

BLOWING THE WHISTLE ON THE LACK OF ANTITRUST WHISTLEBLOWER PROTECTION



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I. INTRODUCTION

The DOJ Antitrust Division's recent public roundtable on the Antitrust Criminal Penalty Enhancement and Reform Act ("ACPERA") has renewed the interest in enacting whistleblower legislation to complement ACPERA and the Division's existing Leniency Program. Specifically, in submissions to the DOJ, the American Antitrust Institute ("AAI") and Committee to Support Antitrust Laws ("COSAL") have both advocated for legislation protecting individuals who disclose antitrust violations to the Antitrust Division.²

These submissions do not arise in a vacuum. In other areas of federal law enforcement, federal agencies administer successful whistleblower programs that generate billions of dollars in recoveries for the government. Many federal whistleblower programs include "bounty" provisions, which provide a monetary award to the whistleblower based on the recovery or fine obtained by the government.

Several years ago, the Government Accountability Office ("GAO") recommended the introduction of antitrust whistleblower legislation.³ In response, legislators have repeatedly introduced antitrust whistleblower bills.⁴ Support for antitrust whistleblower legislation has also developed in Europe, with the European Parliament having recently approved a directive requesting that all member states implement legislation to protect whistleblowers in a variety of settings, including those alleging violations of EU competition law.⁵

However, whistleblower protection (beyond antitrust leniency) has not had much traction in the Antitrust Division, which seems to view this approach as a potential nuisance, or even as a threat to its Corporate Leniency Program for detecting and prosecuting antitrust cartels. While the Antitrust Division's concerns should be considered, they should not shut the door to legislation protecting antitrust whistleblowers.

² See generally Comments of the American Antitrust Institute Prepared for the Antitrust Division Roundtable on the Antitrust Criminal Penalty Enhancement and Reform Act (May 31, 2019), [https://www.justice.gov/atr/page/file/1168666/download#American%20Antitrust%20Institute%20\(AAI\)](https://www.justice.gov/atr/page/file/1168666/download#American%20Antitrust%20Institute%20(AAI)); Submission by COSAL on the efficacy of the Antitrust Criminal Penalty and Enhancement Reform Act (ACPERA) (May 31, 2019), [https://www.justice.gov/atr/page/file/1168671/download#Committee%20to%20Support%20Antitrust%20Laws%20\(COSAL\)](https://www.justice.gov/atr/page/file/1168671/download#Committee%20to%20Support%20Antitrust%20Laws%20(COSAL)).

³ U.S. Gov't Accountability Office, *Report to Congressional Committees, Criminal Cartel Enforcement, Stakeholder Views on Impact of 2004 Antitrust Reform Are Mixed, But Support Whistleblower Protection*, at 2 (2011), <http://www.gao.gov/assets/330/321794.pdf> (the GAO Report).

⁴ See The Criminal Antitrust Anti-Retaliation Act of 2012, S.3462, 112th Cong. § 216 (2012) (2012 CAARA); The Criminal Antitrust Anti-Retaliation Act of 2013, S.42, 113th Cong. § 216 (2013) (2013 CAARA); The Criminal Antitrust Anti-Retaliation Act of 2015, S.1599, 114th Cong. § 216 (2015) (2015 CAARA); The Criminal Antitrust Anti-Retaliation Act of 2017, S.807, 115th Cong. § 216 (2017) (2017 CAARA).

⁵ See Michael Acton, *Antitrust whistleblowers safe after tweaks to new EU law, Dutch regulator says*, MLEX (Mar. 19, 2019), <http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1075114&siteid=190&rdir=1>; Press Release European Parliament, *Protecting whistle-blowers: new EU-wide rules approved* (Apr. 16, 2019), <http://www.europarl.europa.eu/news/en/press-room/20190410IPR37529/protecting-whistle-blowers-new-eu-wide-rules-approved>.

Below, we advocate for legislation affording fulsome protection for antitrust whistleblowers. We examine the previously considered antitrust whistleblower bills and developments in whistleblower programs in the United States and abroad. We also offer a proposal for an antitrust whistleblower program.

II. U.S. ANTITRUST AND WHISTLEBLOWERS

Antitrust Cartels typically operate in secret. To counter this condition, the Antitrust Division relies on the Leniency Program as its crown jewel. Nevertheless, as we discuss below, a more robust program should be developed in order to encourage whistleblowing.

A. The Leniency Program and ACPERA

Neither the Sherman Act nor the Clayton Act provide explicit protection for individuals who disclose antitrust violations to government officials. Although Clayton Act § 4 permits damages actions by “any person . . . injured in his business or property” by an antitrust violation,⁶ courts have generally declined to recognize such standing for whistleblowers under Section 4.⁷

However, in order to enhance detection and prosecution of criminal cartels, the Antitrust Division has created its Leniency Program, a nearly 30-year old non-statutory policy directive that allows both companies and individuals to self-report *per se* antitrust violations in exchange for immunity from criminal prosecution.⁸ To obtain immunity, the Division requires that certain conditions be met, the most salient of which are that the disclosing party: (1) must be the first one to disclose the violation; and (2) must provide continuing cooperation with the Division’s criminal investigation and prosecution.⁹

In addition to the Leniency Program, in 2004, Congress enacted ACPERA “to increase the number of companies and individuals applying for antitrust leniency with the [Antitrust Division] — and thus the detection of cartels — while simultaneously benefiting consumers by offering an incentive for leniency applicants to cooperate with plaintiffs in their civil cases.”¹⁰ ACPERA sought to remove a perceived potential disincentive to self-reporting: the risk of treble damages liability to civil plaintiffs.¹¹ For applicants who satisfy ACPERA’s cooperation requirement, the statute: (1) limits the leniency applicant’s liability to single damages, based on the applicant’s market share; and (2) eliminates joint and several liability for damages caused by the conspiracy overall. In 2010, Congress renewed ACPERA for another 10 years. Absent further congressional action, the law will expire in June 2020.

