Fried Frank Antitrust & Competition Law Alert®

Having an Effective Antitrust Compliance Program Is More Important Than Ever

Over the past two decades, having robust compliance programs has become increasingly important across a wide range of enforcement matters. In addition to helping avoid violations before they start, having effective compliance programs in place can be critical when prosecutors are making charging or settlement determinations. Companies that maintain robust internal procedures also have more opportunities to self-report or take other proactive measures in response to illegal conduct by their employees. The advantages of having a comprehensive compliance program are especially acute in the antitrust arena, given the considerable benefits available under DOJ's antitrust Leniency Program. Having effective compliance programs will be even more crucial with the recent enactment of the Criminal Antitrust Anti-Retaliation Act – a new law that sends a strong message to whistleblowers and their employers that employees are free to report antitrust violations without fear of reprisal.

The Criminal Antitrust Anti-Retaliation Act

On December 23, 2020, President Donald J. Trump signed into law a new bipartisan bill, the Criminal Antitrust Anti-Retaliation Act of 2019 (the "Act"), S. 2258, 116th Cong., enacted as Pub. L. 108-237, Title II, Subtitle A, § 216.[1] The Act seeks to protect whistleblowers in criminal antitrust cases by prohibiting an employer (*i.e.*, "a person, or any officer, employee, contractor, subcontractor, or agent of such person") from retaliating against a covered individual (*i.e.*, "an employee, contractor, subcontractor, or agent of an employer") who provides information regarding misconduct that violates the antitrust laws.[2] This Act is the first legislation to afford whistleblower protections to private-sector employees who report criminal antitrust violations or assist in related federal investigations or prosecutions.

The Act, which amends the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 ("ACPERA"), Pub. L. 108-237, Title II, Subtitle A, §§ 211-215, 118 Stat. 661, makes it unlawful for an employer to "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against a covered individual in the terms and conditions of employment" for lawfully reporting potential misconduct.[3] The Act's whistleblower protections extend to covered individuals who provide information regarding conduct that the covered individual reasonably believes to be a violation of (i) the criminal antitrust laws, or (ii) another criminal law committed in conjunction with a potential violation of the antitrust laws or in conjunction with an antitrust investigation by DOJ.[4] Under the Act, a covered individual may report

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1 Press Release, DOJ, Antitrust Div., *Justice Department Applauds Passage of the Criminal Antitrust Anti-Retaliation Act* (Dec. 24, 2020).

2 Act §§ 216(a)(1), (a)(3)(B),(C).

3 Act § 216(a)(1).

4 Act § 216(a)(1)(A)(i)-(ii).

misconduct to the Federal Government, a person with supervisory authority, or a person working for the employer with authority to investigate, discover or stop the misconduct.[5]

The Act's protections do not apply to any covered individuals who have engaged in the underlying criminal conduct. Specifically, the Act does not cover individuals who planned and initiated (i) a violation or attempted violation of the antitrust laws; (ii) a violation or attempted violation of another criminal law in conjunction with a violation or attempted violation of the antitrust laws; or (iii) an obstruction or attempted obstruction of an antitrust investigation by the DOJ.[6]

Available Relief

Until now, nonculpable individuals reporting or assisting with the investigation of criminal antitrust violations lacked a civil remedy for retaliation. Under the new Act, however, whistleblowers may seek relief administratively by filing a complaint with the Secretary of Labor within 180 days of the retaliatory action or, if the Secretary of Labor does not issue a final decision within 180 days, by bringing an action in the appropriate federal district court.[7] If successful, a covered individual is "entitled to all relief necessary to make the covered individual whole," including (i) reinstatement with the same seniority status; (ii) back pay with interest; and (iii) compensation for any special damages, such as litigation costs, expert witness fees, and attorneys' fees.[8]

Notably, unlike other federal whistleblower programs, the new antitrust bill does not include a monetary reward, or bounty, for whistleblowers who provide information that leads to the successful prosecution of criminal antitrust cases. DOJ's Antitrust Division has historically taken the position that whistleblower rewards could jeopardize DOJ criminal cases because of witness credibility issues, given that "jurors may not believe a witness who stands to benefit financially from successful enforcement action against those he implicated."[9] Senator Patrick Leahy (D-Vt.), the Act's co-sponsor, has commented that the Act was "carefully drafted to ensure that whistleblowers have no economic incentive to bring forth false claims."[10]

