

AntitrustConnect Blog

It Is Time For An Antitrust Whistleblower Statute—Part 2

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Objections to an Antitrust Whistleblower Statute

The idea of an antitrust whistleblower is not new, but it has never gained much traction in the past. There have been significant objections, or at least disinterest—particularly from the Department of Justice. The mood seemed to be “Our cup runneth over with Amnesty applications so let’s not screw this thing up.” But, perhaps times have changed. Our analysis is that the objections to a whistleblower statute were either superficial, or when having merit, still not enough to outweigh the benefits of a whistleblower statute.

Before considering some of the possible downside to an antitrust whistleblower statute, a little explanation of what we have in mind may be helpful. We propose an SEC-style whistleblower statute where an informant can be awarded a level of compensation (bounty) when information of illegality leads to charges and recovery by the SEC. This is different than a False Claims Act qui tam case where a Relator brings a case in the name of the government alleging the government has been defrauded. In fact, an antitrust whistleblower statute is needed because a qui tam case is not generally available in price-fixing matters since it is the private sector, not the government that has been harmed.

Concerns About an Antitrust Whistleblower statute

It’s worth noting that the Criminal Antitrust Anti-Retaliation Act has been passed twice unanimously by the Senate in the last two Congresses and is up for vote again on the Senate floor. It will no doubt pass—most likely again unanimously. There is agreement that a person who reports criminal antitrust activity should not face retaliation in the workplace. (Despite the consensus, the House has failed to take up this bill the last two times it has passed the Senate). There is controversy, however, about whether a whistleblower should be eligible for some type of bounty if the information leads to successful cartel prosecution and the imposition of fines.

In 2011, the General Accounting Office Published a report on Criminal Cartel Enforcement that reported stakeholders’ views on a possible antitrust whistleblower statute ([here](#)). This is a summary of the [GAO findings](#):

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 antiretaliatory 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.

The GAO report is several years old and it may be that positions have been reevaluated. For example, I think the Antitrust Division today would support the anti-retaliation measures in whistleblower statute. But below is an analysis of some of the objections raised to making a bounty available to an antitrust whistleblower.

Whistleblower Credibility

The Antitrust Division's principal concern was that jurors may not believe a witness who stands to benefit financially from successful enforcement action against those he implicated. GAO Report p. 39. But, a whistleblower is highly unlikely to ever be a principle witness at a trial. An antitrust crime typically involves many culpable actors. A whistleblower would generally "get the ball rolling" and provide evidence that will turn other witnesses, and allow subpoenas and search warrants from target companies. Further, a single whistleblower who might receive a financial reward seems no less credible than witnesses from an amnesty company where everyone—including the highest-ranking culpable executives—will have escaped criminal prosecution. Also, criminal antitrust trials are relatively rare—almost all cases are resolved by pleas. Finally, it is not logical to worry about the credibility of a witness you would otherwise not even know about absent a whistleblower statute.

A Whistleblower Reward Could Result in Claims That Do Not Lead to Criminal Prosecution:

There was some fear expressed in the GAO report that would-be whistleblowers would fabricate information in order to conjure up a cartel in the hopes of collecting a reward. GAO Report p. 40. Anything is possible, but the Antitrust Division folks are pretty savvy and have standards for opening grand jury investigations. Moreover, the possibility of fabricated charges exists today with a company applying for leniency in the hopes of knee-capping competitors who would have to deal with a criminal cartel investigation. The reality is a "false accusation" simply wouldn't be corroborated by anyone else and could land the accuser in jail for making a false statement.

In a similar vane, concern was expressed that a whistleblower statute may result in a deluge of complaints to the Antitrust Division that would take additional resources to sift through. This seems like a good problem to have. When Ms. Justice and I were at the Division, we received a fair number of complaints that amounted to no more than oligopoly pricing. It did not take too much time to ask: "What else ya got?"

Undermining Internal Compliance Programs:

A concern that seems more legitimate is that a whistleblower reward could undermine companies'

internal compliance program. GAO report p. 42. An employee who learns about cartel behavior may decide there is more in it for her to go directly to the Antitrust Division than to report the information to company counsel. This seems like a plausible possibility, though it's hard to envision how often it might happen. An employee may choose to go to the Antitrust Division because if the company is involved in a cartel, the employee may conclude the "compliance" program is not really working and it may be dangerous to report the information internally. But, even if the employee does go directly to the government, all is not lost in terms of a compliance effort. The Antitrust Division may decide to approach the company in question with the information and seek to flush out a leniency application—known as affirmative amnesty. Or, if the compliance program truly was robust, and the employee just chased the possible "whistleblower bounty" the Antitrust Division could still recognize the company's compliance efforts in charging/sentencing decisions. But, in short, if the whistleblower statute is working, and a cartel is exposed by an employee who came to the government instead of reporting to company counsel, the balance of equities seems in favor of exposing and prosecuting the cartel—and dealing with the company's compliance efforts in some other way.

Wrongdoers Should Not Be Rewarded

The GAO report did not address perhaps the strongest objection to an antitrust whistleblower statute, namely that wrongdoers should not be rewarded. Under the whistleblower legislation we propose, certain "members" of a cartel may be eligible for a whistleblower reward. A cartel almost always has many participants; both in terms of companies involved and number of people involved within a company. A typical cartel requires the participation, or at least acquiescence, of a company's senior, highly-culpable executives. But the day-to-day execution of the cartel typically is left to subordinates who are directed to attend meetings, communicate with competitors and monitor the implementation of the scheme. Cartels often have their own nomenclature signifying culpability—"top level meetings," "working group meetings," and "Master and Sherpas," to name a few. These lower level executives could make ideal whistleblowers. If one whistleblower gets immunity and a potential financial reward, there will still be many more culpable conspirators to prosecute.

Under conspiracy law, if an estimator, or a salesperson knows his company is involved in a price-fixing agreement, he is liable as a "coconspirator" if he takes a single act in furtherance of the conspiracy (prepares a bid; quotes a fixed price). Consequently, virtually 100% of witnesses who cooperate with the Antitrust Division demand immunity. But, these "culpable" individuals would make ideal whistleblowers. A financial reward to low-level cartel participants—given the considerable expenses such a witness will incur in providing cooperation seems, at least to us, a reasonable exchange.

There should be no concern that a senior member of a cartel, a "Master," could obtain a whistleblower reward. The first step in becoming a whistleblower for one who has some criminal exposure is to obtain immunity or a non-prosecution/cooperation agreement. This "dance" with the Antitrust Division requires an experienced (and expensive) attorney [one of the reasons people do not come forward without some hope of financial reward]. The Antitrust Division would either simply not grant non-prosecution protection to such an individual, or it could negotiate an agreement that precludes a very culpable executive from seeking a whistleblower reward. Also, keep in mind that the whistleblower reward would be a "bounty" yet to be determined. It could be modest—not like a qui tam recovery where the Relator gets a percentage of the government's recovery.

Conclusion

There are some legitimate concerns around having an antitrust whistleblower bounty for actionable information that leads to the discovery of and prosecution of a cartel. But, there are ways to ameliorate the legitimate concerns, and none of these concerns outweigh the benefit of adding another tool to the government's ability to detect and prosecute cartels—and deter them from forming in the first place.

Thanks for reading.

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