

# The Potential Impact of Adding a Whistleblower Rewards Provision to ACPERA

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The U.S. Department of Justice Antitrust Division has called its Corporate Leniency Program (Leniency Program) its “most effective investigative tool,” providing government prosecutors “unparalleled information from cartel insiders about the origins and inter-workings of secretive cartels.”<sup>1</sup> Under the Leniency Program, a successful leniency applicant can avoid criminal prosecution, criminal fines, and prison sentences for its executives.

Despite these benefits, reporting companies still faced the threat of civil claims potentially exposing them to enormous damage awards because of exposure to treble damages and joint and several liability for the conduct of their co-conspirators. To address this strong disincentive to self-report anticompetitive conduct, Congress enacted the Antitrust Criminal Penalty Enhancement Act (ACPERA) in 2004 to further enhance the Leniency Program by eliminating both treble damages and joint and several liability for the leniency applicant if it provides “satisfactory cooperation” to civil claimants.<sup>2</sup> On June 9, 2010, President Obama signed legislation extending ACPERA for another ten years.<sup>3</sup> While this Extension Act modified some provisions of the original Act, Congress delayed acting on two proposed additions to ACPERA—a whistleblower rewards provision and a whistleblower protection provision. Instead, Congress commissioned the Government Accountability Office (GAO) to study and report back on the appropriateness of adding these two provisions.<sup>4</sup>

On July 25, 2011, the GAO issued its report finding that there was no consensus among selected DOJ Antitrust officials<sup>5</sup> and “key stakeholders”<sup>6</sup> regarding the addition of a whistleblower

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<sup>1</sup> Scott D. Hammond, Deputy Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, The Evolution of Criminal Antitrust Enforcement over the Last Two Decades, Remarks Before the 24th National Institute on White Collar Crime 3 (Feb. 25, 2010), available at <http://www.justice.gov/atr/public/speeches/255515.htm>.

<sup>2</sup> Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, §213(b), 118 Stat. 665, 666 (codified as amended at 15 U.S.C. § 1 note). Although the specifics of what constitutes “satisfactory cooperation” are unclear, the statute does state that cooperation includes: (1) “providing a full account to the claimant of all facts known to the applicant . . . that are potentially relevant to the civil action; (2) furnishing all documents or other items potentially relevant to the civil action that are in the possession, custody or control of the applicant;” and (3) “using its best efforts to secure and facilitate . . . cooperation *Id.*”

<sup>3</sup> Antitrust Criminal Penalties Enforcement and Reform Act of 2004 Extension Act of 2010, H.R. 5330, 111th Cong. § 3(a) (2010) (Extension Act).

<sup>4</sup> *Id.*

<sup>5</sup> The GAO “interviewed DOJ Antitrust Division officials and reviewed speeches by division officials . . . ; academic studies; and articles prepared by economists and attorneys on the Antitrust Division’s criminal cartel enforcement efforts.” U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-619, CRIMINAL CARTEL ENFORCEMENT: STAKEHOLDER VIEWS ON IMPACT OF 2004 ANTITRUST REFORM ARE MIXED, BUT SUPPORT WHISTLEBLOWER PROTECTION 52 (July 2011) [hereinafter GAO Report], available at <http://www.gao.gov/new.items/d11619.pdf>. A summary of the Report indicates that as an organization, “DOJ generally agreed with GAO’s findings but did not comment on [GAO’s recommendations].” *GAO Highlights, id.* (second page).