While providing relief to self-disclosing leniency applicants, ACPERA is silent on protection for whistleblowers. However, in July 2011, a GAO study on ACPERA recommended that Congress consider further amending the law to include anti-retaliation protection to individuals who expose antitrust violations. The GAO concluded that “[b]y considering a civil remedy for whistleblowers who are retaliated against for reporting criminal antitrust violations, Congress could provide existing whistleblowers an assurance of protection for their efforts and, further, could motivate additional individuals to come forward with evidence of criminal cartel activity.”¹²

6 15 U.S.C. § 15.

7 See, e.g. *In re Indus. Gas Antitrust Litig.*, 681 F.2d 514, 519 (7th Cir. 1982) (holding that former corporate president who was terminated and subsequently blacklisted “has sustained no ‘antitrust injury’ because, while he may have suffered some injury-in-fact, he was not the target of the alleged anticompetitive practices”); *Gregory Mktg. Corp. v. Wakefern Food Corp.*, 787 F.2d 92, 96-97 (3d Cir. 1986) (holding that a terminated broker lacked standing to pursue Clayton Act damages claim); *Haigh v. Matsushita Elec. Corp. of Am.*, 676 F. Supp. 1332, 1345 (E.D. Va. 1987) (finding that plaintiff’s transfer and “constructive termination” did not create standing to pursue a claim under the Clayton Act). But see *Ostrofe v. H.S. Crocker Co., Inc.*, 670 F.2d 1378 (9th Cir. 1982), *vacated and remanded*, 460 U.S. 1007 (1983), *on remand*, 740 F.2d 739 (9th Cir. 1984) (holding that retaliation against an employee was actionable under Clayton Act § 4).

8 See generally Dep’t of Justice, Corporate Leniency Policy (Aug. 10, 1993), <https://www.justice.gov/atr/file/810281/download>; Dep’t of Justice, Leniency Policy for Individuals (Aug. 10, 1994), <https://www.justice.gov/atr/individual-leniency-policy>.

9 See generally Dep’t of Justice, Corporate Leniency Policy (Aug. 10, 1993), <https://www.justice.gov/atr/file/810281/download>; Dep’t of Justice, Leniency Policy for Individuals (Aug. 10, 1994), <https://www.justice.gov/atr/individual-leniency-policy>.

10 GAO Report at 2.

11 150 Cong. Rec. S3610-02, at S3614 (April 2, 2004).

12 GAO Report, at 50.

Although Antitrust Division officials took no position on the need for whistleblower protection, several stakeholders interviewed by the GAO opined that providing whistleblower protection “could motivate additional individuals to come forward to DOJ with evidence of criminal cartel activity, resulting in the prosecution of more criminals and the disruption of more cartels.”¹³ This view was supported by officials from the Securities Exchange Commission (“SEC”), Internal Revenue Service (“IRS”) and the Occupational Safety and Health Administration (“OSHA”), three agencies that have their own whistleblower programs.¹⁴

While the Antitrust Division was agnostic with regard to anti-retaliation whistleblower protection, it opposed adding a bounty as an additional incentive for individuals to disclose antitrust violations. Officials expressed the view that a financial reward would undermine a whistleblower witness’s credibility before a jury and also incent false or erroneous reporting.¹⁵ The Division further thought that administering a bounty program would require additional resources to investigate tips, communicate with whistleblowers, and process bounty claims.¹⁶ By contrast, officials outside of the Antitrust Division noted that work-arounds existed to mitigate the need to rely on whistleblower information.¹⁷

B. Legislative responses to the GAO Report

One year after the GAO Report, in July 2012 Senators Patrick Leahy (D-Vermont), Herb Kohl (D-Wisconsin), and Chuck Grassley (R-Iowa) introduced the Criminal Antitrust Anti-Retaliation Act (“CAARA”). The proposed legislation followed the GAO’s recommendations and included: (1) an anti-retaliation provision prohibiting companies from terminating or otherwise disciplining whistleblowers for disclosing antitrust violations to enforcement agencies or Congress; and (2) a civil remedy provision permitting relief for whistleblowers who suffered retaliation in the form of back-pay (with interest), special damages (e.g. litigation costs and expert and attorney’s fees), and reinstatement of seniority.¹⁸ In remarks introducing the bill, Senator Leahy stated that he had “long supported vigorous enforcement of the antitrust laws” and that the bill was “a necessary complement to them.”¹⁹

CAARA’s proposed protections came with a caveat: there would be no protection if the whistleblower had: (1) “planned and initiated a violation or attempted violation” of antitrust laws or any other criminal law; or (2) obstructed or attempted to obstruct the Antitrust Division’s antitrust investigation.²⁰ Notably, unlike whistleblower protection in other enforcement areas, there was no provision awarding the whistleblower a bounty in the event of a successful prosecution.²¹ Senator Leahy explained that CAARA was “carefully drafted to ensure that whistleblowers have no incentive to bring forth false claims” — a likely nod to the concerns expressed by Antitrust Division officials in the GAO study.²²

The Senate’s 2012 CAARA bill was not voted on.²³ But the following year Senators Leahy and Grassley introduced CAARA again, with only minor changes from the 2012 version. In November 2013, the Senate passed the bill by “unanimous consent.”²⁴ However, when the bill

13 GAO Report, at 46.

14 GAO Report, at 46. See also SEC, Office of the Whistleblower, <https://www.sec.gov/whistleblower>; IRS, Whistleblower – Informant Award, <https://www.irs.gov/compliance/whistleblower-informant-award>; OSHA, The Whistleblower Protection Programs, <https://www.whistleblowers.gov/>.

15 GAO Report, at 39-40.

16 GAO Report, at 38-45.

17 GAO Report, at 40.

18 2012 CAARA, § 216(a)-(c). See also 158 Cong. Rec. S5736 (statement of Senator Leahy: “The legislation we introduce today was inspired by a recent report and recommendation from the Government Accountability Office which, based on interviews with key stakeholders, found widespread support for anti-retaliatory protection in criminal antitrust cases.”)

19 158 Cong. Rec. S5736.

