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It's a Crime There Isn't a Criminal Antitrust Whistleblower Statute

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The SEC's [wildly successful whistleblower program](#) has returned hundreds of millions of dollars to investors as a result of actionable whistleblower information over the past six years. The IRS paid one whistleblower more than \$100 million for information that helped the government uncover a massive tax evasion scheme and led to a \$780 million settlement. The CFTC predicts that the results of its whistleblower program this year will be "huge." The Antitrust Division has paid \$0 to whistleblowers and received \$0 from cartels exposed by whistleblowers. Or, as Charlie Brown would say, the Antitrust Division "got a rock."

There is no cartel whistleblower program and this should change now. Price-fixing and bid-rigging conspiracies are felonies costing American consumers millions of dollars in the form of artificially high prices. These fraudulent schemes are particularly suited to exposure by whistleblowers because senior corporate executives frequently use lower level employees (and potential whistleblowers) to carry out the illegal scheme. The time is right for there to be serious antitrust whistleblower legislation.

The SEC Success Story and the Current Environment

The SEC's Whistleblower Program emerged out of the financial crisis of 2008. The results have been phenomenal. Former SEC Chair Mary Jo White called the whistleblower program a "[game changer](#)." In April 2016, the SEC's Director of the Division of Enforcement stated, "[The bottom line is that in its short history, our whistleblower program has had tremendous impact](#)." And the evidence confirms this: since the program's inception, the SEC has ordered wrongdoers in enforcement matters involving whistleblower information to pay over \$975 million in total monetary sanctions, including more than \$671 million in disgorgement of ill-gotten gains and interest, the majority of which has been or will be returned to harmed investors.

Based in part on the success of the SEC's experience, there is momentum for additional whistleblower laws. Last year, Congress approved legislation making it easier for the Department of Veterans Affairs to fire employees for misconduct while better protecting whistleblowers who bring wrongdoing to light. Another whistleblower bill was recently introduced authorizing the Treasury to pay

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rewards to whistleblowers who help identify and recover stolen assets linked to foreign government corruption. There has been some movement in the Senate in the direction of providing minimal criminal antitrust whistleblower protection (without any reward), but even this modest legislation has not made its way through Congress.

Strong Antitrust Whistleblower Legislation Will Produce Results

A cartel whistleblower statute has the potential for tremendous success because of the sheer number of potential whistleblowers. Cartels are typically composed of many companies. Within each company there are usually multiple employees involved in the scheme with varying levels of culpability. Senior executives commit the company to the cartel and make the impactful decisions such as raising prices but delegate the implementation of the overcharge to lower level employees. Cartels often have their own nomenclature to reflect these various roles. In one global cartel the authors prosecuted, the price fixing meetings were designated as either “top guy” or “working level.” Top level guys made decisions. Lower level guys carried out the orders. Another global cartel used the term “masters” and “sherpas” to differentiate the participants.

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There are undoubtedly lower level employees who resent being pushed into criminal behavior and may be tempted to report the scheme but being a whistleblower is career suicide. In addition, even the lowest level employee in a company who knows the company is fixing prices and does anything to help carry out the price fixing agreement (like the salesman who is told to check prices with a competitor) is subject to a maximum 10-year jail sentence. Coming forward without first hiring an (expensive) antitrust lawyer might land someone “trying to do the right thing” in prison. Negotiating immunity is often a complicated dance with the prosecutors that is time consuming and expensive. Even if granted immunity, cooperating with the Antitrust Division can span over many years (think enlisting in the Hundred Years War). A rational potential cartel whistleblower has a strong self-interest to keep whistling to himself, “Nothing to see here.” Even a potential whistleblower who did not participate in the cartel in any way—say a customer who inadvertently learns of the cartel through loose talk by a salesperson—often may decide simply to look the other way. The cartel whistleblower calculus currently is all trouble, no reward. A whistleblower program changes the incentives. It not only provides a potential reward but also an avenue to retain an attorney to help through the difficult process.

Criticisms of a Cartel Whistleblower Statute are Weak

While the SEC whistleblower legislation passed in the wake of the financial crisis, cartel whistleblower legislation has been shot down based on arguments that are really quite weak. They are outlined in a [2011 General Accounting Office report](#). There is concern that a whistleblower witness will lose credibility if he is eligible for a financial reward. But, a whistleblower would generally just “get the ball rolling” and allow subpoenas and search warrants to go out to target companies, providing

evidence that will help develop other witnesses and potential prosecutions. Moreover, in which scenario are consumers better off: When the government has no knowledge of a secret cartel? Or when a cartel is exposed by a whistleblower who will be eligible for a financial reward? Who wouldn't trade a single sherpa for a multitude of masters?