<sup>6</sup> These key stakeholders included seven antitrust attorneys in private practice, seven antitrust attorneys in nongovernmental antitrust organizations, and seven academics who focus on antitrust law and enforcement issues.

rewards provision, but that key stakeholders who were interviewed as part of the GAO's report widely supported adding a whistleblower protection provision.<sup>7</sup> While a few stakeholders believe that a rewards program could motivate whistleblowers to report criminal activity, more than half of the key stakeholders interviewed believed that adding a rewards program could hinder DOJ's enforcement program.<sup>8</sup> Ultimately, the GAO recommended that Congress consider adding a whistleblower protection provision to provide civil remedies for those who face retaliation for reporting criminal antitrust violations.<sup>9</sup> The GAO, however, declined to recommend adding a whistleblower rewards provision. Despite the GAO's recommendations, though, Congress could decide to add a whistleblower-rewards provision to ACPERA at a later date.

### Whistleblower Rewards Programs in Foreign Jurisdictions

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The United States is not the first country to consider adding a whistleblower rewards program to its antitrust enforcement regime. The United Kingdom, South Korea, and Hungary currently have antitrust whistleblower rewards programs in place. In 2008, the UK's Office of Fair Trading (OFT) began offering financial rewards to antitrust informants. The Rewards Program builds on the OFT's leniency program by offering financial rewards to people who have valuable inside information about the existence of a cartel. Under the UK's informant reward scheme, an individual may receive up to £100,000 for providing information on a cartel to the OFT. The amount of the reward depends on a number of factors, including: (1) the value of the information; (2) the amount of harm to the economy and consumers; (3) the effort taken in order to give the information; and (4) the risk taken in order to give the information.<sup>10</sup> The reward is discretionary, so if OFT decides not to use the information, the informant will not get paid.<sup>11</sup> The reward is not available to individuals who have been directly involved in the cartel they are reporting, as those individuals are covered by the UK's leniency program. Furthermore, complainants who simply report their general concerns about possible cartel activity are not able to collect a reward, as the program is meant to apply exclusively to individuals with significant insider information.<sup>12</sup>

In 2002, the Korea Fair Trade Commission (KFTC) introduced its Cartel Informant Reward Program, which provides cash rewards to individual whistleblowers for reporting information on cartels. The original ceiling on the reward was only 20 million won (approximately \$18,780 USD), which was increased to 100 million won (approximately \$93,900 USD) in 2003. The first several years of the program were not considered successful, generating fewer than ten reports in a four-year period.<sup>13</sup> The lack of success has been attributed to the negative perception in Korea about reporting, fear of retaliation, and low cash rewards.<sup>14</sup> In 2005, the KFTC modified the program by increasing the reward to up to 1 billion won (approximately \$1 million USD) and guaranteeing con-

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<sup>7</sup> GAO Report, *supra* note 5, at 36–37.

<sup>8</sup> *Id.* at 38.

<sup>9</sup> *Id.* at 50.

<sup>10</sup> OFFICE OF FAIR TRADING, REWARDS FOR INFORMATION ABOUT CARTELS, <http://www.offt.gov.uk/OFTwork/competition-act-and-cartels/cartels/rewards>.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Byongbae Kim, Dir. General, Competition Bur., Korea Fair Trade Comm'n, Measures to Improve Cartel Detection (Other than Leniency), Remarks Before the ICN Cartel Workshop (Nov. 8, 2005), available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc681.pdf>.

<sup>14</sup> *Id.*

fidentiality by using an enforcement decree under the Monopoly Regulation & Fair Trading Act (MRFTA).<sup>15</sup>

In April 2010, Hungary introduced its Informant Rewards Program to encourage private persons to report anticompetitive activity. Under Hungary's Informant Reward Program, any natural person who has knowledge of a cartel and provides to the Hungarian Competition Authority essential written evidence will receive an award amounting to at least 1 percent, but no more than 50 million forints (approximately \$238,000 USD), of the fine levied against the participants in the cartel.<sup>16</sup> Importantly, parallel application to Hungary's leniency program and the information reward program is prohibited.<sup>17</sup> Thus, if a representative of a cartel requests leniency, he or she is not also entitled to an informant's reward.

