Morgan Lewis

on the Criminal Antitrust Anti-Retaliation Act of 2019's Implications for

CORPORATE WHISTLEBLOWER AND CORPORATE COMPLIANCE PROGRAMS

On December 23, 2020, the Criminal Antitrust Anti-Retaliation Act (the "Act") became law after three prior failed attempts at enactment between 2012 and 2020. The Act establishes protections for whistleblowers who report—either internally to a supervisor or individual with investigative authority, or externally to a federal regulatory or law enforcement agency or a member of Congress—what they reasonably believe to be criminal antitrust violations, crimes ancillary to criminal antitrust violations, or obstruction of DOJ criminal antitrust investigations. These protections are unavailable if the whistleblower "planned and initiated" the underlying crime or attempted crime.[1]

The Act incentivizes "Covered Individuals" to report criminal antitrust violations by providing new protections against employer retaliation. This new reporting option may bring to DOJ's attention criminal antitrust violations that previously went undetected or that were detected later. Companies can help protect against greater liability and antitrust exposure by (i) implementing an effective whistleblower program that encourages Covered Individuals to report suspected criminal antitrust violations internally, rather than to the government, and (ii) ensuring their antitrust compliance program satisfies the requirements set out in the Antitrust Division's July 2019 criteria for "Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations." Implementing these two best practices provides companies with the greatest flexibility when responding to allegations of criminal antitrust violations.

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[1] Criminal Antitrust Anti-Retaliation Act of 2019, Pub. L. No: 116-257 (2020). For background on the Act, *see* Mark L. Krotoski & Bernard W. Archbold, Prospects Improve for Enactment of the Criminal Antitrust Anti-retaliation Act Of 2019, Competition Policy International (Dec. 15, 2019), https://www.morganlewis.com/pubs/2019/12/prospects-improve-for-enactment-of-the-criminal-antitrust-anti-retaliation-act-of-2019-competition-policy-international.

Q1. Who is covered by the new law?

- The law extends protection for employees, contractors, subcontractors, and agents (cumulatively "Covered Individuals") who are "discharge[d], demote[d], suspend[ed], threaten[ed], harass[ed], or in any other manner discriminate[d] against" for whistleblowing disclosures that the Covered Individual reasonably believes amounts to criminal violation of Section 1 or 3 of the Sherman Act, associated non-antitrust crimes, or attempts to obstruct a criminal DOJ antitrust investigation.

- *Exclusions from coverage*:

    - Covered Individuals who both planned *and* initiated the underlying criminal antitrust violations (including an ancillary violation or obstruction of a DOJ investigation) are not afforded protection under the Act.
    - Individuals not covered by the Act may still report criminal antitrust violation in which they are complicit under the DOJ's Leniency Program and may be protected against prosecution and criminal penalties if their employer seeks and receives leniency.

Q2. What is the DOJ Leniency Program and how does it impact criminal antitrust cases?

- The Antitrust Division's Leniency Program, established in 1978 and revised in 1993, allows the first company or individual involved in antitrust criminal conduct to self-report and avoid criminal convictions, criminal fines, and prison if the program requirements are met.
- Under the program, time is of the essence, as only the first leniency applicant to obtain a marker and satisfy all conditions, including full cooperation, receives leniency for the reported antitrust crime. All other participants may be subject to criminal prosecution and penalties.
- Over the last few decades, many of the criminal antitrust cases prosecuted by the DOJ stemmed from the Leniency Program.

Q3. What are the potential penalties for criminal violations of Section 1 or 3 of the Sherman Act?

- The maximum criminal penalties under the Sherman Act, 15 U.S.C. §§ 1 and 3, may include fines up to $100 million for corporations, and imprisonment up to 10 years and fines up to $1 million for individuals.
- While this is the statutory maximum sentence, the ultimate sentence is determined by the court under the Sentencing Guidelines and applicable sentencing factors and will depend on the particular facts and circumstances. (Note that under a separate statute, the Alternative Fines Act, the DOJ has obtained higher fines based on the ultimate gain or loss under the conduct.)
- The DOJ and FTC can file civil enforcement actions.
- Additionally, private civil lawsuits may be filed seeking treble damages.

Q4. Why is it best to implement whistleblower protocols that incentivize internal reporting?

- Companies maintain maximum flexibility regarding how to plan a defense when criminal antitrust violations are reported internally. This allows the company to consult outside counsel

and organize a defense strategy, assess whether to seek leniency, and prepare for an investigation by DOJ (and any enforcement officials in other affected jurisdictions).

- Companies often lose the benefit of lead time to plan a defense when a whistleblower reports potential criminal antitrust violations to DOJ or other federal government representatives. In these instances DOJ's investigation may be sufficiently advanced, or another conspirator involved in the alleged criminal antitrust violation may have already sought and received the first leniency marker, precluding the company from taking advantage of the Leniency Program's protections against criminal fines and treble damages.

Q5. What safeguards can a company implement to encourage whistleblowers to report internally?

- The keys to an effective whistleblower program are support from company leadership and employee trust that the system will work and that the company will transparently investigate whistleblower reports and address any wrongdoing exposed without reprisals against a whistleblower.