20 2012 CAARA § 216(a)(2).

21 See, e.g. 18 U.S.C. § 1514A (Sarbanes Oxley whistleblower protections); 15 U.S.C. § 78u-6 (SEC whistleblower program); 26 U.S.C. § 7623 (IRS whistleblower program); 7 U.S.C. § 26 (CFTC whistleblower program)

22 158 Cong. Rec. S5736; GAO Rep. at 38-39.

23 GovTrack.us. (2019). S. 3462 — 112th Congress: Criminal Antitrust Anti-Retaliation Act. Retrieved from <https://www.govtrack.us/congress/bills/112/s3462>.

24 GovTrack.us. (2019). S. 42 — 113th Congress: Criminal Antitrust Anti-Retaliation Act of 2013. Retrieved from <https://www.govtrack.us/congress/bills/113/s42>.

reached the House, it died without a vote.²⁵ This pattern recurred when in 2015 and 2017, Senators Leahy and Grassley introduced CAARA bills containing provisions identical to the 2013 version.²⁶ Each time, the bill passed in the Senate, but died in the House.²⁷

In July 2019, Senators Grassley and Leahy again re-introduced CAARA. With a Democratic majority now controlling the House and increased public debate over antitrust enforcement, there may be traction for enactment not present when the earlier bills were introduced.²⁸

III. WHISTLEBLOWER LEGISLATION IN OTHER AREAS OF LAW ENFORCEMENT

Federal whistleblower legislation goes back at least as far as the False Claims Act (“FCA”), which was enacted in 1863 during the Civil War. The FCA enabled private citizens to bring claims on behalf of the government for fraud perpetrated against it.²⁹ As a reward for disclosing and helping prosecute such fraud, “relators” — as FCA plaintiffs are called — were given a bounty equal to 50 percent of the recovery.³⁰

In 1986, Congress amended the FCA to give whistleblowers a right of action against anyone who retaliated against them for disclosing the FCA violation.³¹ The relief available includes reinstatement, back-pay, litigation costs, and attorney’s fees.³² And even before the 1986 FCA amendments, labor and civil rights laws were passed to include protection for those who disclosed violations or cooperated with government officials investigating violations.³³ Since 1986, Congress has also passed whistleblower legislation covering other federal laws, including those enforced by the IRS, the SEC, and the Commodity Futures Trading Commission (“CFTC”).

For example, the Tax Relief and Health Care Act of 2006³⁴ expanded the IRS’s whistleblower program and reinforced the authority of the Secretary of the Treasury to “pay such sums as he deems necessary for detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at the same.”³⁵ Although the bounty level is discretionary, whistleblowers who “substantially contribute[...]” to the prosecution of tax law violations are entitled to at least 15, but not more than 30, percent.³⁶ Awards, however, may be reduced if the bounty claim is made by an “individual who planned and initiated the actions that led to the [violation].” And to the extent that the individual is convicted of a crime in connection with the disclosed violation, “Whistleblower Office shall deny any award.”³⁷

25 GovTrack.us. (2019). S. 42 — 113th Congress: Criminal Antitrust Anti-Retaliation Act of 2013. Retrieved from <https://www.govtrack.us/congress/bills/113/s42>.

26 2015 CAARA, § 216; 2017 CAARA, § 216.

27 See GovTrack.us. (2019). S. 1599 — 114th Congress: Criminal Antitrust Anti-Retaliation Act of 2015. Retrieved from <https://www.govtrack.us/congress/bills/114/s1599> (2015 CAARA); GovTrack.us. (2019). S. 807 — 115th Congress: Criminal Antitrust Anti-Retaliation Act of 2017. Retrieved from <https://www.govtrack.us/congress/bills/115/s807> (2017 CAARA).

28 S. 2258, 116th Cong., 1st Sess. (July 24, 2019). The sunset of ACPERA in June 2020 may offer an additional impetus for enacting whistleblower protection. See ACPERA § 211(a).

29 31 U.S.C. §§ 3729, *et seq.*

30 NYSBA Commercial & Federal Litigation Section, Antitrust Committee, *Whistle While You Work—For a Cartelist: Whistleblower Protection and Antitrust*, 20 N.Y. Litigator 8 (Fall 2015). This bounty percentage has since been reduced to at most 30 percent of a recovery. See 31 U.S.C. § 3730(d).

31 False Claims Amendments Acts of 1986, 100 Stat. 3153, at § 3 (1986).

32 31 U.S.C. § 3730(h).

33 See, e.g. Civil Rights Act of 1964, 78 Stat. 241 (1964), codified at 42 U.S.C. § 2000e-5(g) & (k) (providing for reinstatement, back-pay, and attorneys’ fees); Occupational Safety and Health Act, 84 Stat. 1603 (1970), codified at, 29 U.S.C. § 660(c)(1) & (2) (prohibiting discrimination against whistleblower for revealing OSHA violations and permitting whistleblower to seek relief in the form of reinstatement with back-pay); Federal Mine Safety and Health Act, 91 Stat. 1304 (1977), codified at, 30 U.S.C. § 815(c) (prohibiting discrimination against or disciplining of employee who discloses violations of act and permitting such an employee to seek relief in the form of reinstatement, back-pay with interest or any other such remedy as may be appropriate).

34 120 Stat. 2922 (2006).

35 26 U.S.C. § 7623(a). See also IRS, History of the Whistleblower/Informant Program, <https://www.irs.gov/compliance/history-of-the-whistleblower-informant-program> (last visited July 17, 2019).

36 26 U.S.C. § 7623(b)(2). To the extent that a whistleblower provides less than “substantial contribution” — e.g. where the disclosure is “based principally on disclosures” from “judicial or administrative hearing, from a governmental report, hearing, audit, or investigation, or from the news media”—the IRS Whistleblower Office’s award is capped at 10 percent. 26 U.S.C. § 7623(b)(2)(A).

37 26 U.S.C. § 7623(b)(3).