### Adding a Whistleblower Rewards Provision

**Proponents' Views.** The general concept of adding a whistleblower rewards provision to U.S. antitrust statutes enjoys support from prominent individuals in the antitrust community, including former FTC Commissioner William Kovacic.<sup>18</sup> The most often cited argument in favor of adding a whistleblower rewards program is that the current leniency program does not offer reporting incentives to people who are not participants in reported activity.<sup>19</sup> Proponents of a whistleblower rewards provision believe that employees who are aware of cartel activity but are not actually involved in the activity are in an ideal position to assist the government in reporting and gathering evidence of anticompetitive conduct.<sup>20</sup> Despite their awareness of the conduct, proponents believe that many employees may fail to report such conduct because of the potential for retaliation from employers, social stigma, and the lack of rewards for the time spent assisting authorities. Proponents believe that a reward is necessary to compensate potential informants for the substantial risk they undertake.<sup>21</sup>

Proponents also argue that offering a reward to informants may increase the cost of colluding because it increases the number of potential informants an employer must "bribe" to keep quiet.<sup>22</sup> Proponents argue that reward programs complement leniency programs because they motivate the colluding firm to detect, report, and stop "bribing" its own informed employees, destabilizing collusion.<sup>23</sup>

<sup>15</sup> *Id.* The amount of the reward is determined by the seriousness of the violation and by the quality of evidence reported.

<sup>16</sup> Geoff Bennett & Balázs Domineck, *Hungary*, in THE EUROPEAN ANTITRUST REVIEW 2012 (2012), <http://www.globalcompetitionreview.com/reviews/37/sections/132/chapters/1396/hungary/>.

<sup>17</sup> *Id.* For more information on Hungary's Informant Reward Program, see, for example, REGULAR QUESTIONS ABOUT THE CARTEL INFORMANT REWARD, [http://www.gvh.hu/gvh/alpha?do=2&st=2&pg=154&m129\\_doc=6429](http://www.gvh.hu/gvh/alpha?do=2&st=2&pg=154&m129_doc=6429).

<sup>18</sup> See William E. Kovacic, *Bounties as Inducements to Identify Cartels*, in EUROPEAN COMPETITION LAW ANNUAL 2006: ENFORCEMENT OF PROHIBITION OF CARTELS 571 (Claus-Dieter Ehlermann & Isabela Atanasiu eds., 2007), available at [http://www.eui.eu/RSCAS/Research/Competition/2006\(pdf\)/200610-COMPed-Kovacic.pdf](http://www.eui.eu/RSCAS/Research/Competition/2006(pdf)/200610-COMPed-Kovacic.pdf); see also William E. Kovacic, *Private Monitoring & Antitrust Enforcement: Paying Informants to Reveal Cartels*, 69 GEO. WASH. L. REV. 766 (2001) [hereinafter *Paying Informants*].

<sup>19</sup> Daniel L. Low & Daniel A. Kotchen, *Rewards Would Help Leniency Plan, Cartel Reporting*, LAW360, June 23, 2009, <http://www.kotchen.com/complaw360-article.pdf>.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Cecile Aubert, Patrick Rey & William E. Kovacic, *The Impact of Leniency and Whistle-Blowing Programs on Cartels*, 24 INT'L J. INDUS. ORG. 1241, 1251–52 (2006); Giancarlo Spagnolo, *Leniency and Whistleblowers in Antitrust*, in HANDBOOK OF ANTITRUST ECONOMICS 259 (Paulo Buccirossi ed., 2008).

