ANTITRUST COMPLIANCE AND THE CRIMINAL ANTITRUST ANTI-RETALIATION ACT

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By Jennifer M. Dixton, Rebecca D. Ryan & Anthony Rosa

The Criminal Antitrust Anti-Retaliation Act of 2019 ("CAARA") provides protections for employees, contractors, and agents who notify their employers or the federal government of antitrust violations. Given CAARA's enactment, there are several reasons why it is in companies' best interest — now more than ever — to adopt effective internal antitrust compliance programs that support the reporting of violations without reprisal. First, CAARA complements and bolsters the Antitrust Division's Leniency Program that allows companies first to report a criminal antitrust violation to the government to avoid prosecution for itself and its employees. Second, when making charging decisions and sentencing recommendations, Division prosecutors holistically evaluate the effectiveness of a company's compliance programs, including its reporting mechanisms. Finally, employers that do not support reporting efforts may become the subject of a CAARA complaint and faced with penalties generated by the Occupational Safety and Health Administration's Whistleblower Protection Program. With CAARA's passage, companies must implement effective internal reporting mechanisms; the risks of not doing so are too great.

The Criminal Antitrust Anti-Retaliation Act of 2019 ("CAARA") was enacted to enhance protections for employees, contractors, and agents who blow the whistle on criminal antitrust violations to their employer or to the federal government.[2] Specifically, it prohibits employers from taking punitive action against employees or agents who report potential antitrust crimes or assist a federal government investigation.[3] The Antitrust Division of the Department of Justice (the Division) applauded CAARA's passage, stating that "[b]y incentivizing disclosures of anticompetitive conduct, the Act will strengthen the Antitrust Division's criminal enforcement program, a cornerstone of [the Division's] mission to protect the American consumer."[4] Indeed, CAARA's whistleblower protections support individuals reporting to, and cooperating with, both internal and government investigations, and complement the Antitrust Division's Leniency Program.[5]

Recognizing that CAARA can play an important role in criminal antitrust enforcement, Department of Justice leadership has sought to ensure its effective implementation. Associate Attorney General Vanita Gupta issued a memorandum instructing the Division to strengthen its partnership with the Department of Labor and Occupational Safety and Health Administration ("OSHA") by offering antitrust training, guidance on antitrust laws, and technical assistance to help implement CAARA.[6] The memorandum followed President Biden's Executive Order to all executive branch agencies to take measures to promote the whole-of-government approach to protecting competition in the American economy.[7]

Self-reporting, of course, is in the Division's interest: its goal is to deter antitrust violations in the first place and encourage good corporate citizenship — and when that fails, to encourage prompt detection, reporting, and remediation. The Division therefore welcomed CAARA's passage and is assisting OSHA in its implementation of this new whistleblower protection.

In light of CAARA's new whistleblower protections and the Justice Department's demonstrated commitment to CAARA's implementation, as well as other recent developments, it is more imperative than ever before that companies invest in effective antitrust compliance programs — and that those programs include strong internal reporting mechanisms. It is in a company's best interest to promote prompt self-reporting for several reasons:

- it may allow the company to quickly detect an antitrust violation, stop the conduct, and seek leniency;
- when leniency is unavailable, the Division still considers self-reporting, corporate compliance efforts, and cooperation when making charging decisions;[8]
- effective compliance and reporting mechanisms may mitigate a corporate sentence;[9] and
- it may avoid a CAARA complaint.

Robust antitrust compliance programs foster a culture of good corporate citizenship and provide the first line of defense in preventing, detecting, and addressing antitrust violations. And, in light of the risk or reward calculus created by leniency, compliance program credit, and CAARA, compliance programs are essential.