The SEC and CFTC also have legislatively created whistleblower programs. Protections for whistleblowers of securities violations began with the Sarbanes-Oxley Act of 2002 (“SOX”).³⁸ SOX prohibited public companies from “discharg[ing], demot[ing], suspend[ing], threaten[ing], harass[ing], or in any other manner discriminat[ing] against an employee” who discloses a violation or potential violation of the securities laws to the SEC, Congress, or any other regulatory body.³⁹ Whistleblowers subjected to retaliation can seek relief in the form of reinstatement with the same seniority, back-pay with interest, and special damages (e.g. costs and expert witness and attorney’s fees).⁴⁰

After a rash of post-SOX financial frauds, which caused the collapse of financial markets and the Great Recession, Congress reinforced SOX by enacting the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank”).⁴¹ Dodd-Frank enhanced whistleblower protection by, among other things, empowering the SEC to grant bounties of up to 30 percent of any recovery to whistleblowers who provide “original information” leading to the prosecution of securities violations.⁴² Dodd-Frank also enhanced the relief whistleblowers could obtain if they were victims of retaliation by permitting the recovery of twice the back-pay owed.⁴³ The law also protects the anonymity of whistleblowers who choose to proceed that way.⁴⁴ As with the IRS whistleblower program, persons are disqualified from receiving an award if they are convicted of criminal conduct arising from the violation disclosed.⁴⁵

Dodd-Frank also created a separate CFTC whistleblower program to encourage detection of financial fraud in commodities and derivatives markets.⁴⁶ The terms for eligibility, anonymity, and scope of the bounty are largely identical to those enacted for SEC’s program.⁴⁷

The whistleblower programs administered by the SEC, CFTC, IRS, and DOJ Civil Division (which oversees FCA whistleblower actions) have: (1) led to tens of thousands of tips; (2) awarded hundreds of millions of dollars in bounties; and, most significantly, (3) resulted in judgments, fines, and recoveries many times the amount of the bounties paid.⁴⁸ Table 1 summarizes the data.

TABLE 1: RECOVERIES AND BOUNTIES AWARDED

Agency	Amount Recovered by Government	Whistleblower Bounties Since Inception of Program	Largest Whistleblower Bounty to Date
SEC	>\$1 billion ⁴⁹	>\$300 million	\$50 million ⁵⁰
CFTC	>\$730 million ⁵¹	>\$90 million ⁵²	≈\$30 million ⁵³
IRS	>\$4.6 billion ⁵⁴	>\$797 million ⁵⁵	\$104 million ⁵⁶
DOJ Civil Division	>\$59 billion ⁵⁷	>\$7.0 billion ⁵⁸	\$250 million ⁵⁹

³⁸ SOX § 806, 116 Stat. 745 (2002), codified at, 18 U.S.C. § 1514A.

³⁹ 18 U.S.C. § 1514A(a).

⁴⁰ 18 U.S.C. § 1514A(c).

⁴¹ 124 Stat. 1376-2223 (2010).

⁴² 15 U.S.C. § 78u-6(a)(3) and (b).

⁴³ 15 U.S.C. § 78u-6(h)(1)(C).

⁴⁴ 15 U.S.C. § 78u-6(h)(2). The SEC is prohibited from disclosing any information that may reveal the identity of the whistleblower “unless and until required to be disclosed to a defendant or respondent in connection with a public proceeding instituted by the Commission or [a grand jury proceeding].” *Id.*

⁴⁵ 15 U.S.C. § 78u-6(c)(2).

⁴⁶ See 7 U.S.C. § 26; 17 C.F.R. §§ 165, *et seq.*

⁴⁷ Compare 15 U.S.C. § 78u-6 with 7 U.S.C. § 26.

⁴⁸ The SEC alone received nearly 23,000 tips from all 50 states between 2011 and 2017. *Whistleblower Awards Over \$300 Million for Tips Resulting in Enforcement Actions*, SEC, <https://www.sec.gov/page/whistleblower-100million> (last visited July 1, 2019). The CFTC received over 2,000 tips between FY 2012 and FY 2018, with the largest year-over-year increase occurring between FY 2017 and FY 2018, when the number of tips jumped 63 percent. See CFTC 2018 Annual Report on the Whistleblower Program and Customer Education Initiatives, at 4, <https://whistleblower.gov/sites/whistleblower/files/2018-10/FY18%20Annual%20Report%20to%20Congress%20Final.pdf>.

These statistics demonstrate the success of U.S. whistleblower programs generally. Indeed, two recent FCA whistleblower actions led to the discovery of bid-rigging cartels: one involving supplies to U.S. military bases in South Korea, and the other involving USAID infrastructure contracts in Egypt. Combined, the DOJ recovered \$283 million, with the enforcement action against the South Korean bid-rigging cartel yielding the largest-ever antitrust-based FCA recovery.⁴⁹ These results further suggest that the Antitrust Division's reluctance to adopt whistleblower protection as an aid in detecting antitrust violations is short-sighted.

IV. WHISTLEBLOWER LEGISLATION — AN INTERNATIONAL PERSPECTIVE

The United States is not the only country to offer protection to, or financial bounties for, individuals who disclose unlawful activities. For example, the Canadian Competition Bureau, which is charged with prosecuting violations of the Canadian Competition Act, has established the “Criminal Cartel Whistleblowing Initiative” to serve as “a way for members of the public to provide information to the Competition Bureau regarding possible violations of the criminal cartel provision of the Competition Act.”⁵⁰ Under the law, the whistleblower's identity is kept confidential, and employers are forbidden from terminating or disciplining employees for disclosing potential violations to the Bureau.⁵¹

In Europe, the evolution of whistleblower legislation has, until recently, been slow and spotty. As late as 2013, only a handful of European countries — the United Kingdom, Norway, the Netherlands, Hungary, Romania, and Switzerland — had legislation specifically directed towards whistleblowers.⁵² The UK, the pioneer for whistleblower legislation in Europe, enacted the 1998 Public Interest Disclosure Act (“PIDA”), which covers all employees — public and private, as well as independent contractors — who report: “(1) criminal offenses, (2) failure by a person to comply with a legal obligation, (3) miscarriages of justice, (4) dangers to health and safety, (5) dangers to the environment, or (6) concerns that information about one of these matters is being deliberately concealed.”⁵³ Under PIDA, employees reporting these “protected disclosures” shall “not . . . be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.”⁵⁴ However, PIDA does not provide a bounty for those who make protected disclosures.

