines the pros and knocks down the cons of a cartel whistleblower statute: “It’s a Crime There Isn’t a Criminal Antitrust Whistleblower Statute.” With leniency applications down, the whistleblower idea should get a serious, long look as a great supplement to leniency.

D. Further International Cooperation to Reduce Burden on Leniency Applicants

Thanks in large part to the efforts of the Division, cartel enforcement agencies with leniency policies now exist in over 100 countries. This success, however, has resulted in an increased burden on leniency applicants to deal with a proliferation of proffers, witness interviews and document requests in many languages. This is natural and to some extent unavoidable. Each enforcement agency is going to protect its consumers (and budget) from substantial injury by an antitrust cartel. But facing a growing gauntlet of cooperation obligations can deter an applicant from taking the initial plunge anywhere.

Suggestion: Competition agencies are already aware of the problem and are working towards solutions. Cooperation in an international cartel investigation is a little like voluntarily enlisting in the Hundred Years War. Requiring witnesses to appear for interviews in multiple international jurisdictions can create inconsistent statements and resentful/tired witnesses. Competition agencies should give a heightened focus on reducing this burden. As the international cartel prosecution pie gets smaller, and with more mouths to feed, maybe the most injured jurisdictions can take the lead and other enforcement agencies can pass at taking a bite on the cartel and wait for the next meal to come along. Reducing cooperation burdens and redundancies will be difficult, but hopefully as each enforcement agency sees that progress is needed, it will come sooner rather than later

E. Reopen Two Regional Field Offices

In late 2013, the Division closed down four regional field offices: Atlanta, Cleveland, Dallas and Philadelphia. The Division did not just lose regional coverage, but it lost a significant number of experienced cartel prosecutors. The regional offices that were closed were all in low(er) cost cities where dedicated cartel attorneys could stay with the DOJ as a career and still raise families. Continuity and institutional memory suffered a big blow when a sledgehammer was taken to the Division's structure.

Suggestion: From an earlier [Cartel Capers post](#) urging the reopening of at least the Atlanta and Dallas field offices:

International cartels are a worthy focus of Antitrust Division resources but it's worth remembering that the field offices played a huge role in the development of the Division's international cartel program. The modern era of international cartel

enforcement was the Archer Daniels Midland case brought by the Chicago Field Office. The record \$500 million fine and other convictions in the vitamins investigation led by the Dallas Field Office followed that. The Philadelphia Field Office had some “firsts” with the graphite electrode investigation and the extradition, trial and conviction of British executive Ian Norris. San Francisco has had accomplishments too numerous to mention as have the criminal sections headquartered in DC with blockbusters like air cargo and auto parts. The point is that international cartels can be investigated and prosecuted wherever there are talented and dedicated antitrust enforcers. But as for regional conspiracies, I don’t believe the opposite is true. The strength of the field offices had always been their ability to network with investigative agencies from the FBI, the gamut of federal IG’s offices, state and local prosecutors and public procurement officials. These local contacts were crucial to educating agents and purchasers about antitrust violations, and giving them the information (and motivation) needed to spot and report possible collusion.

Regional conspiracies do not produce the extraordinary fines that international cartels can. But, there is merit to investigating and prosecuting regional cartels. First, the harm from bid rigging on public procurement is very focused. It isn’t a case of millions of consumers losing pennies on a purchase, but a federal, state or local entity losing a big chunk of its scarce tax dollars. Bid rigging schemes are often more effective at raising prices. They can also be very long-lasting as the structure of public procurement can make these awards both more susceptible to bid rigging and more difficult for market forces to disrupt in the short-term. For these reasons, the Sentencing Guidelines give a modest one-point bump for bid rigging, recognizing it generally has a more serious impact on the victim.

Finally, successful prosecution of a bid-rigging scheme can bring meaningful restitution to the public victim in the form of treble damages. It restores public confidence that tax dollars are being spent wisely. And the cost of publicly procured goods often sees a dramatic drop, sometimes even simply by the start of an investigation. I also think the prosecution and imprisonment of domestic price fixers and bid-riggers can generate publicity and pack more of a “deterrent punch” than prosecution of foreign executives, many whom remain fugitives. Additionally, if the Antitrust Division isn’t developing and prosecuting cases involving regional cartels, who is?

Conclusion

This is a good time for the Division to take stock of the cartel enforcement program and see if improvement can be made. The leadership has had time to evaluate the program they inherited and see what they think works and what may be improved. Or, maybe even launch new initiatives. Richard Powers was fairly recently named as the Deputy Attorney General for Criminal Enforcement, so the team is together. In all likelihood the evaluation is underway already. But, it would be helpful to solicit ideas from the cartel defense bar, the private class action bar, economists, and academics to re-lock and reload the cartel enforcement program.

This was a long post. Thanks for reading. I welcome any feedback.

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This post originally appeared on the Cartel Capers blog.

[1] Leniency Applicants were also cautioned that leniency only covered “the Antitrust Division’s exercise of its prosecutorial discretion in connection with self-reported criminal violations and does not prevent other components from prosecuting offenses other than Sherman Act violations.” See, Bill Baer, Assistant Attorney General Antitrust Division, Prosecuting Antitrust Crimes, September 10, 2014, Georgetown University.

[2] The updated FAQs were issued on January 17, 2017 and were reissued on January 26, 2017, adding to suspicion that the new FAQ’s was issued in haste without appropriate deliberation or deference to a new administration. The Division reissued the FAQs on January 26, 2017, because a footnote “was inadvertently omitted from the January 17 version.”

[3] The SEC has now awarded over \$326 million to 59 individuals since issuing its first award in 2012. In that time, more than \$1.7 billion in monetary sanctions have been ordered against wrongdoers based on actionable information received by whistleblowers.

[4] The Bid Rigging Whistleblower, <http://cartelcapers.com/blog/bid-rigging-whistleblower-part-1/>; Its Time For An Antitrust Criminal Whistleblower Statute, <http://cartelcapers.com/blog/time-antitrust-whistleblower-statute-part/>; A

Whistleblower Story (Hypothetical),
<http://cartelcapers.com/blog/a-whistleblower-story-hypothetical/>.