I. CAARA MAKES THE RACE FOR LENIENCY EVEN MORE COMPETITIVE

The Division's Leniency Program already creates a race among corporate and individual co-conspirators to report an antitrust violation to the Division.[10] To win that race, a company must be able to detect and report a violation more quickly than any of its competitors — and a simple way to do that is to

2 Criminal Antitrust Anti-Retaliation Act of 2019, Pub. L. No. 116-257, 134 Stat. 1147.

3 *Id.*

4 Press Release, U.S. Dep't of Justice, Justice Department Applauds Passage of the Criminal Antitrust Anti-Retaliation Act (Dec. 24, 2020), https://www.justice.gov/opa/pr/justice-department-applauds-passage-criminal-antitrust-anti-retaliation-act.

5 U.S. Dep't of Justice, Frequently Asked Questions About the Antitrust Division's Leniency Program and Model Leniency Letters 1 (Jan. 26, 2017), https://www.justice.gov/atr/page/file/926521/download.

6 Memorandum from Assoc. Att'y Gen. Vanita Gupta on Promoting Competition in the American Economy to the Antitrust Div. (July 9, 2021), https://www.justice.gov/asg/page/file/1410836/download.

7 Exec. Order No. 14,036, 86 Fed. Reg. 36,987 (July 9, 2021).

8 U.S. Dep't of Justice, Justice Manual § 9.28-900.

9 U.S. Dep't of Justice, Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations 11 (July 2019), https://www.justice.gov/atr/page/file/1182001/download.

10 See U.S. Dep't of Just., Frequently Asked Questions About the Antitrust Division's Leniency Program and Model Leniency Letters 5-6 (Jan. 26, 2017), https://www.justice.gov/atr/page/file/926521/download.

provide the proper incentives and mechanisms for employees who are involved in the misconduct to come forward internally. The benefits of winning the race are enormous. A company that qualifies for leniency avoids criminal conviction and will be eligible for Antitrust Criminal Penalty Enhancement & Reform Act (ACPERA) protections in any parallel civil litigation.[11] On the flipside, the costs of losing the race can be catastrophic. A company faces potential felony criminal charges which may result in substantial fines for the corporate entity — with a statutory maximum of $100 million per charge — and significant prison terms for culpable individuals (for example, one executive was recently sentenced to forty months in prison).[12]

CAARA raises those stakes even higher by providing protection for employees and agents that blow the whistle on antitrust crimes. This protection allows the Leniency Program to work as intended because employees and agents can report crimes internally or to the Antitrust Division without fear of reprisal.[13] And CAARA adds to the self-reporting race a new set of contestants who are now eligible for whistleblower protection: employees or agents who are aware of a company's antitrust violations, and report them to the company or directly to the federal government.[14]

As mentioned, CAARA prohibits employers (or any officer, employee, contractor, subcontractor, or agent of an employer) from retaliating against employees, contractors, subcontractors, or agents for engaging in protected activity. An employer may not discharge or otherwise retaliate against an employee, contractor, subcontractor, or agent for reporting certain information to the federal government, the individual's supervisor, or a person working for the employer who has the authority to investigate, discover, or terminate misconduct; or for initiating, testifying in, participating in, or otherwise assisting in certain federal government investigations or proceedings. The information, investigation, or proceeding must relate to an antitrust law violation prosecuted under Sections 1 or 3 of the Sherman Act (15 U.S.C. § 1 and § 3) or another criminal violation committed in conjunction with a potential antitrust violation, or violation related to a Justice Department investigation into an antitrust violation.

This has significant implications for the leniency race. If a whistleblower reports internally, a company has the opportunity to seek Type A leniency, obtaining protection for itself, its management, and its employees.[15] However, if a whistleblower — now protected and incentivized by CAARA — reports not internally but directly to the Division, a company will be eligible only for Type B leniency.[16] There is an important difference between obtaining Type A and Type B leniency: companies risk losing coverage for highly culpable corporate executives and leadership if the whistleblower has already provided sufficient evidence against them. Therefore, a company would be well served by ensuring that employees are encouraged to self-report internally — giving the company the opportunity to pursue Type A leniency. In short, investing in robust, effective self-reporting mechanisms is a prudent business decision.

