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New Incentives, New Rewards: What You Need to Know About the Antitrust Division's First-Ever Whistleblower Rewards Program

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By: James W. Attridge, Daniel K. Oakes, Tiffany Rider

Cartel conduct tends to occur in secret. As a result, the Antitrust Division has long focused on augmenting its abilities to identify conspiracies and to incentivize self-reporting of conduct that may otherwise go undetected. Traditionally, its Leniency Policy — by which those who self-report cartel conduct and meet the program's requirements receive non-prosecution protection — was its core carrot. Now there's another. A new whistleblower rewards program, announced in partnership with the United States Postal Service (USPS), offers the possibility of a financial reward for reporting antitrust conspiracies to fix prices, rig bids, or divide markets. The potential reward is significant: up to 15-30% of resulting criminal fines or recoveries for voluntarily providing the Antitrust Division with original information about antitrust and related violations.

Here's what you need to know about the Antitrust Division's game-changing whistleblower rewards program:

How will the Antitrust Division administer the program?

The Division has established a website to facilitate public reporting and will designate attorneys and staff to vet submitted reports. Payment to whistleblowers comes through USPS, however, whose Office of the Inspector General (OIG) is a longtime law enforcement partner of the Antitrust Division with a surprisingly broad investigative mandate.

Why is the program in partnership with USPS?

Because payment comes from USPS, the program is limited to fines and penalties arising out of matters affecting the Postal Service, its revenues, or property. That's because USPS has a statutory ability to collect fines and penalties obtained from violations of law affecting the Postal Service and to share up to half of those penalties with informants.[1]

The bar for what "affects" USPS appears to be low. As a result, it would be incorrect to assume that this is a narrow program. A Memorandum of Understanding implementing the new program explains that the violation must lead to the conclusion that "the Postal Service has suffered an identifiable harm," but "the harm need not be material or otherwise pose any substantial detriment to the Postal Service." USPS is America's second-largest employer, with $79.5 billion in operating revenue, and 8,515 properties. Its scale, scope, and employee base are likely to mean broad jurisdiction. Prior USPS OIG antitrust cases illustrate a broad view of USPS's mandate. For instance, USPS partnered with the Antitrust Division to investigate price fixing of generic drugs.

One area to watch is labor-related collusion, where effects may be harder to tie to USPS than price fixing. Even there, however, both USPS and DOJ have an incentive to promote this new program by rewarding whistleblowers wherever possible.

How much can whistleblowers receive?

The potential reward is significant: the Antitrust Division has sole discretion over the reward amount, but the program creates a presumption that at least 15% of the recovered criminal fine will be rewarded, up to a maximum of 30% of the recovered fine. Considering fines for antitrust violations have reached as high as $925 million, whistleblowers could potentially collect bounties in the millions of dollars.

If the investigation results in a criminal fine (or equivalent recovery from a deferred prosecution or nonprosecution agreement) of at least $1 million, the Antitrust Division will approve USPS's collection of a portion of that fine or penalty. In turn, USPS will pay the whistleblower.

What requirements must whistleblowers meet to be eligible for a financial reward?

An eligible whistleblower is any person who: (1) voluntarily; (2) provides original information; (3) regarding an "Eligible Criminal Violation," including anonymously through an attorney. However, a person who acted as the leader or originator of the illegal conduct, or who forced another person to participate, will not be eligible for the program. In fact, the online whistleblower submission form notes that individuals who believe they have been involved in a violation can apply for leniency. Importantly, the leader, originator, or coercion exclusions match those under the Leniency Policy, which are narrowly construed to incentivize leniency applicants.

Voluntarily: A whistleblower report is considered to be provided voluntarily when "specific, credible, and timely" information about possible violations is directly communicated to one of the relevant law enforcement agencies *before a formal demand*, such as a grand jury subpoena, is issued that would compel the whistleblower's testimony or other document production revealing the violation. This information could potentially also yield Type A leniency, which

requires prompt reporting before the Antitrust Division has begun an investigation into the conduct, but some daylight may exist between those two standards.