Most other European countries did not have special protection for whistleblowers. Some have suggested that the absence of such legislation is in part due to: (1) the belief that workers in many member states already have sufficient protections against unfounded termination or discipline⁵⁵; (2) cultural norms discouraging whistleblowing generally⁵⁶; and (3) the need to protect the data privacy and due process rights of

49 See Constantine I Cannon, Three South Korean Companies to Pay \$236 million, Resolving Civil and Criminal Liability for Bid Rigging Alleged in Constantine Cannon Whistleblower Suit (Nov. 14, 2018), <https://constantinecannon.com/2018/11/14/south-korean-bid-rigging-whistleblower/#https://constantinecannon.com/2018/11/14/south-korean-bid-rigging-whistleblower/>; Press Release, DOJ, Harbert Companies Agree to Pay \$47 Million to Resolve False Claims Act Allegations (Mar. 20, 2012), <https://www.justice.gov/opa/pr/harbert-companies-agree-pay-47-million-resolve-false-claims-act-allegations>.

50 Canadian Competition Bureau, Whistleblowing initiative, <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02819.html>. See also Competition Act, R.S.C. 1985, c. C-34, §§ 66.1, 66.2 (Can.).

51 Competition Act, § 66.2 (Can.).

52 Thad M. Guyer & Nikolas F. Peterson, *The Current State of Whistleblower Law in Europe: A Report by the Government Accountability Project*, ABA Section of Labor & Employment Law — International Labor & Employment Law Committee (May 2013), at 7, <https://www.whistleblower.org/wp-content/uploads/2018/11/TheCurrentStateofWhistleblowerLawinEurope-1.pdf>.

53 Jenny Mendelsohn, *Calling the Boss or Calling the Press: A Comparison of British and American Responses to Internal and External Whistleblowing*, 8 Wash. U. Global Stud. L. Rev. 723, 737 (2009). See also PIDA, § 1 (adding § 43B(1)(a)-(f) to Employment Rights Act of 1996), <https://www.legislation.gov.uk/ukpga/1998/23/section/1>.

54 PIDA, § 2 (adding § 47B to Employment Rights Act of 1996), <https://www.legislation.gov.uk/ukpga/1998/23/section/2>.

55 Thad M. Guyer & Nikolas F. Peterson, *The Current State of Whistleblower Law in Europe: A Report by the Government Accountability Project*, ABA Section of Labor & Employment Law — International Labor & Employment Law Committee, at 7-8 (May 2013), <https://www.whistleblower.org/wp-content/uploads/2018/11/TheCurrentStateofWhistleblowerLawinEurope-1.pdf> (noting that in France, Spain, and Germany, employers are generally required to show some form of cause prior to terminating an employee).

56 Thad M. Guyer & Nikolas F. Peterson, *The Current State of Whistleblower Law in Europe: A Report by the Government Accountability Project*, ABA Section of Labor & Employment Law — International Labor & Employment Law Committee, at 16 (May 2013), <https://www.whistleblower.org/wp-content/uploads/2018/11/TheCurrentStateofWhistleblowerLawinEurope-1.pdf> (“German society shares cultural norms that are antithetical to the promotion of protections for whistleblowing.”); Council of Europe, Protection of Whistleblowers, Recommendation CM/Rec(2014)7 and explanatory memorandum, at 14 (Apr. 30, 2014), <https://rm.coe.int/16807096c7> (“There are also cultural and social attitudes that work against protecting whistleblowers. Some of these stem from traditional hierarchical organisational structures in which obedience is valued to the extent that it works against the flow of communication (including about wrongdoing) from the lower to the upper ranks, or similarly where obedience to an organisation is emphasised more than its accountability to those it is meant to serve.”).

managers and companies accused of misconduct.⁵⁷

Recognizing the cultural and institutional inertia in many European Union member states, in April 2014, the Council of Europe issued a report recommending that “member States have in place a normative, institutional and judicial framework to protect individuals who, in the context of their work-based relationship, report or disclose information on threats or harm to the public interest.”⁵⁸ The Council’s recommendations included ensuring the confidentiality of a whistleblower’s identity and protection against retaliation.⁵⁹

After the Council’s 2014 report, several European countries enacted new legislation, adding explicit whistleblower protections or bolstering existing ones. For example, in October 2017 the Italian Parliament passed Italy’s first whistleblower legislation, protecting anonymity, banning retaliation, and providing sanctions for retaliation.⁶⁰ The same year, the UK’s Competition & Markets Authority (“CMA”), launched its “Cracking down on Cartels” campaign to encourage individuals to report competition law violations. Under the program, the CMA offers whistleblowers bounties of up to £100,000 and protects their identity if they choose to proceed anonymously.⁶¹ While direct participants in the cartel are generally ineligible to receive a bounty, the program guidelines leave open the possibility of a bounty “where the role of the person in the cartel was relatively peripheral - for example that of an employee who was occasionally directed by his superiors to attend a cartel meeting and who was not asked to take an active part in decision-making about the cartel.”⁶² Notably, in 2018, the program’s first full year, tips to the CMA increased 18 percent over the number received in 2017, suggesting public awareness of the program and an increased willingness to report potential violations.⁶³

Europe’s development of whistleblower protection continues. In response to scandals uncovering tax evasion and corruption — including the “Luxembourg Leaks”⁶⁴ and “Panama Papers”⁶⁵ scandals — the European Parliament recently issued a directive establishing “new, EU-wide standards to protect whistle-blowers revealing breaches of EU law in a wide range of areas” including EU competition law.⁶⁶ Specifically, Recital 17 of the Whistleblower Directive states that the new rules are intended to bolster the enforcement of EU competition laws and work in conjunction with the existing European Commission leniency policy:

57 Thad M. Guyer & Nikolas F. Peterson, *The Current State of Whistleblower Law in Europe: A Report by the Government Accountability Project*, ABA Section of Labor & Employment Law – International Labor & Employment Law Committee, at 15 (May 2013), <https://www.whistleblower.org/wp-content/uploads/2018/11/TheCurrentStateofWhistleblowerLawinEurope-1.pdf> (commenting on French experience).

