

Antitrust Alert

Senate Proposes Whistleblower Protections for Antitrust Division's Leniency Program

August 17, 2012

New legislation was introduced in the Senate in July that would provide whistleblower protection for employees that report criminal antitrust activity. The bill, titled the Criminal Antitrust Anti-Retaliation Act, was introduced by Senators Patrick Leahy (D-VT) and Chuck Grassley (R-IA) on July 31, 2012.¹ Corporations are advised to keep an eye on this bill as its passage could complicate corporate compliance efforts.

The Antitrust Division's Leniency Program

The Department of Justice Antitrust Division has well-established corporate and individual leniency programs for those involved in criminal antitrust conduct. A corporation or individual that is the first to report a criminal antitrust conspiracy has the opportunity to receive full immunity for the antitrust violations. The corporate leniency policy, in its present form since 1993², extends immunity to all current employees that cooperate with the Antitrust Division's investigation.

Congress provided statutory incentives to participate in the leniency program in 2004 with the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA).³ ACPERA provided both a carrot and a stick to incentivize potential leniency applications. The stick came in the form of increased penalties: potential jail time for individuals increased from three to ten years, and maximum fines for antitrust violations increased from \$10 million to \$100 million for corporations and from \$350,000 to \$1 million for individuals. ACPERA's carrot consisted of reduced civil liability for successful leniency applicants. Those who receive leniency have the potential to avoid treble damages as well as joint and several liability in parallel civil actions.

The Proposed Legislation

The proposed Criminal Antitrust Anti-Retaliation Act would amend ACPERA by extending whistleblower protection to employees of companies engaged in criminal antitrust conduct. Employees who reported to the Antitrust Division any act or omission that the employee reasonably believed to be a violation of the antitrust laws would be protected against retaliation by their employers. The proposed legislation would also protect a whistleblower that reported other violations committed either in conjunction with an antitrust violation, or during an investigation by the Antitrust Division. Prohibited retaliatory action would include discharge, demotion, suspension, threatening, harassing or discriminating in any other manner in the terms of employment. Individuals involved in an antitrust or related violation would be excluded from becoming whistleblowers.

¹ Criminal Antitrust Anti-Retaliation Act, S. 3462, 112th Cong. (2012)

² Department of Justice Antitrust Division Corporate Leniency Policy, *available at* <http://www.justice.gov/atr/public/guidelines/0091.htm>.

³ Pub. L. No. 108-237, tit. II, 118 Stat. 665 (2004) (codified at 15 U.S.C. 1 note).



The legislation implements the recommendations of the Government Accountability Office (GAO) outlined in its report on Criminal Cartel Enforcement issued in July 2011. The reauthorization of ACPERA in 2010 included a requirement that the GAO report on anti-retaliation protections.⁴ The Report concluded that without a civil remedy for individuals who are retaliated against for reporting criminal antitrust activity, whistleblowers are unprotected and likely deterred from reporting such activity. The GAO noted that Antitrust Division officials did not take a position on the issue. The bill has been referred to the Senate Judiciary Committee, where it awaits consideration.

Conclusion

In some respects, this bill seeks to fix a program that is not broken. The Antitrust Division's leniency program has been, since it was revised in 1993, the Division's single largest source of criminal cases. Virtually every international cartel prosecution undertaken by the Division in recent years can be traced, either directly or indirectly, to a leniency application. We believe the Division will be hesitant to support changing such a successful program. From the perspective of potential applicants to the leniency program, the proposed legislation could be very problematic. Effective corporate compliance programs create incentives for employees to report potential problems through the compliance department. This gives the company an opportunity to evaluate reported problems and gather information to assess whether there has been a violation. If a violation is likely, then the company can bring the information to the Antitrust Division in its application for leniency. The proposed whistleblower legislation creates an incentive for employees to bypass the compliance department and report possible violations directly to the Antitrust Division. Such conflicting incentives could undermine a company's compliance program, making it less likely to uncover potential violations, which could ultimately weaken the Antitrust Division's leniency program.

CONTACT INFORMATION

If you have any questions concerning this alert, please contact—

J. Brady Dugan
bdugan@akingump.com
202.887.4152
Washington, D.C.

Stacy R. Kobrick
skobrick@akingump.com
202.887.4288
Washington, D.C.

⁴ Pub. L. No 111-190, § 5, 124 Stat. 1275, 1276 (2010).