- The following are some steps companies can take to improve their whistleblower programs:

    - "An anonymous, confidential, and accessible mechanism for covered individuals to report potential antitrust law violations, such as a reporting hotline or a third-party encrypted reporting system that permits direct, but anonymous communication between the whistleblower and the company's legal or compliance department.
    - A code of conduct and employee handbook that includes clear, step-by-step whistleblower reporting procedures for employees to understand and follow to report anonymously suspected criminal antitrust activity.
    - Transparency and independence in the procedures that the company's legal and compliance departments follow when investigating a whistleblower report.
    - Training for employees to recognize prohibited antitrust conduct that may create antitrust risk, and understand the company's whistleblower reporting and investigative process."[2]

Q6. How can companies make changes to their whistleblower program that also improve the effectiveness of their compliance program under DOJ's criteria for the "Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations?"

- DOJ's Antitrust Division issued criteria for the "Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations" in July 2019, which provided a nine point framework for assessing antitrust compliance programs.[3]

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[2] Mark L. Krotoski & Bernard W. Archbold, Double-Check Whistleblower Programs to Prep for Antitrust Anti-Retaliation Act, BLOOMBERG LAW (Jan. 7, 2021), https://news.bloomberglaw.com/antitrust/double-check-whistleblower-programs-to-prep-for-antitrust-anti-retaliation-act.

[3] *See also* Mark L. Krotoski, Landmark Antitrust Division Policy to Incentivize Corporate Compliance and Mitigate Antitrust Risk, BNA's Antitrust & Trade Regulation (Oct. 2019), https://www.morganlewis.com/-/media/files/publication/outside-publication/article/antitrustpolicytomitigaterisk.pdf.

- An effective antitrust whistleblower program should enhance each of the nine compliance program considerations put forward by DOJ. These include assessing if (i) the compliance program is thoughtful and comprehensive, (ii) a top-down corporate compliance culture exists at the company, (iii) a compliance program is sufficiently well-resourced and independent, (iv) the antitrust compliance policies addresses industry and employee-specific antitrust risks, including by using quality data sources, (v) company employees receive antitrust trainings that explain how to identify anticompetitive conduct (price fixing, bid rigging, or market or customer allocation, among others) and to distinguish procompetitive competitor collaborations (vi) the antitrust compliance program is periodically reviewed and revised to account for changes circumstances, (vii) employees are able to effectively report potential violations of the antitrust laws, including through a whistleblower program, (viii) the compliance program incentivizes reporting and disciplines obstacles to reporting, like retribution, and (ix) the compliance program helps effectively remediate violations.
- Appropriate incentives and effective safeguards for antitrust whistleblower encourage reporting and can support each of the nine objectives highlighted in DOJ's guidance regarding corporate compliance programs.

Q7. What are the Act's available remedies, and by what means can a whistleblower pursue those remedies?

- The act provides that a successful complainant is entitled to seek reinstatement along with backpay, "special damages," and attorneys' fees and costs (including expert witness costs).
- To pursue a claim under the Act, a whistleblower must file a complaint with the Occupational Safety and Health Administration (OSHA). In order to succeed, a whistleblower will need to show (first during OSHA's investigation and later during litigation) that: (1) he or she engaged in protected activity under the Act; (2) that he or she was subject to an adverse employment action; and (3) that his or her protected activity was a contributing factor to the adverse employment action.
    - If the whistleblower does not make the above prima facie case, he or she will not prevail under the Act and is not entitled to any remedy.
    - Even if the whistleblower does make the above prima facie case, a respondent will avoid liability under the act—and the whistleblower is not entitled to any remedy—if the respondent can show that it would have taken the same action in the absence of protected activity.

Q8. How can Morgan Lewis help?

- Morgan Lewis has experienced antitrust and labor and employment counsel who have been assisting companies and organizations establish corporate antitrust compliance programs and providing support on investigations by DOJ as well as other enforcement agencies in the E.U. and Asia into alleged violations of various jurisdiction's cartel prohibition laws.

- Morgan Lewis's interdisciplinary whistleblower team has extensive experience litigating these types of matters both before the DOL and in courts across the country. With respect to complaints filed under the Act, members of our whistleblower team would seamlessly partner with our antitrust practitioners to deliver across-the-board subject matter expertise.

Morgan Lewis

- Morgan Lewis lawyers have experience under the Antitrust Division Leniency Program and analogous programs worldwide, both as former Antitrust Division prosecutors/agency officials and in assisting numerous companies confronting criminal and civil antitrust issues.
- Morgan Lewis can analyze the issues, identify potential criminal or civil violations, and discuss options to mitigate or address issues concerning whistleblower reports, the underlying potentially criminal conduct, and how best to prepare a criminal and civil defense strategy.

- Morgan Lewis has assisted clients with the following:

    - Updating companies' whistleblower protocols and corporate compliance programs to ensure they include best practices to mitigate antitrust issues before they arise and to provide companies the greatest flexibility following an allegation of antitrust violations.

    - Compliance training and policy development for HR, in-house counsel, executives, and other company leadership about adherence to the DOJ's July 2019 criteria for "Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations."

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