<sup>23</sup> *Id.*

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Finally, proponents of adding a whistleblower rewards provision to ACPERA argue that programs, such as the U.S. Civil False Claims Act (CFCA) and antitrust whistleblower rewards programs in the United Kingdom, South Korea, and Hungary, provide both evidence that a rewards program will result increased cartel reporting and a framework for the proposed provision.<sup>24</sup>

Key commentators argue that the qui tam provisions in the CFCA provide a helpful framework for potential rewards and anti-retaliatory provisions in ACPERA.<sup>25</sup> The CFCA allows individual whistleblowers, called “relators,” to file qui tam<sup>26</sup> lawsuits against companies or individuals that have committed fraud against the federal government in return for a fraction of the fines and recovered funds.<sup>27</sup> To do so, the relator files a complaint in federal court, and the DOJ decides whether to intervene. If the DOJ declines to join in the qui tam action, the relator has the right to prosecute the case on his or her own.<sup>28</sup> If the DOJ intervenes, the government takes the lead role and the relator takes on a secondary role.<sup>29</sup> The relator will receive a certain percentage of the government’s recovery if the relator prevails in the action, either through litigation or in a settlement. If the government has intervened in the action, the relator shall receive “at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action.”<sup>30</sup> If the government has not intervened, the relator shall receive an amount “not less than 25 percent and not more than 30 percent of the proceeds.”<sup>31</sup> The CFCA also has a provision that prohibits retaliation against an employee who files claims under the act.<sup>32</sup>

**Opponents’ Views.** While DOJ Antitrust Division officials acknowledge that adding a rewards program could result in greater cartel detection, these officials believe that the potential benefits would be outweighed by a number of disadvantages that could hinder DOJ’s enforcement program.<sup>33</sup> Indeed, their main concern is the threat to the DOJ’s criminal cases because jurors may question the credibility of a witness who stands to benefit financially from a successful enforcement action.<sup>34</sup>

<sup>24</sup> See Low & Kotchen, *supra* note 19. No empirical evidence exists supporting the argument that these three jurisdictions have seen an increase in cartel enforcement.

<sup>25</sup> See Kovacic, *Paying Informants*, *supra* note 18.

<sup>26</sup> A qui tam provision would not work in the criminal context because that would allow a whistleblower to bring a criminal lawsuit against a cartel member on behalf of the government and be rewarded for a portion of the penalties. The DOJ has the sole authority to prosecute criminal antitrust cases so any incentive program added to ACPERA would have to be a rewards provision and not a qui tam provision. See GAO, *supra* note 6, at 38.

<sup>27</sup> Civil False Claims Act, 31 U.S.C. §§ 3729 et seq.

<sup>28</sup> 31 U.S.C. § 3730(c)(3).

<sup>29</sup> 31 U.S.C. § 3730(c)(1).

<sup>30</sup> 31 U.S.C. § 3730(d).

<sup>31</sup> *Id.*

<sup>32</sup> 31 U.S.C. § 3730(h)(1)–(2) (“Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, or agent on behalf of the employee, contractor, or agent or associated others in furtherance of other efforts to stop 1 or more violations of this subchapter. Relief under paragraph (1) shall include reinstatement with the same seniority status that employee, contractor, or agent would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys’ fees. An action under this subsection may be brought in the appropriate district court of the United States for the relief provided in this subsection.”).

<sup>33</sup> See GAO, *supra* note 6, at 38–45.

<sup>34</sup> *Id.* at 38–39.

The GAO report identified several other concerns by DOJ Antitrust Division officials and key stakeholders on how a whistleblower rewards program could hinder the DOJ's enforcement program.<sup>35</sup> These stakeholders, including antitrust officials, expressed concern that a rewards program could (1) result in claims that do not lead to criminal prosecution because they lack sufficient information or are fraudulent claims; (2) undermine internal compliance programs by offering incentives for employees to report to the government instead of internally reporting; and (3) require additional government resources to administer the program.<sup>36</sup>

In addition to the concerns identified in the GAO report, are several other considerations weigh against a whistleblower rewards provision. For example, the DOJ's Leniency Program currently provides strong incentives to those have the most valuable information about cartel activity to come forward. The Leniency Program has been successful because those who potentially face punishment are the individuals most likely to know about cartel activity. Conversely, those who are not likely to be punished for cartel activity are less likely to be aware of the cartel activity because cartel behavior is by nature very secretive and non-participants are unlikely to have critical information to assist in an investigation.

