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## Rewards Would Help Leniency Plan, Cartel Reporting

*Law360, New York (June 23, 2009)* -- Congress recently approved a one-year extension of the Antitrust Criminal Penalty Enhancement and Reform Act ("ACPERA"), giving Congress time to more fully evaluate the merits of ACPERA and any potential revisions before considering a more permanent reauthorization.

The extension also gives Congress an opportunity to consider any related legislative changes that would further ACPERA's policy goal of encouraging voluntary disclosure of information related to antitrust violations.

DOJ's leniency program, which ACPERA bolstered, creates incentives for those who potentially face punishment for their roles in antitrust violations to cooperate with the DOJ in return for leniency and reduced fines.

While the leniency program has been described as the Antitrust Division's "most effective investigative tool," the incentives created by the leniency program are too narrowly focused because they only provide incentives to companies and individuals who believe that they are likely to be punished for their role in antitrust violations. The DOJ leniency program does not create affirmative incentives for other individuals to report cartel activity.

A substantial number of individuals, often sales representatives or executives, become aware that their employers are engaged in cartel activity, but choose not to report them. These potential whistleblowers, often current employees of a member of the cartel, are in an ideal position to assist the government in reporting and gathering evidence of wrongdoing.

But such individuals vastly underreport the wrongdoing because of strong disincentives against reporting: Whistleblowers typically face retaliation from their employers, are socially stigmatized, and are unrewarded for the time they spend assisting authorities. According to one study, over 80 percent of whistleblowers who reported misconduct to outside authorities were fired.

Conversely, if potential whistleblowers fail to report or participate in antitrust violations, they are likely to be rewarded with a share of antitrust overcharges — through increased salaries, bonuses, promotions, or other economic rewards.

To properly incentivize potential antitrust whistleblowers, affirmative incentives must outweigh the substantial risk of retaliation that whistleblowers face. The highly successful qui tam provisions of the False Claims Act (“FCA”), 31 U.S.C. §§ 3729-3733, have shown that insiders will report unlawful activities if sufficient incentives are provided, such as a percentage of the government’s recovery.

Last July, the DOJ observed in a letter to the Chairman of the House Judiciary Committee that DOJ “continue[s] to support vigorously” the qui tam provisions, under which the United States had recovered over \$12 billion since 1986. DOJ further stated that “the [FCA’s] incentives ... are necessary to ensure that relators come forward, especially in light of the large personal hardships many must endure in bringing these suits.”

Congress has also expressed its support for the FCA recently, passing by a wide margin legislation strengthening the FCA. See Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617 (enacted May 20, 2009).

We propose that legislation be enacted to reward individuals for reporting unlawful cartel activity by providing them a percentage of any antitrust penalties or fines collected by the federal government. Similar proposals have been championed by economists, academics, and others, including FTC Commissioner William Kovacic, and similar antitrust whistleblower rewards programs have been enacted in England and South Korea.

Modeled after the qui tam provisions of the False Claims Act, our proposed legislation would provide rewards only if the whistleblower were the first individual to provide a written disclosure to the DOJ revealing the existence of unlawful cartel activity.

The reward would be set ex post in a court hearing depending on how much the whistleblower contributed to the government’s prosecution, and would be reduced or eliminated if the whistleblower participated in the scheme. Informers would be protected by anti-retaliation safeguards, and their attorneys would be eligible for attorneys’ fee awards for their assistance.

A paradigm example demonstrating the need for affirmative antitrust whistleblower incentives is the story of Martin McNulty, a whistleblower in the packaged ice industry.

Mr. McNulty alleges that he was terminated from his job because of his refusal to participate in his employer’s conspiracy to allocate markets and customers. After he was fired, his former employer learned that Mr. McNulty planned to speak to authorities, and the employer allegedly offered to more than double his salary if he kept quiet and returned to work.

Instead of accepting the offer and becoming relatively wealthy, Mr. McNulty declined the offer and was allegedly blacklisted by the industry, causing economic difficulties for himself and his family, including losing his home to foreclosure.

In an interview last year, Mr. McNulty stated, “I never imagined that taking a principled stand would cause as much hardship to my family as we’ve endured over the past three years,” and he observed that he is not certain whether he would advise other potential whistleblowers to make the same decision that he made.

