Antitrust

Double-Check Whistleblower Programs to Prep for Antitrust Anti-Retaliation Act

By Mark Krotoski and Bernard Archbold

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Companies should consider the new Criminal Antitrust Anti-Retaliation Act's implications for their whistleblower protocols, as it would protect from retaliation employees who report corporate antitrust crimes internally or to the federal government. Morgan, Lewis & Bockius LLP attorneys Mark Krotoski and Bernard Archbold have some recommendations.

The Criminal Antitrust Anti-Retaliation Act of 2019 (the act) was enacted on Dec. 23. Companies should consider the new law's implications for their whistleblower protocols and complete an independent review of their antitrust compliance program

Companies can act now to enhance the likelihood that whistleblowers report potential antitrust violations internally so that they can be investigated appropriately, effectively respond to any whistleblower reports of antitrust violations, and act quickly to assess and consider the Department of Justice Antitrust Division Leniency Program's protections and criminal enforcement process.

The act provides protections to non-complicit employees, contractors, subcontractors, and agents (covered individuals) who report conduct that he or she "reasonably believes to violate antitrust laws," another related criminal violation, or obstruction of a DOJ antitrust investigation.

Whistleblowers alleging retaliation under the act may pursue remedies including "all relief necessary to make the covered individual whole," including reinstatement, back pay with interest, and any special damages (including litigation costs, expert witness fees, or reasonable attorneys' fees).

Statutory protections are not available if the individual "planned and initiated" the violation of the antitrust laws or related conduct.

Updating Whistleblower Protocols

Companies should update existing whistleblower protocols to comply. Under the act, “antitrust laws” include violations of Section 1 and Section 3 of the Sherman Act. Conduct may include agreements to fix prices, rig bids, allocate markets or customers, along with “naked no-poaching” and wage-fixing agreements.

Criminal antitrust penalties can be severe. Individuals may face up to 10 years in prison and fines up to $1 million per offense. For example, this year a former canned tuna company CEO was sentenced to serve 40 months in prison and fined $100,000 following his jury trial conviction.

Companies may face criminal fines up to $100 million per offense, or twice the company’s gains or customers’ losses, whichever is greater. In several cases, the DOJ has obtained fines in the hundreds of millions of dollars.

The act recognizes new avenues to report suspected violations of antitrust law to either (a) the federal government, (b) an internal supervisor, or (c) an internal employee authorized to investigate the potential criminal conduct and to terminate it.

If a company receives a report of potential antitrust violations from a whistleblower, the company can conduct a thorough internal investigation, determine if the allegations are substantiated by evidence, respond to the report, and assess the company’s options under the DOJ’s leniency program.

If employees do not feel confident in reporting to the company, they can instead report directly to a federal regulatory or law enforcement agency, member of Congress or congressional committee.

Without knowledge about the suspected violation, the company may confront a criminal investigation based on a whistleblower report. Federal antitrust investigations may start with dawn raids and grand jury subpoenas and can take up to several years to complete. Costly, extensive follow-on civil litigation may also result.

Updating Policies

Considering this new law, companies should review and update their existing whistleblower policies. Key elements include:

- 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.

Finally, support from company executives and management for the whistleblower program is essential to its success. Employees must understand and trust the company process if they are going to use it.

Assessing Leniency as an Option

For more than 25 years, the DOJ's Antitrust Division Leniency Program has allowed the first qualifying company or individual that self-reports a criminal antitrust violation to avoid criminal convictions, criminal fines, and incarceration of executives. Many significant criminal cases started under the leniency program.

If a company discovers criminal antitrust exposure, a careful assessment of the options under the Leniency Program should be made with experienced antitrust counsel.

Time is of the essence as only the first qualifying self-report obtains the immunity benefits provided by the leniency program. Non-qualifying companies and executives may face criminal prosecution and severe criminal penalties.

New Standards for Compliance Programs

In 2019, the DOJ identified new, specific elements it reviews to determine if a company's antitrust compliance program is "effective." As we have noted, programs that do not contain the elements identified by the DOJ may not qualify for credit with the DOJ at the charging stage of a criminal investigation.

Such credit may include the possibility of entering into a deferred prosecution agreement rather than a criminal plea or indictment, and a reduced sentence. Companies should consult with experienced counsel to assess the effectiveness of their antitrust compliance program.

Companies can proactively use the new law to stay ahead of potential antitrust issues and avoid the costs, penalties and criminal and civil litigation that may follow a report of an antitrust law violation and investigation. The new act provides companies with the opportunity to comply with the whistleblower standards, promote antitrust compliance, and detect and mitigate the risks from an antitrust whistleblower report.

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