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Corporate leniency. It is for most countries these days the key foundation to cartel enforcement. Encouraging the wrongdoers to come forward, confess their antitrust transgressions, expose their co-conspirators, and receive absolution or some form of leniency in return. By most accounts, these programs have worked fairly well. Some would argue they have been a game-changer in the fight against cartels. Just look at the record number of enforcement successes across the globe. Most spawned from a leniency application. It is hard to argue that corporate leniency has not led to real results.

But you have to wonder, is trying to team up with the antitrust offenders really the best way to go about uncovering, and ultimately discouraging, cartels? Based on the unremitting flow of cartel activity that still exists, it seems apparent it is not or, at the very least, could use a serious boost. What is more, there are several problems inherent in an enforcement model that relies on and essentially rewards the very offenders that should be punished. We are well past the time to taking a step back from our unwavering devotion to corporate leniency and focusing on other equally, if not more, effective enforcement tools. Top of the list—a full-fledged, all-encompassing antitrust whistleblower system.

The United States seems to be moving in the right direction with the antitrust whistleblower legislation just passed by the Senate. Titled the Criminal Antitrust Anti-Retaliation Act, it would for the first time extend whistleblower protections to those reporting criminal antitrust violations. The bill, introduced by Senators Patrick Leahy (D-Vermont) and Chuck Grassley (R-Iowa), would amend the Antitrust Criminal Penalties Enforcement and Reform Act ("ACPERA"). This statute was enacted in 2004 to expand the Department of Justice's ("DOJ") corporate leniency program by providing greater incentives for individuals and companies to self report antitrust violations.

The problem with ACPERA, like with all leniency programs, is the incentives are only directed towards the individuals and companies actually participating in the antitrust misconduct. They are not directed at innocent employees with knowledge of their employer's anticompetitive activity. The proposed legislation would change this dynamic by targeting these potential whistleblowers. It would thus bypass the key pitfalls in the leniency model—relying on antitrust violators to come clean; exonerating them for doing so; applying different punishments to participants in the same conspiracy; removing prosecutorial discretion over successful

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leniency applicants; clashing with private enforcement; and, ultimately, fostering a reactive, rather than proactive, mindset on the part of the regulators.

The new whistleblower legislation follows a 2011 report by the Government Accountability Office ("GAO") on the impact ACPERA has had in advancing the effectiveness of the DOJ's leniency program. According to the GAO, the statute has not done all that much. In fact, the report showed little change in the number of wrongdoers applying for leniency, despite the added incentives for doing so. The GAO concluded that bringing whistleblowers into the enforcement mix would be an important supplement to the leniency enforcement model. That is just what Senators Leahy and Grassley have proposed with their antitrust whistleblower bill.

But there is one major shortcoming in the legislation. It does not go far enough in providing adequate incentives for would-be antitrust whistleblowers to step forward. It would merely allow them to seek reinstatement, backpay, and special damages if their employer retaliates against them for blowing the whistle on the company's anticompetitive conduct. What it would not do is offer the whistleblower any kind of financial incentive for risking this retaliatory treatment in the first place. In fact, in his statement introducing the legislation, Senator Leahy highlighted the fact that the language is carefully drafted to ensure that whistleblowers have no economic incentive to bring forth claims.

In failing to provide a financial bounty for whistleblowers, this draft legislation would part ways with the False Claims Act ("FCA"), the linchpin of the American whistleblower system and the statutory vehicle through which the vast majority of whistleblowers bring their claims. Notably, it was only after the whistleblower reward provisions of the FCA were increased and strengthened in the mid-1980s—providing for a whistleblower reward of up to 30 percent of any government recovery—that whistleblowers began to bring claims under this law. Since then, whistleblowers have led the charge in government fraud enforcement and the government's recovery of billions of dollars a year in associated penalties.