58 Council of Europe, Protection of Whistleblowers, Recommendation CM/Rec(2014)7 and explanatory memorandum, at 6 (Apr. 30, 2014), <https://rm.coe.int/16807096c7>.

59 Council of Europe, Protection of Whistleblowers, Recommendation CM/Rec(2014)7 and explanatory memorandum, at 9-10 (Apr. 30, 2014), <https://rm.coe.int/16807096c7>.

60 International Bar Association, Whistleblower Protections: A Guide, at 48 (Apr. 2018), <https://www.ibanet.org/Conferences/whistleblowing.aspx> (follow link to download report).

61 CMA Reporting Form, <https://cma-553899.workflowcloud.com/forms/c35b> (last visited June 21, 2019); Norton Rose Fulbright, *Whistleblowing in Italy* (May 2018), <https://www.nortonrosefulbright.com/en/knowledge/publications/35ad57e2/whistleblowing-in-italy#section2>.

62 CMA, Rewards for Information About Cartels, at 5, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/299411/Informant_rewards_policy.pdf.

63 Amir Sherdil Rana, *The Competition and Markets Authority’s Compensation Campaign: Is the UK On the Way to Adopting an Award System for Corporate Crime Reporting?* The Corporate Social Responsibility & Bus. Ethics Blog (June 11, 2019), <https://corporatesocialresponsibilityblog.com/2019/06/11/cma-award/>.

64 The Luxembourg Leaks or “LuxLeaks” involved the leak of documents revealing efforts by international companies, with the help of accounting firms, to evade tax obligations through complicated tax structures based out of Luxembourg. See International Consortium of Investigative Journalists, Luxembourg Leaks: Global Companies’ Secrets Exposed, <https://www.icij.org/investigations/luxembourg-leaks/> (last visited June 23, 2019).

65 The Panama Papers scandal involved the leak of documents revealing efforts by a Panamanian law firm to assist an array of individuals, from celebrities and sports stars to fraudsters and drug traffickers, to evade taxes in various jurisdictions. See International Consortium of Investigative Journalists, About the investigation – Panama Papers, <https://www.icij.org/investigations/panama-papers/pages/panama-papers-about-the-investigation/> (last visited June 23, 2019).

66 Press Release, European Parliament, Protecting whistle-blowers: new EU-wide rules approved (Apr. 16, 2019), <http://www.europarl.europa.eu/news/en/press-room/20190410IPR37529/protecting-whistle-blowers-new-eu-wide-rules-approved>; Directive (EU) 2019/ [NUMBER PENDING ASSIGNMENT FROM OFFICIAL JOURNAL] of the European Parliament and of the Council of [DATE PENDING] on the protection of persons reporting on breaches of Union law (Apr. 10, 2019), http://www.europarl.europa.eu/doceo/document/A-8-2018-0398-AM-155-155_EN.pdf (the “Whistleblower Directive”).

*[T]he protection of whistleblowers to enhance the enforcement of Union competition law, including State aid would serve to safeguard the efficient functioning of markets in the Union, allow a level playing field for business and deliver benefits to consumers. As regards [sic] competition rules applying to undertakings, the importance of insider reporting in detecting competition law infringements has already been recognised in the EU leniency policy as well as with the recent introduction of an anonymous whistleblower tool by the European Commission.*⁶⁷

The Whistleblower Directive seeks to impose common, minimum standards across the EU for: (1) internal and external reporting mechanisms; (2) the types of disclosures that are protected; and (3) prohibitions against retaliation for making protected disclosures.⁶⁸ The Whistleblower Directive also attempts to balance the need for companies to manage their internal affairs and the recognition that internal reporting procedures may be ineffective, result in employee retaliation, lead to the destruction of evidence, or jeopardize law enforcement efforts.⁶⁹

The Whistleblower Directive further notes that breaches of competition law may be the type of violation where employees can skip internal reporting and go straight to the Commission or national authorities.⁷⁰ The Directive protects whistleblower disclosures, where the whistleblower “had reasonable grounds to believe that the reporting or disclosure of such information was necessary for revealing a breach pursuant to this Directive.”⁷¹ Moreover, in actions by whistleblowers alleging retaliation, the Directive establishes a burden shifting model: where the whistleblower establishes any form of retaliation (whether by termination, demotion, transfer, or the like), the burden shifts to the employer to “prove that [the action] was based on duly justified grounds.”⁷²

In sum, there is increasing vigor in Europe to enact legislation encouraging and protecting whistleblowers. Europe not only appears to be catching up to the United States, but, particularly for antitrust and competition law, now offers whistleblower protection exceeding that available here.

V. RETURNING STATESIDE: A PROPOSED ANTITRUST WHISTLEBLOWER PROGRAM

As noted above, whistleblower programs in several areas of federal law enforcement attest to their effectiveness and value. Thus, the Antitrust Division’s lack of enthusiasm for such legislation warrants close and critical scrutiny. We outline below an antitrust whistleblower program, borrowing in part from existing programs in the United States and internationally. Our proposal has three main parts: (1) the creation of discrete anti-retaliation rights and remedies for whistleblowers subjected to retaliation; (2) the creation of a bounty program for whistleblowers who provide original information that leads to the successful prosecution of antitrust violations; and (3) the delegation to an independent DOJ unit the decision regarding bounty eligibility and level of award.