The Antitrust Division's Leniency Program

The Act's new protections are merely the latest in a series of enforcement-focused legal protections and policy initiatives designed to facilitate the reporting and prosecution of antitrust violations. For nearly 30 years, the Antitrust Division has relied heavily on its Leniency Program to detect and prosecute illegal antitrust activity. The Leniency Program is a non-statutory policy directive that affords the first company or individual to self-report criminal antitrust violations immunity from criminal prosecution, criminal fines, and incarceration. Immunity is generally granted so long as the disclosing party, among other things, did not coerce another party to participate in the illegal activity and was not the leader in, or originator of, the activity; reports the wrongdoing with candor and completeness; and provides full, continuing and complete cooperation with the Division's investigation.

The Antitrust Criminal Penalty Enhancement and Reform Act of 2004

Although the Leniency Program provides immunity from criminal charges, it does not offer a shield against civil liability. To provide greater incentive for companies and individuals to self-report and

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5 Act § 216(a)(1)(A); *see also* Act § 216(a)(3)(D) (defining Federal Government as "a Federal regulatory or law enforcement agency" or "any Member of Congress or committee of Congress").

6 Act § 216(a)(2).

7 Act § 216(b)(1).

8 Act § 216(c)(1)-(2).

9 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 39 (2011).

10 158 Cong. Rec. S5736 (daily ed. July 31, 2012) (statement of Sen. Leahy).

cooperate, Congress passed ACPERA. One of the key provisions of ACPERA is its "detrebling relief," which limits a leniency applicant's civil liability to actual, rather than treble, damages in return for cooperation in both the resulting criminal case, as well as any subsequent civil suit based on the same conduct.[11]

On June 22, 2020, ACPERA, which initially contained a five-year sunset provision that Congress extended twice, expired without reauthorization or amendment. Three days later, on June 25, 2020, the House of Representatives and Senate passed identical bills, H.R. 7036 and S. 3377, permanently authorizing ACPERA and repealing the sunset provision. On October 1, 2020, President Trump signed the bills into law as the Antitrust Criminal Penalty Enhancement and Reform Permanent Extension Act.[12]

Both the Leniency Program and ACPERA provide strong incentives for individuals involved in the criminal antitrust activity to cooperate. However, until the recent enactment of the Criminal Antitrust Anti-Retaliation Act, there has been no civil remedy for retaliation against innocent third parties who report suspected antitrust violations. It is too soon to tell what the long-term effects of this new law will be, but it is likely to incentivize more individuals to report misconduct who might not have before. The new Act will also require companies to carefully consider whether they have the right compliance structures in place to anticipate and encourage internal reporting – allowing companies to move quickly in the event that the conduct at issue would otherwise allow the company to benefit from the Division's Leniency Program or other corporate cooperation incentives.

Corporate Compliance Programs

The Antitrust Division recently announced a new policy that will complement the existing Leniency Program, ACPERA and the newly enacted Criminal Antitrust Anti-Retaliation Act. Under the new policy, the Division will now consider an organization's antitrust compliance program at the charging and sentencing stages of a criminal antitrust investigation and prosecution. This new approach reflects the reversal of the Division's former policy, which had stated "that credit should not be given at the charging stage for a compliance program."[13] Another significant change to the Division's Leniency Program is that companies that are not first in but nonetheless self-report may now receive credit for an effective compliance program in the form of a deferred prosecution agreement.[14] Previously, only non-prosecution agreements were available under the Leniency Program. The Division intends, however, to limit non-prosecution agreements to companies that are the first to self-report and also meet the Corporate Leniency Program requirements.[15]

To provide greater transparency into its new policy and analysis of compliance programs, the Division released a detailed guidance document entitled "Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations."[16] This guidance discusses how the Division will assess a corporation's antitrust compliance program at the charging stage, as well as the considerations that may warrant sentence reductions for companies with effective antitrust compliance programs. As stated in the guidance document, the Division has adopted a case-by-case approach to its evaluation of compliance

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11 ACPERA § 213, 118 Stat. at 666-67.

