AntitrustConnect Blog

A Modest Proposal—Antitrust Division Special Counsel for Whistleblower

Robert E. Connolly (Law Office of Robert Connolly) · Thursday, May 9th, 2024

There has been a series of announcements by the Department of Justice of pilot programs designed to lure "insiders" to expose crimes, particularly financial crimes. The first announcement was a new Whistleblower Pilot Program to financially reward whistleblowers in certain circumstances. See DOJ Announces New Whistleblower Pilot Program, Cartel Capers, March 14, 2024. More recently, on April 15, 2024, the DOJ's Criminal Division announced another pilot program, Criminal Division Pilot Program On Voluntary Self-Disclosures For Individuals, designed to offer potential non-prosecution agreements to individuals ['little fish"] who come forward and provide "original information" about criminal misconduct by "big fish."

The Whistleblower Pilot program is a particularly hopeful development for criminal cartel enforcement. The Antitrust Division already has an Individual Voluntary Discovery Program.

Individual Leniency–Voluntary Self Disclosure for Individuals

The Antitrust Division has long had a program similar to the Criminal Division Pilot Program on Voluntary Self Disclosure. It is so rarely used it is easy to forget it exists. The Individual Leniency Program was announced in 1993 at the same time as the well-known, successful revised Corporate Leniency Program.

DOJ Manual- 7-3.330 – Individual Leniency

"Leniency will be granted to an individual reporting their participation in illegal activity.
before the Antitrust Division has begun an investigation."

Like the pilot DOJ disclosure policy, a key condition of the program is: "At the time the individual reports the illegal activity, the Antitrust Division has not received information about the illegal activity from any other source." I believe the main reason that individual leniency has been unused is financial—an individual can't afford the expense or risk, without the support of a corporate backer, that it takes to engage in the leniency process with the Antitrust Division. Negotiating leniency, including individual leniency, is dance and often a "dance marathon." Both sides, the Antitrust Division and the individual making a proffer, will proceed cautiously. A [sane] individual, not knowing what information the Antitrust Division may already have, will not come forward without experienced (i.e. costly) antitrust counsel. This can be a very expensive proposition. The negotiation with DOJ will likely require numerous interviews and travel for the

witness and her attorney. If conditional leniency is granted, the cooperating individual is at the Division's beck and call for many years come. This is an expensive and uncertain undertaking for a lone individual to take without the benefit of an employer [or former employer] paying for the individual's attorney fees. An individual who successfully obtains conditional Individual Leniency will likely be saddled with significant attorney fees at a time when she is likely a former employee and now unemployable in whatever industry she has reported illegal conduct. I'm sure there are other reasons why the Individual Leniency Policy is rarely pursued, but the expense of doing so seems to be an effective roadblock to its use. This hurdle in the Individual Leniency Policy is instructive for the Pilot Whistleblower Program because a potential whistleblower may well be deterred by the same prospect of significant legal fees for doing the right thing.

Pilot Whistleblower Program

At one time I was hopeful that comprehensive SEC-like criminal antitrust whistleblower legislation would be passed. Senator Amy Klobuchar introduced sweeping antitrust legislative reform that included, among many items, a whistleblower program that would "establish a bounty system to reward criminal whistleblowers for providing evidence in antitrust cases resulting in the collection of a criminal fines." See, Senator Klobuchar Unveils Wide Ranging Antitrust Enforcement Legislation, Cartel Capers, February 4, 2021. The proposed legislation covered many aspects of antitrust reform, too many it turns out, and as a package, could not muster sufficient support. Someday, perhaps, the whistleblower provisions will be taken up on their own. After all, the Biden Administration has introduced numerous antitrust initiatives, and s program for uncovering and prosecuting cartels that inflate prices would seemingly fit this agenda.

Nonetheless, there has been some incremental progress on the antitrust whistleblower program. On Dec. 23, 2020, the Criminal Antitrust Anti-Retaliation Act, sponsored by Senator Charles Grassley, was signed into law. The Act prohibits employers from retaliating against certain individuals who report criminal antitrust violations. While a step forward, the potential aid of the Department of Labor is not likely to give much comfort to a potential whistleblower worried about being wrongfully sacked and blackballed.

Will the Pilot Whistleblower Program be of any help in criminal antitrust enforcement? Too early to tell, but again, any step forward is appreciated. The most significant roadblock which must be removed to enable willing whistleblowers to come forward is the burden of substantial attorney fees. Like a potential cooperating witness, a whistleblower must expect to sit for multiple interviews with the DOJ. A great deal of attorney preparation would take place before the first encounter with the DOJ. Whistleblowers, in my experience, are not in it to get rich; but they also are not looking to burden themselves and their families with significant debt, especially at a time when their career prospects are likely to take sharp downward turn. One of the most attractive elements to the SEC-style whistleblower regime as well as the qui tam statutory regime is the ability, if successful, to receive a monetary award. The certainty of the monetary award, and a track record of fairly administering the program, enables a legitimate whistleblower to come forward with an attorney on a contingent fee basis. A contingency fee set up also has the salutary effect of having the whistleblower bar act as a screening mechanism for the DOJ. While certainly no guarantee that the whistleblower has credible, material evidence of a crime, the fact that an attorney has taken on the case adds some weight to the whistleblower. The whistleblower attorney is motivated to assist the DOJ and avoids the DOJ having to engage directly with an unrepresented person. To be effective, the Pilot Whistleblower Program will need a transparent and predictable basis for obtaining a financial award. This may not be true in all potential whistleblower situations,

but is likely so for more complex matters such as criminal cartel enforcement.