Whistleblower protection provisions. There seems to be little disagreement about the value of protecting whistleblowers from retaliation and providing a remedy in the event of retaliation. Members of Congress, federal officials administering whistleblower programs in other areas of law, and a growing number within the international community agree that individuals with knowledge of wrongdoing should be encouraged to come forward and report without fear of reprisal. Antitrust Division officials themselves do not appear to have strong opposition to such measures, instead questioning “whether there was a need for such a provision and whether it makes sense to create an antitrust-specific civil remedy.”⁷³

67 Whistleblower Directive, Recital 17, http://www.europarl.europa.eu/doceo/document/A-8-2018-0398-AM-155-155_EN.pdf (bold and italics in original).

68 See Michael Huertas, *EU Parliament adopts Whistleblowing Directive proposal – what is next for financial services firms?*, Dentons (Apr. 23, 2019), <https://www.dentons.com/en/insights/articles/2019/april/23/eu-parliament-adopts-whistleblowing-directive-proposal#footnote1>.

69 Compare Whistleblower Directive, Recital 47 (“As a principle, therefore, reporting persons should be encouraged to first use the internal channels and report to their employer, if such channels are available to them and can reasonably be expected to work.”) with Recital 63 (“In other cases, the use of internal channels could not reasonably be expected to function properly.”).

70 Whistleblower Directive, Recital 63.

71 Whistleblower Directive, Article 21(2).

72 Whistleblower Directive, Article 21(5).

73 GAO Report at 47.

The need for such legislation is real, however. The most notable instance of retaliation against a whistleblower was that of Martin McNulty, who refused to participate in a customer allocation conspiracy and was terminated and later blackballed after he disclosed the packaged-ice price-fixing cartel's existence to the Antitrust Division. Mr. McNulty attempted to use the Crime Victims' Right Act to redress the financial harm he suffered, but lost in both the district court and court of appeals on a motion to dismiss.⁷⁴ If Congress had enacted anti-retaliation legislation protecting antitrust whistleblowers, Mr. McNulty would not have had to argue for a strained reading of federal victim rights legislation.

The CAARA bills provide a good framework for the protection that should be provided to antitrust whistleblowers. The bills permit whistleblowers to seek relief either administratively through the Secretary of Labor, or, if the Secretary of Labor does not issue a final decision within 180 days, through litigation in federal court.⁷⁵ The relief provided includes reinstatement, back-pay with interest, and special damages⁷⁶ CAARA whistleblower protections could be strengthened, however.

First, the 2017 CAARA bill excludes from protection individuals who "planned and initiated a violation or attempted violation of the antitrust laws."⁷⁷ This eligibility limitation seems unwarranted. Antitrust whistleblowers risk much by disclosing what they know and assisting prosecutors. Being black-balled from an industry can spell financial ruin for whistleblowers. Persons who come forward nonetheless should be protected from retaliation even if they were involved in the cartel activity. Other federal whistleblower programs generally do not deny retaliation protection on this basis, but instead usually take criminal involvement into account only in deciding the amount of the bounty award, or whether to deny a bounty entirely.⁷⁸

Second, filing a complaint with the Secretary of Labor (or a comparable DOJ official) should not be a precondition to the whistleblower's own lawsuit in federal court. This is an unnecessary barrier that would leave the whistleblower in limbo for six months while awaiting a final administrative decision. This limbo period increases the risk that the employer may discover the whistleblower's identity, thereby resulting in the individual becoming a pariah at the company — still employed while trying to perform job responsibilities in increasingly inhospitable and thus stressful surroundings. As with other federal whistleblower legislation (e.g. Dodd-Frank), whistleblowers should be free to pick their path to remedy acts of retaliation without preconditions.

Third, the legislation should explicitly prohibit any agreement, policy form, or condition of employment that might otherwise limit the remedies available under the statute. For example, employment agreements requiring arbitration of retaliation claims arising under this law should be unenforceable. Such conditions of employment would plainly discourage whistleblowers from reporting violations, as well as hamper their ability to enforce their right to seek appropriate relief in the event of retaliation. SOX forbids such arrangements in the securities area.⁷⁹ So, too, should CAARA, which used SOX as the model for its anti-retaliation provisions.⁸⁰

With these tweaks, CAARA would ensure that antitrust whistleblower protection is sufficiently robust to encourage individuals to report antitrust violations, whether or not they participated in the conduct giving rise to the violation.

Implementing a Bounty Program for Whistleblowers. Along with protection against retaliation, antitrust legislation should also include a bounty program, providing whistleblowers the opportunity to recover a financial award for disclosing antitrust violations. Despite the Antitrust Division's opposition, there does not seem to be strong (if any) evidence that a bounty would significantly disadvantage the Division's efforts to investigate and prosecute antitrust violations, or otherwise interfere with its Leniency Program.

74 See *In re McNulty*, 597 F.3d 344, 352 (6th Cir. 2010) ("Here, we agree with the district court's holding that McNulty is not a victim for the purposes of the CVRA. . . . To fire an employee and prevent a former employee from being hired by another company may be illegal under the civil law, but they are not inherently criminal actions, nor are they actions inherent in the crime of conspiracy to violate antitrust laws to which Arctic Glacier pled.").

75 See 2017 CAARA, § 216(b)(1).

76 See 2017 CAARA, § 216(c).

77 2017 CAARA § 216(a)(2)(A).

78 See, e.g. 7 U.S.C. § 26(c)(2)(B); 15 U.S.C. § 78u-6(c)(2)(B).

79 18 U.S.C. § 1514A(e).

80 See 158 Cong. Rec. S5736 (remarks from Senator Leahy: "[CAARA] is modeled on the successful anti-retaliation provisions of the Sarbanes Oxley Act").