Original Information: To be considered "original information," the whistleblower submission must be truthful and complete, and not already known to the relevant law enforcement agencies. Most importantly, it must be derived from independent, personal knowledge, and not from publicly available sources, including allegations from a court or a governmental report or investigation. Such personal knowledge may include "experiences, communications and observations in business or social interactions, or from independent analysis of public or private data." Whether and when "independent analysis" of bidding or pricing data, for example, will be sufficient to earn benefits under the program will be interesting to watch. The program carves out from eligibility several types of potential reporters, subject to certain caveats, for example, information learned by company agents such as attorneys (through privileged communications) or by company compliance officers.

Eligible Criminal Violation: The standard criminal antitrust offenses are presumptively eligible, including criminal violations of Sections 1, 2, and 3 of the Sherman Act, violations affecting government procurement, and other federal criminal violations that attempt to effectuate or conceal Sherman Act violations. However, the Antitrust Division holds ultimate discretion to determine whether a potential or actual violation of a federal criminal statute is eligible. That is potentially different from and broader than the Leniency Policy, which only applies to violations of Section 1 or 3(a) of the Sherman Act, along with other offenses "in furtherance of" the conspiracy to fix prices, rig bids, or allocate markets.

What does this mean for companies and their compliance efforts?

The chances that cartel conduct will be detected have just increased dramatically.

With significant financial incentives now available, employees (and even third parties) have stronger motives to report suspected antitrust issues. This places a greater importance than ever before on enhancing internal compliance mechanisms, such as: implementing, monitoring, and acting upon *internal* whistleblower complaints, updating antitrust training content, monitoring internal conduct, and promoting a culture that rewards raising concerns internally before individuals might take external action.

Indeed, the whistleblower program further encourages internal reporting. The Antitrust Division will credit the time of a whistleblower's internal disclosure to compliance officials as the date of the disclosure to the Antitrust Division *if* the whistleblower can demonstrate that they reported their information to the Antitrust Division within 120 days of the internal corporate report. Companies have long been in a race for leniency, and the possibility of a whistleblower reward expands that race and raises its stakes.

It also goes a step further. If a whistleblower internally reports misconduct and the company fails to further report it to DOJ within 120 days, executives who learned about the violation but would otherwise have been ineligible become potentially eligible for a whistleblower reward. In short, the program further emphasizes prompt corporate self-disclosure when learning of potential antitrust violations.

Companies should also review their own whistleblower protection mechanisms and ensure anti-retaliation safeguards are in place to avoid hampering individual reporting.

What does this mean for the Division's Leniency Policy?

The Leniency Policy remains intact and is designed for companies and individuals involved in antitrust misconduct to self-report in exchange for immunity. The new whistleblower program is aimed at outsiders or insiders not directly involved in the conduct—such as employees, former employees, competitors, customers—who can report violations and receive financial rewards. The new whistleblower program adds significant urgency and pressure to a company to quickly report illegal conduct to the DOJ, or risk losing the race to report not only to a competitor, but now also to a whistleblower who may trigger a government inquiry that eliminates the potential to achieve Type A leniency.

Are individuals who participated in a violation eligible whistleblowers?

Yes. There is no general eligibility bar based on participation in the misconduct. But individuals are ineligible if they coerced another party's participation or were clearly the leader or organizer of the activity, a preclusion that would also render the individual ineligible for individual leniency.

Are companies eligible whistleblowers?

No. The program applies to "individuals." But companies that receive internal reports can use that information to self-report under the Leniency Policy.

[1] *See* 39 U.S.C. § 2601(a)(2) (the Postal Service "shall collect and remit fines, penalties, and forfeitures arising out of matters affecting the Postal Service."); 39 U.S.C. § 404(a)(7) (the Postal Service is authorized "to pay one-half of all penalties for violations of law affecting the Postal Service, its revenues, or its property, to the person informing for the same.").

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James W. Attridge
Daniel K. Oakes
Tiffany Rider

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