A Modest Proposal—Antitrust Division Special Counsel for Whistleblower

As the whistleblower landscape develops, a low/no cost tool would be for the Antitrust Division to appoint a Special Counsel for Whistleblowers. [An Office of Whistleblowers would be better but my recollection is that step would require Congressional approval.] There could be many benefits:

• Visibility, Visibility Visibility When the revised Corporate Leniency program was launched it was the subject of intense promotion by the Antitrust Division and Gary Spratling. The Division/Spratling wanted to defense bar to know the Division was open for Leniency business and wanted to create a win/win environment for the leniency applicant and the Division. By any measure it was a smashing success.
At this point in time, the Antitrust Division may not have much to offer a potential whistleblower, but a "point person" is at least a signal that the Division will help where it can.

• The Special Counsel for Whistleblowers would be a central and visible place for potential whistleblowers to begin an interaction. They will have questions. Perhaps they would not have a path to a monetary award for price fixing in the public market, but is there a qui tam (i.e. government purchasing angle) to be explored.?

While I have focused on the expense as a deterrent to a whistleblower coming forward, it is possible that in certain situations a whistleblower could aid the Antitrust Division with a fairly discreet piece of information. The Antitrust Division would help by being sensitive to the cost associated with numerous interviews. And even if it is not clear that someone can qualify as a whistleblower for a monetary award, that person may decide to simply provide information that can start an investigation. There have been numerous major cartel investigations that have begun by an industry person providing the Antitrust Division with information.

Another issue that could come up: there is a fine line between being a whistleblower and a co-conspirator. Does the individual contemplating coming forward have criminal liability? Conspiracy law is sweeping. Knowledge of the agreement and even one act to carry it out can make someone a co-conspirator. This would have to be worked out in most cases before a potential whistleblower could/should come forward.

• A Special Counsel can keep abreast of all developments. Hopefully, the Antitrust Division has already has a seat at the table to give input for the DOJ Pilot Whistleblower Program. The Special Counsel for Whistleblowers could interact with foreign counterparts who are experimenting/implementing various whistleblower ideas. There are many interesting developments in foreign competition agencies regarding whistleblowers. The EU for example has an encrypted message system where a whistleblower can communicate with enforcers anonymously. See EU Sanctions Whistleblower Tool.

• A Special Counsel for Whistleblower could interact with members of Congress who may be interested in pushing a more comprehensive criminal antitrust whistleblower package.

• It's possible a Special Counsel for Whistleblower won't have much to do [it doesn't have to be their only responsibility]. Or that person may have duties that evolve to a greater extent than brainstormed here [with just one brain]. It's a cost free additional tool to help potential whistleblower and uncover criminal antitrust cartels.

A Final Thought

The revised 1993 Leniency Policy came at the right time. International cartels were plentiful. Foreign executives/conspirators, who had no idea they could be subject to US jurisdiction and the nightmare that awaited them, were plentiful as well. A compilation of the "greatest hits" hot document of the era would fill a file cabinet or its gig equivalent. Now, however, after many successful criminal prosecutions with foreign executives indicted, placed on red notices, and occasionally captured and brought to the US and jailed, executives have taken notice. Certainly many have learned "Don't engage in cartels" but others have learned "Don't write incriminating emails or other documents." No paper or electronic trail cartels are the order of the day. Ephemeral messages were now part of Cartel 101 code of conduct. None of this is news to cartel practioneers.

Corporate Leniency is still a great enforcement tool but today there is a real need for a tool that attracts a cooperator while the cartel is still operating. Well-hidden, document-free cartels make it harder for a willing applicants to obtain a leniency marker even if they are considering it. When a corporate leniency applicant had a collection of hot documents such as "pricing notes from a working group meeting," the applicant could be more certain that conditional leniency would be granted. Today, the proffer will likely rely more on testimony. Prosecutors may be skeptical of a testimony heavy/document lean application. There is concern that as soon as the ink is dry on the leniency agreement, memories will fade as the cooperator's company faces an avalanche of civil suits. Lack of hot docs make it riskier for the leniency applicant to come forward, and risky for the govt to issue a conditional leniency, which makes it riskier to come forward…..

A whistleblower can expose a cartel—while it is still in progress. This opens up significant avenues of covert investigation–consensual monitoring, wire taps, etc. In addition, or instead, a whistleblower can help start the investigation with search warrants, perhaps coordinated with dawn raids. The destabilizing potential of an effective whistleblower program can be a catalyst to a corporate leniency applicant racing in. There are limited situations where the Antitrust Division can accomplish these things with a Type A leniency applicant, but a robust whistleblower monetary award program could discourage, destabilize and detect criminal antitrust cartels with the same success the Corporate Leniency Program once enjoyed. See A Practical Look at Why A Criminal Antitrust Program is Needed, Cartel Capers March 28, 2023.

Corporate Leniency once transformed criminal cartel prosecution and ushered in a n era of record breaking prosecutions fines and jail sentences. The next step in the evolution of criminal price fixing prosecutions is a whistleblower program to incentivize someone to come forward who can assist the investigation while the cartel is still ongoing. A Special Counsel or whistleblowers is a modest step, but modest steps seems to be the only way to advance the ball of developing whistleblower tools in criminal antitrust investigations.

This is a rambling post but use a quote attributed to Mark Twain {among others]: "I didn't have time to write a short letter [post], so I wrote a long one instead."

Thanks for reading [if you got this far].

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