The experiences of other agencies with bounty programs are instructive. The IRS, SEC, CFTC, and DOJ Civil Division have collectively recovered several billion dollars as a result of whistleblower tips.⁸¹ IRS and DOJ Civil Division officials have also noted that, but for the whistleblowers, many of these recoveries would not have occurred.⁸² Internationally, whistleblower bounty programs also appear to have had positive results. In the United Kingdom, the CMA's whistleblower bounty program provides rewards of up to £100,000. Although cartel participants are generally ineligible for a bounty, the CMA leaves open the possibility that, depending on their level of involvement, a cartel participant could receive a bounty. As noted above, the number of tips received by the CMA as a result of its campaign has increased substantially. Thus, rather than curtailing the program, Andrew Tyrie, the CMA's Chairman, has reportedly sought to increase the potential rewards and protections for whistleblowers because he believes they are "inadequately compensated for the risks they incur to their livelihoods and careers, and insufficiently protected from having their identities disclosed."⁸³

Recognizing that many whistleblowers may themselves be participants in an antitrust violation, the bounty program for antitrust whistleblowers can be more limited in scope than that offered in other areas of law enforcement. While whistleblowers take significant risks in revealing criminal cartels, they should not get rich from their own unlawful behavior. Similar to the CMA's bounty program, the upper limit for a bounty under a U.S. antitrust whistleblower bounty program can be capped at a dollar level, rather than metered against the amount of the government's recovery. By contrast, for whistleblowers who are not participants in the unlawful conduct — "mere" witnesses — the bounty program could look more like the IRS, SEC, and CFTC programs, which permit the whistleblower the ability to obtain a percentage of the total recovery.

The Antitrust Division's arguments against a whistleblower bounty are not particularly persuasive. To begin with, under the Leniency Program, the recipient company's employees who testify are probably cartel participants anyway, but they have escaped imprisonment or fine. These individuals already are subject to impeachment on that basis. A financial bounty would not seem likely to make a whistleblower-witness materially less credible at trial.

Equally important, DOJ's Criminal Division and the U.S. Attorney's offices nationwide prosecute countless federal crimes involving murder, assault, and other acts of violence, often relying on the most unsavory of witnesses. Witnesses in these cases have sometimes been immunized entirely, or otherwise fairly anticipate favorable treatment on sentencing based on their cooperation. They also may receive the benefits of the federal witness protection program to induce their cooperation. Again, having to rehabilitate a whistleblower-witness in an antitrust prosecution should not be materially more challenging.

Besides, antitrust prosecutions are not likely to rise or fall on the testimony of a whistleblower alone. Cartels, after all, necessarily involve multiple companies. Therefore, trial witnesses will include multiple percipient witnesses besides the whistleblower. Criminal antitrust cases will also invariably have extensive documentary evidence corroborating the cartel activity. Indeed, as IRS and DOJ Civil Division officials noted in response to GAO inquiries, prosecutors can avoid potential whistleblower-witness constraints by independently corroborating the information provided through other sources.⁸⁴

Finally, just as the Antitrust Division relies on its Leniency Program to incent companies to turn in other cartel participants, so too, it should welcome having a financially-incented whistleblower, whose information creates the opportunity not only for additional cartel detection, but also for "flipping" other cartel participants into cooperating in exchange for consideration on sentencing.

Nor would a bounty seem likely to increase the amount of false or erroneous information provided. First, intentionally providing false information to government prosecutors or investigators is a felony punishable by up to five years in prison.⁸⁵ Second, false reporting can also be addressed by conditioning the availability of a bounty on the truthfulness and accuracy of the whistleblower's information. For example, Dodd-

⁸¹ See Table 1, above.

⁸² GAO Report at 44.

⁸³ Barney Thompson, *Number of whistleblowing reports on UK cartels up 18% last year*, Fin. Times (May 27, 2019), <https://www.ft.com/content/bd41277c-7d54-11e9-81d2-f785092ab560>.

⁸⁴ See GAO Report at 40 ("For example, an IRS official stated that they do not use whistleblower-provided information as the basis for an assessment of wrongdoing, but rather try to obtain corroborating information from another source because the whistleblower has a personal interest in the success of the case and his or her credibility may be questioned in litigation.").

⁸⁵ See 18 U.S.C. § 1001(a) ("[W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully. . . makes any materially false, fictitious, or fraudulent statement or representation. . . shall be fined under this title, imprisoned not more than 5 years . . .").

Frank permits the SEC and CFTC to deny a bounty to a whistleblower who provides false information.⁸⁶ Similar provisions could be enacted in antitrust whistleblower legislation to discourage false reporting.

Delegating bounty determination issues to an independent DOJ unit. The IRS, SEC, CFTC, and other federal agencies have separate whistleblower offices. It is not clear, however, that this structure would be appropriate to handle antitrust whistleblowers. The Division already has a long-established Leniency Program to incent self-reporting, which includes leniency for individuals employed by cartel participants who first bring antitrust violations to the Division's attention. There is no readily apparent reason why the Division could not develop comparable intake procedures and follow-up investigation for individual whistleblowers.

However, it might make sense to delegate to a DOJ unit other than the Antitrust Division the responsibility for determining bounty eligibility and amount. The Antitrust Division could be authorized to initiate a "bounty-determination proceeding" at a point it deems appropriate. Then, both the Division and the whistleblower, represented by counsel, could present their positions. The independent DOJ unit would decide whether a bounty should be awarded and its level within statutorily-prescribed limits. An internal appeal to the Attorney General or its designee could also be provided. This framework would introduce a degree of impartiality into the bounty-determination decision.

VI. CONCLUSION

With ACPERA approaching its sunset, legislators and relevant stakeholders will soon debate its renewal and what changes, if any, should be made. Whistleblower protection should be a priority. These provisions would incent individuals to disclose antitrust crimes. And, by providing the Antitrust Division with yet another potential source of information, they also would bolster (not hinder) the existing Leniency Program — and, in turn, destabilize existing cartels and discourage the formation of new ones.

Anti-retaliation protection for individuals with knowledge of antitrust violations who report to the Antitrust Division should be enacted. The provision should bar retaliation even if the whistleblower participated in the violation. A civil remedy for retaliation is also warranted. Introducing a bounty program would further incent whistleblowers to come forward. The positive experiences of other federal agencies with bounty programs confirm the adage: "money talks."

⁸⁶ 15 U.S.C. § 78u-6(i); 7 U.S.C. § 26(m).



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