Additionally, a whistleblower rewards program may also deter productive cooperation among firms, such as procompetitive information sharing. This type of cooperation could be mistaken for collusion by employees, and due to the cash reward incentive, an employee might report the activity. If employees have the incentive to report perceived cartel activity instead of reporting the matter internally, companies engaged in legal procompetitive cooperation may be discouraged from doing so in the future for fear of becoming entangled in an antitrust investigation.

The current leniency program gives the DOJ the flexibility to adjust fines and penalties to best serve the public interest. However, a whistleblower rewards program could complicate this process. For example, consider this scenario: An employee, motivated by a whistleblower rewards program, reports cartel activity at his company. The DOJ then launches an investigation, and the employee's company agrees to cooperate. However, the company is on the brink of bankruptcy and a large fine could put it out of business, resulting in thousands of lost jobs. The DOJ may conduct an "ability to pay" analysis, possibly resulting in a greatly reduced fine or no fine at all. However, in this scenario the whistleblower has been promised a generous portion of any penalty the company pays. In this situation, the whistleblower may be compensated very little, if at all, for his or her efforts, negating incentives for future whistleblowers and ultimately decreasing the effectiveness of such a program.

Because the Leniency Program and ACPERA already provide strong incentives for companies to self-report cartel activity quickly upon discovery, it is unlikely that the whistleblower rewards provision is necessary for cartels to be exposed. In fact, a whistleblower rewards provision might actually undermine the Leniency Program by making self-reporting nearly impossible. If a company discovers or uncovers possible cartel activity, conducting an internal investigation may be nearly impossible when employees have financial incentives to report the conduct to the government before the company does.

Finally, there is insufficient information to assess the effectiveness of the whistleblower reward programs in the UK, South Korea, and Hungary. For example, since the UK introduced its rewards program in 2008, there has been little publicity about the program and it is unclear whether the

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<sup>35</sup> *Id.* at 38–45.

<sup>36</sup> *Id.*

OFT has made any payment to an individual pursuant to the program.<sup>37</sup> Furthermore, to the extent these countries do report an increase in the rate of the detection of cartels, it is possible that the increased rate of detection is linked more to the corporate leniency programs in these countries than the informant reward programs. Because these programs are relatively new, it remains to be seen if they provide a long-term benefit to their respective countries' antitrust regimes. More data on the rewards actually being granted, the quality of evidence procured, and views among companies and individuals that the programs in fact act as a deterrent are necessary to properly evaluate their effectiveness.

### Conclusion

Adding a whistleblower rewards provision is likely to be a counter-productive addition to U.S. antitrust policy. It is unlikely that employees who are not engaged in cartel activity will be able to provide the Antitrust Division with the vital information needed to prosecute a cartel. The implementation of such a policy may both eliminate procompetitive collaboration among firms and result in higher internal costs to firms. Furthermore, with a whistleblower rewards program, the financial interests of the whistleblowers could supersede both the actual individuals damaged by the cartel and general public policy considerations. ●

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<sup>37</sup> In February 2011, following the launch of EC investigations into suspected price-fixing and market allocation by truck manufacturers, OFT appealed for further information in its civil and criminal investigations by offering the possibility of rewards of up to £100,000 for individuals that came forward with information. A public and specific appeal by OFT in a particular case appears to be unprecedented in the UK. See OFFICE OF FAIR TRADING, OFT REQUEST FOR INFORMATION ON SUSPECTED CARTEL ACTIVITY INVOLVING MANUFACTURERS OF COMMERCIAL VEHICLES, [http://www.offt.gov.uk/about-the-offt/legal-powers/enforcement\\_regulation/Cartels/commercial-vehicle-criminal/request/](http://www.offt.gov.uk/about-the-offt/legal-powers/enforcement_regulation/Cartels/commercial-vehicle-criminal/request/).