In contrast to the hardships that Mr. McNulty has endured as a whistleblower, the government is likely to recover tens of millions of dollars in criminal fines, partly as a result of Mr. McNulty’s assistance, which included reporting the unlawful activity and tape-recording phone calls and wearing a wire. Mr. McNulty’s cooperation has led one company to plead guilty to violating Section 1 of the Sherman Act, and has led to an ongoing investigation of other companies in the packaged ice industry.

Providing individuals like Mr. McNulty with a percentage of any antitrust-related government criminal fines or disgorgement would provide a much-needed incentive to potential whistleblowers, and could substantially increase the reporting of unlawful cartel activity. Like qui tam rewards under the False Claims Act, antitrust whistleblower rewards could help the United States recover billions of dollars that it would not have recovered otherwise. Moreover, antitrust whistleblower rewards could benefit consumers across the country in the form of many billions of dollars in avoided overcharges.

## **Text of Proposed Legislation**

(a) Sharing of Antitrust Fines with Individual Sources — In any action in which the United States recovers a monetary fine for a violation of the Federal Antitrust Laws, an Individual Source may apply to the District Court in which the action was filed or, if no litigation has been initiated, a federal district court of competent jurisdiction, for a share of the monetary award within ninety days from the date of entry of the order imposing such fine.

(b) Federal Antitrust Laws defined — For purposes of this section, “Federal Antitrust Laws” means the Sherman Act, the Clayton Act, and antitrust matters brought under the Federal Trade Commission Act.

(c) Individual Source defined — For the purposes of this section, “Individual Source” means an individual who: (1) has knowledge of evidence or information on which allegations of the violation of the Federal Antitrust Law(s) in subsection (a) are based; and (2) prior to the filing of a criminal, civil, or administrative action involving the same allegations or transactions, the individual was the first to have served a written disclosure of specific information that initiates a government investigation or, if a government investigation has been initiated, substantially contributes to a government investigation and/or prosecution.

(d) Award to Individual Source —

(1) Upon application from an Individual Source pursuant to subsection (a), a court may award the Individual Source at least 15 percent but not more than 25 percent of the fines imposed, depending on the extent to which the Individual Source substantially contributed to a government investigation or action. Where the action resulting in the fines at issue is one where the United States initiated a preliminary investigation of the conduct before receiving the information from the Individual Source, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the fines, taking into account the significance of the information and the role of the Individual Source in advancing the case. Any payment to a person under this paragraph shall be made from the fines collected by the United States. An Individual Source shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant(s).

(2) If the court finds that the Individual Source planned, initiated, or actively participated in the violation of the Federal Antitrust Law(s) at issue, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) of this subsection, taking into account the role of that person in advancing the government investigation and/or litigation and any relevant circumstances pertaining to the violation. If the Individual Source is convicted of criminal conduct arising from his or her role in the violation of the Federal Antitrust Law(s) at issue, that person shall not receive any share of the fine, nor shall such person receive an award of costs or fees.

(3) An Individual Source shall not be eligible for an award pursuant to subsection (a) if the information was provided against a current or former member of the armed forces and the information was obtained in the course of the individual source's service in the armed forces.

(4) If the United States initiates an unsuccessful investigation based on information provided by an Individual Source, and the court finds that the information provided by the Individual Source was both false and was provided primarily for purposes of harassment, the court may order the Individual Source to pay defendant's reasonable attorneys' fees and expenses.

(e) Original Source Requirement —

(1) No person shall be entitled to a reward under this section where the material allegations that the person provided to the government were based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accountability Office report, hearing, audit, or investigation, or from the news media, unless the person bringing the action is an Original Source of the information.

(2) For purposes of this paragraph, “Original Source” means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the United States before requesting a reward under this section that is based on the information.

(f) Government not liable for certain expenses — The Government is not liable for any expenses that a person incurs in seeking an award under this section.

(g) Relief From Retaliatory Actions —

(1) IN GENERAL — 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 an effort to provide information to the United States under this section, including investigation for, testimony for, or assistance in an action filed or to be filed by the United States under the Federal Antitrust Laws.

(2) RELIEF — 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.

--By Daniel L. Low and Daniel A. Kotchen, Kotchen & Low LLP

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*The opinions expressed are those of the author and do not necessarily reflect the views of Portfolio Media, publisher of Law360.*