12 Press Release, DOJ, Antitrust Div., *Department of Justice Applauds President Trump's Authorization of The Antitrust Criminal Penalty Enhancement and Reform Permanent Extension Act* (Oct. 1, 2020).

13 Press Release, DOJ, Antitrust Div., *Antitrust Division Announces New Policy to Incentivize Corporate Compliance* (July 11, 2019).

14 *See* Speech, DOJ, Antitrust Div., *Assistant Attorney General Makan Delrahim Delivers Remarks at the New York University School of Law Program on Corporate Compliance and Enforcement* (July 11, 2019).

15 *See id*.

16 DOJ, Antitrust Div., *Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations* (July 2019).

programs. Any credit afforded to companies will depend on their programs' effectiveness in preventing, detecting and addressing violations of the antitrust laws.

The Division does not follow a strict, formulaic approach to determining the effectiveness of antitrust compliance programs. Instead, it asks prosecutors to consider the following three "fundamental" questions: (1) "Is the corporation's compliance program well designed?"; (2) "Is the program being applied earnestly and in good faith?"; and (3) "Does the corporation's compliance program work?" The guidance document also identifies, and explains in detail, several factors that DOJ prosecutors should consider when evaluating the effectiveness of an antitrust compliance program, including: (1) the design and comprehensiveness of the program; (2) the culture of compliance within the company; (3) responsibility for, and resources dedicated to, antitrust compliance; (4) antitrust risk assessment techniques; (5) compliance training and communication to employees; (6) monitoring and auditing techniques, including continued review, evaluation, and review of the antitrust compliance program; (7) reporting mechanisms; (8) compliance incentives and discipline; and (9) remediation methods. Ultimately, prosecutors must determine whether a compliance program "is merely a 'paper program' or whether it was designed, implemented, reviewed, and revised, as appropriate, in an effective manner."[17]

Once there is a decision to charge a company for antitrust violations, the guidance document encourages Division prosecutors to consider recommending a sentence reduction for companies with effective antitrust compliance programs. Under the U.S. Sentencing Guidelines (the "Guidelines"), the existence and effectiveness of a compliance program may entitle a company to a three-point reduction in its culpability score;[18] impact a company's eligibility for probation;[19] and influence the amount of the recommended fine, either within the Guidelines range or below the Guidelines range in extraordinary circumstances.[20]

The Guidelines provide, however, that the three-point culpability score reduction for an effective compliance program does not apply in cases where "the organization unreasonably delayed reporting the offense to appropriate governmental authorities."[21] There is also a rebuttable presumption in the Guidelines that a compliance program is not effective when "high-level personnel" (*i.e.*, a director or executive officer) or "substantial authority personnel" (*i.e.*, an individual with authority to negotiate or set price levels or negotiate or approve significant contracts) "participated in, condoned, or [were] willfully ignorant of the offense."[22]

Taken together as a whole, all of these legal requirements and policy incentives make it more important than ever for companies to have compliance programs that are robust and responsive. The Division has offered tangible benefits for companies with compliance programs that meet or exceed regulatory requirements. Companies should be sure to have in place an active and effective compliance program that demonstrates a clear and unambiguous commitment to antitrust compliance. Under the Division's new policy and the most recent Act, such programs will undoubtedly help companies avoid or mitigate potentially harsh penalties for criminal antitrust violations.

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17 *See id*. at 2-4 (quoting DOJ, *Justice Manual* § 9-28.800).

18 United States Sentencing Commission, *Guidelines Manual* ("U.S.S.G."), § 8C2.5(f)(1) (Nov. 2018).

19 *See* U.S.S.G. § 8D1.1.

20 *See* U.S.S.G. § 8C2.8.

21 U.S.S.G. § 8C2.5(f)(2).

22 U.S.S.G. § 8C2.5(f)(3)(A)–(C).

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