II. ENCOURAGING SELF-REPORTING IS AN ESSENTIAL ELEMENT IN WELL-FUNCTIONING COMPLIANCE PROGRAMS

In an ideal world, a compliance program would prevent anticompetitive conduct entirely or, if wrongdoing occurs, would allow a company to qualify for leniency. But, failing that, implementation of a compliance program that protects employees who report violations is still critical, as the Division evaluates the effectiveness of a company's compliance program in making charging decisions and sentencing recommendations.[17] Part of that evaluation is whether the company has a reporting mechanism, including whether that mechanism permits employees to report or seek guidance regarding potential criminal conduct "without fear of retaliation."[18]

A. The Evaluation of Compliance Program Effectiveness

The Division's approach to crediting compliance programs has shifted over the past decade. Historically, the Division did not credit compliance programs during the charging phase of an investigation, because it held the view that any compliance program that failed to prevent the criminal

11 *Id.* at 20; see also Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, tit. II, 118 Stat. 661.

12 See Press Release, U.S. Dep't of Justice, Former Bumble Bee CEO Sentenced to Prison for Fixing Prices of Canned Tuna (June 16, 2020), https://www.justice.gov/opa/pr/former-bumble-bee-ceo-sentenced-prison-fixing-prices-canned-tuna.

13 15 U.S.C. § 7a-3.

14 Criminal Antitrust Anti-Retaliation Act of 2019, Pub. L. No. 116-257, 134 Stat. 1147.

15 *Leniency Program*, U.S. Dep't of Justice (Sep. 24, 2021, 1:10PM), https://www.justice.gov/atr/leniency-program.

16 *Id.*

17 Richard Powers, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Criminal Antitrust Enforcement: Recent Highlights, Policy Initiatives, and What's to Come, Remarks at the 29th Annual Antitrust, UCL, and Privacy Section Golden State Institute (Nov. 14, 2019), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-richard-powers-delivers-remarks-29th-annual-antitrust.

18 U.S. Dep't of Justice, Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations 11 (July 2019), https://www.justice.gov/atr/page/file/1182001/download.

behavior or did not allow for early detection, timely disclosure, and a successful application for leniency, was not a credit-worthy compliance program.[19] In 2019, recognizing the role that compliance programs play in detecting and deterring criminal antitrust conduct and to further incentivize companies to prioritize compliance, the Division changed its policy to consider a company's compliance program at the charging stage of its investigations.[20] A company with an effective antitrust compliance program can be eligible for a deferred prosecution agreement, which occupies an important middle ground between a guilty plea and a declination. This pivot now aligns the Division's policy with broader Justice Department policy, which considers the effectiveness of a company's compliance program, along with several other factors, in determining the appropriate resolution under the Justice Manual's Principles of Federal Prosecution of Business Organizations.[21]

Whether a company resolves a criminal antitrust investigation through a deferred prosecution agreement or a guilty plea, a company's criminal fine or penalty will be based on the U.S. Sentencing Guidelines — and a robust compliance program that encourages self-reporting can also confer substantial benefits at that stage. Under the U.S. Sentencing Guidelines, a corporate defendant may be eligible for a reduction in culpability score if it has an "effective" antitrust compliance policy as defined by the Guidelines.[22] Although many antitrust defendants will have difficulty qualifying for this sentencing "credit,"[23] a company's compliance program, including its internal reporting mechanisms and response to a violation, is still relevant to the recommended corporate fine and whether a downward departure is appropriate. The effectiveness of a company's program also affects whether the Division will recommend that the company be placed on probation to ensure the company improves its compliance program.[24] Indeed, the failure to have an effective program can even subject the company to monitoring to ensure the company's compliance program improves during the terms of probation.[25]