In failing to include a whistleblower reward, the draft legislation would also differ from the recently enacted Dodd-Frank Act. This statute was Congress' response to the Great Recession and the Wild West behavior of the Wall Street institutions that led us there. Largely modeled on the FCA, Dodd-Frank also includes a whistleblower reward of up to 30 percent of any government recovery. In passing this legislation, Congress saw the wisdom of providing financial incentives to encourage whistleblowers to come forward, recognizing the Securities and Exchange Commission's ("SEC") previously existing whistleblower program—which lacked any financial incentives—did not work. Since the SEC added financial incentives, as Dodd-Frank requires, the whistleblower tips have been flooding in, leading to a record number of successful enforcement actions.

Aside from this empirical evidence from the FCA and Dodd-Frank programs that financial incentives work, there also is a strong policy rationale for their use. They are just and necessary. They are just because they compensate whistleblowers for what will almost certainly be a tiresome and unpleasant ordeal with a real risk of retaliation, alienation, blacklisting, and in some cases, even physical harm. Not to mention the lost income so many will face from losing their job and being unable to find a new one. And they are necessary for whistleblowers to find qualified counsel to represent them through what is typically a long and complicated legal

process. This is important not only for the whistleblower but for weeding out those matters not worthy of the government's time.

Those opposed to financial incentives claim they lead to frivolous filings and consequently, a waste of government resources, and they interfere with the internal compliance programs so many companies employ. Neither argument holds up in the face of the actual U.S. experience. There is no evidence that whistleblower rewards have led to frivolous filings. And given the involvement of counsel with most whistleblower claims, and the threat of Rule 11 sanctions that accompanies any filing, it is unlikely that there would be.

In any event, the relevant question is not whether financial incentives result in a greater number of whistleblower complaints the government will decide to decline (even if some of them are in fact frivolous). It is whether the incentives have resulted in a greater number of meritorious whistleblower complaints, leading to a greater number of successful prosecutions. Under the FCA and Dodd-Frank whistleblower programs, it is clear that they have.

The concern that incentives interfere with internal compliance programs is equally unfounded. This was one of the major arguments the business community made in unsuccessfully attempting to defeat the inclusion of a whistleblower rewards provision under Dodd-Frank. The truth is there is no evidence that financial rewards drive whistleblowers directly to the government at the expense of reporting internally to their employers. In fact, study after study shows just the opposite; that only a tiny fraction of whistleblowers go straight to the government to report fraud or misconduct. Rather, they do so only after they first try to work within their company to expose and attempt to remedy the wrong.

The bottom line is that our antitrust enforcement model is in need of an upgrade. Cartels are being busted. More and more every year. But they are not going away. For every conspiracy the government cracks down on, we can be sure there are several more that carry on unnoticed and unscathed. A broad-based whistleblower program offers the most promising solution to fill this enforcement gap. It has all the benefits of the leniency model, but few of the drawbacks. No amnesty to a guilty party. No conflict with private litigation. An unadorned enticement for industry insiders to come forward and provide the government with information that it would otherwise be unlikely to obtain.

But it has to include financial incentives. From the unmistakable success of the FCA and Dodd-Frank programs to which whistleblower rewards are inextricably linked, this should not even be a close call. It also should be apparent from an honest recognition of the character and purpose that drives most whistleblowers and the hurdles they face and sacrifices they make in standing up against fraud and misconduct. That is why the explicit absence from the new legislation of any financial incentives is so surprising and why, as currently drafted, it is unlikely to accomplish much.

It is all the more surprising given Senator Leahy's own recognition, as stated by the Supreme Court forty years ago, that the antitrust laws are "the Magna Carta of free enterprise . . . as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." So, if we really are serious about taking antitrust enforcement to the next level, and most would agree that we should be, we need to bring whistleblowers into the antitrust enforcement scheme and pay them. Mere

protection from retaliation just isn't going to cut it. Nor is an enforcement policy that continues to depend so heavily on the cooperation and conscience of the guilty parties.