Another concern is that a potential whistleblower reward will lead to many frivolous claims. No need to worry; Antitrust Division attorneys are skilled enough to know the difference between a report of simultaneous price increases and an insider who *knows* about a cartel. The extra resources need to review whistleblower complaints will be more than offset by the resources saved by access to an insider, including an informant who might be motivated to wear a wire.

“Whistleblowers are in a position to sound the gun to let the amnesty race begin.”

Business groups complain that with a whistleblower reward, an employee who learns about cartel behavior may decide to go directly to the DOJ rather than report the information internally, as is the case now with SEC whistleblower complaints, thus undermining corporate compliance programs. That may happen. An employee may reasonably conclude that the “compliance program” is not really working if senior executives are involved in a cartel, and it may be dangerous to report the information internally. But even if the employee does go directly to the government, all is not lost in terms of a company with a legitimate compliance program. A single whistleblower is highly unlikely to be able to prove a cartel beyond a reasonable doubt. If the Antitrust Division wants to credit the compliance program it may offer a favorable plea agreement or even no criminal prosecution at all.

Finally, there is concern that a senior member of a cartel, a “master,” could obtain a whistleblower reward. No, not likely. The first step in becoming a whistleblower for one who has some criminal exposure is to obtain immunity or a non-prosecution/cooperation agreement. The Antitrust Division would simply either not grant non-prosecution protection to an individual who played a central role in the cartel, or it could negotiate an agreement that precludes a very culpable executive from seeking a whistleblower reward or limit the award to the reimbursement of attorney fees.

The Antitrust Division already has a whistleblower program of sorts—its [Corporate Leniency Policy](#). Under this policy, the first corporation (and its cooperating executives) in an investigation to self-report and confess cartel conduct will receive amnesty from prosecution. While the corporation is not paid a bounty, the Antitrust Division has frequently noted that the financial benefit of amnesty to the corporation can run into the hundreds of millions of dollars. Currently corporations can “confess” a cartel before there is even an investigation and get amnesty for the company and its employees. But since one amnesty is available in each cartel investigation, corporations often “hold the line” until there is an indication that the government has sniffed out a cartel. Whistleblowers are in a position to sound the gun to let the amnesty race begin. Whistleblower legislation will be a boost—not a detriment—to the Corporate Leniency Policy.

Conclusion

An antitrust whistleblower statute is needed now. In the wake of Hurricanes Harvey, Irma and Maria, the Antitrust Division and Federal Trade Commission recognized concern that collusion could emerge on a wide scale as rebuilding efforts begin. In a joint statement, the agencies said, [“While natural disasters often bring out the best in human compassion and spirit, they can also lead to unscrupulous individuals and organizations taking advantage of those in need.”](#) Bid rigging on government contracts usually involves the President/owner of a company colluding with competitors and directing estimators to concoct the bogus bids. Isn't it a good idea to incentivize the little guy to come forward and blow the whistle on the big guy? And a whistleblower, with a prospect of monetary reward may be perfectly suited to wear a wire and become a one man “trust-buster” saving the taxpayers from collusive overcharges and the Antitrust Division from lengthy and sometimes fruitless investigations.

Even without cartel whistleblower legislation the Antitrust Division could take steps right now to encourage cartel whistleblowers. Bid rigging on government contracts is nothing more than fraud and is already subject to qui tam litigation filed by a whistleblower. But cartel cases are extremely difficult to prove and take a special skill and experience. If the Antitrust Division made known that it would take a serious look at bid rigging qui tams and intervene when appropriate, a new avenue of exposing (and deterring) collusion on government contracts could emerge. However, broader SEC-style cartel whistleblower legislation is necessary. Allowing a whistleblower to disclose evidence of a cartel, even anonymously at first, will fuel new investigations. The SEC noted “[I]mitation is the sincerest form of flattery, other domestic and foreign regulators have sought to replicate the success of our program.” The objections to a whistleblower receiving an award for a successful cartel prosecution should be set aside. The Supreme Court has called cartels “the supreme evil of antitrust.” Sometimes you have to deal with a little devil to get Satan and his close associates.