B. Corporate Compliance Policies Under Department of Justice Guidance

To be clear, the mere existence of an antitrust compliance program does not automatically merit credit at the charging or sentencing stage, and it certainly does not absolve a corporation of liability.[26] When the Division evaluates compliance programs, it scrutinizes whether the program is merely a "paper program" or a well-designed, well-funded, well-implemented, and well-supported program.[27] This includes whether the company has provided the requisite staffing and resources to implement, audit, and re-evaluate the compliance program and utilize the evaluation results. Overall, there are no "formulaic requirements regarding corporate compliance programs"[28] and the Division's factors are not a checklist. Instead, Division prosecutors take a holistic view of the company — including its size and the industry — in deciding whether its program is effective.[29]

A compliance program is unlikely to be effective unless the company gives careful consideration to reporting mechanisms and ensures that employees, contractors, and agents know about those mechanisms and are comfortable using them.[30] For example, companies should allow

19 See Brent Snyder, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Compliance Is A Culture, Not Just A Policy, Remarks as Prepared for the International Chamber of Commerce/United States Council of International Business Joint Antitrust Compliance Workshop (Sept. 9, 2014), https://www.justice.gov/atr/file/517796/download.

20 *Id.*; see Richard Powers, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Criminal Antitrust Enforcement: Recent Highlights, Policy Initiatives, and What's to Come, Remarks at the 29th Annual Antitrust, UCL, and Privacy Section Golden State Institute (Nov. 14, 2019), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-richard-powers-delivers-remarks-29th-annual-antitrust.

21 U.S. Dep't of Justice, Just. Manual § 9-28.800.

22 U.S. Sent'g Guidelines Manual § 8C2.5(f) (U.S. Sent'g Comm'n 2018), https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2018/GLMFull.pdf.

23 The reduction will not apply if there was a delay in reporting the anticompetitive conduct, or if "high-level" or "substantial authority personnel" are involved in the antitrust crime. *Id.*

24 U.S. Dep't of Justice, Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations 14 (July 2019), https://www.justice.gov/atr/page/file/1182001/download. The Division has recommended fine reductions under 18 U.S.C. § 3572 based on extraordinary efforts to create effective "forward looking" compliance programs. Plea Agreement, *United States v. Kayaba Industry Co.*, 15-cr-00098-MRB (S.D. Ohio Sept. 16, 2015), https://www.justice.gov/atr/case-document/file/791911/download; Plea Agreement, *United States v. Barclays PLC*, 15-cr-77-SRU (D. Conn. May 5, 2015), https://www.justice.gov/atr/file/838001/download.

25 Plea Agreement, *United States v. Hoegh Autoliners AS*, GLR-17-0505 (D. Md. Dec. 8, 2017), https://www.justice.gov/atr/case-document/file/347164/download.

26 See *United States v. Basic Constr. Co.*, 711 F.2d 570, 573 (4th Cir. 1983) ("[A] corporation may be held criminally responsible for antitrust violations committed by its employees . . . even if . . . such acts were against corporate policy or express instructions."); *United States v. Potter*, 463 F.3d 9, 25-26 (1st Cir. 2006) (finding a corporation is not automatically absolved of liability by "adopting abstract rules" that prohibit employees or agents from engaging in illegal acts).

27 U.S. Dep't of Justice, Just. Manual § 9-28.800.

28 *Id.*

29 U.S. Dep't of Justice, Antitrust Division Manual III.G.2.c (5th ed. 2012), https://www.justice.gov/atr/file/761166/download.

30 U.S. Dep't of Justice, Just. Manual § 9-28.900.

for reports to be made "anonymously or confidentially and without fear of retaliation."[31] Antitrust Division prosecutors will also consider whether employees know where to seek antitrust guidance and the positive or negative incentives in place for doing so.[32]

The Division also considers whether compliance is promoted and championed by senior leadership, how well reporting mechanisms are known, how often the mechanisms are used, and what the company did to investigate the antitrust violations at issue.[33] A compliance program is not effective if it is not supported by the company's leadership and internal controls. Employees should be "convinced of the corporation's commitment to [the compliance program]"[34] which includes the company's support for individuals who report wrongdoing. When corporate leadership fosters an environment where employees and agents feel comfortable reporting suspected wrongdoing without the fear of reprisal, this serves as evidence of a strong culture of compliance.

C. Evaluating the Compliance Response

Reporting mechanisms also enhance a company's compliance efforts in myriad other ways. As the Division's Compliance Guidelines recognize, "effective antitrust compliance programs not only prevent, detect, and address antitrust violations, they also further remedial efforts and help foster corporate and individual accountability by facilitating a corporation's prompt self-reporting."[35] Similarly, the Justice Manual states that "the Department encourages corporations, as part of their compliance programs, to conduct internal investigations and to disclose the relevant facts to the appropriate authorities."[36] To that end, Antitrust Division prosecutors consider not only whether and how employees and agents report possible antitrust violations, but also what the company does to investigate and respond.[37] An effective reporting mechanism has little value if the company did nothing to investigate and determine whether the reports received had merit. Indeed, "[d]eciding to do nothing or sweep misconduct under the corporate rug can be a costly mistake that deprives the company of the benefits of leniency and severely undermines any subsequent claims for compliance credit."[38] Prosecutors will consider how the company processed reports of misconduct including whether the company used the information gleaned from its reporting mechanisms to identify "patterns or other red flags of a potential antitrust violation."[39]

D. The Importance of Timeliness

Finally, robust self-reporting mechanisms are critical to allowing a company to detect and report its misconduct to the Division in a timely way. Even when a company does not qualify for leniency, timely disclosure, cooperation, and remediation are still relevant considerations at the charging stage, under the Principles of Federal Prosecution of Business Organizations.[40] Because time is often of the essence in criminal investigations, prosecutors may consider a corporation's "timely and voluntary disclosure, both as an independent factor and in evaluating the company's overall cooperation."[41] For a company that loses the race for leniency, the existence of an otherwise effective compliance program as evidenced by prompt self-reporting may allow for a deferred prosecution agreement.[42] Timeliness also matters at sentencing, where a company that provides timely and thorough self-reporting and cooperation can receive up to a five-point reduction in its culpability score — which can translate into a substantial reduction in its criminal fine.[43]

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31 U.S. Dep't of Justice, Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations 11 (July 2019), https://www.justice.gov/atr/page/file/1182001/download.

32 *Id.* at 11-12. For example, a company might discipline an employee for failing to report a known antitrust violation.

33 *Id.* at 5, 11.

34 *Id.* at 5; U.S. Dep't of Justice, Just. Manual § 9-28.800.

35 U.S. Dep't of Justice, Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations 1 (July 2019), https://www.justice.gov/atr/page/file/1182001/download.

36 U.S. Dep't of Justice, Just. Manual § 9-28.900.

37 U.S. Dep't of Justice, Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations 12-13 (July 2019), https://www.justice.gov/atr/page/file/1182001/download.

38 Richard Powers, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Criminal Antitrust Enforcement: Recent Highlights, Policy Initiatives, and What's to Come, Remarks at the 29th Annual Antitrust, UCL, and Privacy Section Golden State Institute (Nov. 14, 2019), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-richard-powers-delivers-remarks-29th-annual-antitrust.

39 U.S. Dep't of Justice, Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations 11, 13 (July 2019), https://www.justice.gov/atr/page/file/1182001/download.

40 U.S. Dep't of Justice, Just. Manual § 9-28.300.

41 U.S. Dep't of Justice, Just. Manual § 9-28.900.

42 Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Wind of Change: A New Model for Incentivizing Antitrust Compliance Programs, Remarks at the New York University School of Law Program on Corporate Compliance and Enforcement (July 11, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-university-school-l-0.; U.S. Dep't of Justice, Just. Manual § 9-28.300.

43 U.S. Sen'g Guidelines Manual § 8C2.5(g)(1)&(2), cmt 13 (U.S. Sent'g Comm'n 2018), https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2018/GLMFull.pdf.

III. CAARA AND OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION WHISTLEBLOWER PROTECTION PROGRAM

Investing in effective reporting mechanisms makes sense for a third, independent reason: antitrust whistleblowers are now protected under CAARA. As explained, supporting CAARA's successful implementation is a priority for Justice Department leadership. The Justice Department will work in partnership with OSHA to provide antitrust training, guidance on antitrust laws, and technical assistance to help implement CAARA. Thus, failing to facilitate self-reporting without fear of reprisal not only subjects a company to increased risk of criminal charges, conviction, and substantial fines, it also subjects it to civil penalties under this new law that protects efforts to disclose antitrust crimes.[44]

OSHA's Whistleblower Protection Program enforces protections for employees who suffer retaliation for engaging in protected activities under 25 federal laws including CAARA. Covered individuals who believe that they have suffered retaliation in violation of CAARA may file a retaliation complaint with OSHA, either on their own or through an attorney or designated representative, within 180 days of the unfavorable personnel action alleged in the complaint. Employees, or their representatives, can file whistleblower complaints with OSHA via mail, fax, telephone, in person, or online. After receiving a retaliation complaint under CAARA, OSHA will interview the employee to obtain information about the alleged retaliation, and will determine whether the allegation is sufficient to initiate an investigation.[45]

If the allegation is sufficient to proceed with an investigation, the complaint will be assigned to an OSHA Whistleblower Investigator who is a neutral fact-finder and does not represent either party.[46] The investigator will notify the Complainant, Respondent, and the Justice Department's Antitrust Division that OSHA has opened an investigation.

Whistleblower investigations vary in length of time. The parties may settle the retaliation complaint at any point in the investigation either through OSHA's Alternative Dispute Resolution program, with the assistance of the assigned investigator, or through their own negotiated settlement that OSHA approves.

At the conclusion of the investigation, OSHA will issue a findings letter to both parties stating whether OSHA has reasonable cause to believe that retaliation occurred. If OSHA finds retaliation, its findings may include an order for reinstatement, back pay, and other appropriate remedies. Either the individual or the employer may object to OSHA's findings and request a hearing before a Department of Labor Administrative Law Judge ("ALJ"). If no objections are filed, OSHA's findings become the final order of the Secretary of Labor in the case. If an ALJ hearing is requested, the ALJ's decision may be appealed to the Department of Labor's Administrative Review Board, which issues the Department of Labor's final decision in CAARA whistleblower cases, subject to discretionary review by the Secretary of Labor. The Administrative Review Board's final decision may be appealed to a court of appeals.

Under CAARA, the individual may file their CAARA retaliation complaint in federal district court if there is no final order of the Department of Labor and 180 days has passed from the filing of the complaint with OSHA.

IV. CONCLUSION

It is critical that companies invest in effective antitrust compliance and reporting mechanisms. The rewards for having effective compliance are significant, including avoiding an antitrust violation altogether, and when that fails, at least quickly detecting and reporting it. By contrast, the risks of not having effective compliance and reporting are even more severe with CAARA's passage. The Justice Department and OSHA are working together in partnership to ensure CAARA protects those who have the courage to report antitrust crimes. This partnership adds to the Antitrust Division's detection toolkit and is likely to result in enhanced criminal enforcement consistent with President Biden's call for all agencies to promote competition in the American economy.

44 See infra Part I.

45 More information about OSHA's investigation is available on OSHA's website. See Occupational Safety and Health Administration, Whistleblower Investigations Manual (Jan. 28, 2016), https://www.osha.gov/sites/default/files/AnnotatedWIM.pdf.; *What to Expect During a Whistleblower Investigation*, U.S. Dep't of Labor (last visited Sept. 24, 2021), https://www.whistleblowers.gov/whattoexpect.

46 During the investigation, the employee who files the complaint is referred to as "the Complainant," and the employer, against whom the complaint is filed, is referred to as "the Respondent." Neither side is required to retain an attorney, but if a party designates a representative, the designee will serve as the point of contact with OSHA.

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