BLOW THE WHISTLE! HOW BRINGING WHISTLEBLOWER REWARDS TO ANTITRUST WOULD HELP CARTEL ENFORCEMENT

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TABLE OF CONTENTS

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INTRODUCTION

You are a secretary in a real estate firm in the suburbs. You have a spouse, two children, and a mortgage. The firm you work for is part of a local trade association encompassing many real estate agencies in the area. Your boss, along with other high-ranking members of the association, organized a plan to fix brokerage fees for all association members, thus allowing each real estate firm to obtain artificially high profits by avoiding direct competition. You are aware of the plan through conversations with your boss as well as internal memoranda sent between association members. You are not sure whether the agreement is illegal because of its secretive nature. What's more, your boss previously sent emails threatening members if they lowered brokerage fees.[1] You pause to consider whether you should contact authorities, and even who to contact . . . .

Currently, the secretary of the real estate firm lacks any good option. The United States Department of Justice (DOJ) Antitrust Division (the Division) does not have a whistleblower rewards program to compensate innocent individuals willing to report conduct in violation of criminal antitrust laws. It seems unlikely that an individual placed in similar circumstances as the secretary would risk his or her job, well-being, and future by reporting anticompetitive conduct without some financial incentive.[2] Furthermore, as those directly involved in underground cartels[3] often

1. For a case with similar facts, *see generally* United States v. Foley, 598 F.2d 1323 (4th Cir. 1979).

2. *See* Andreas Stephan, *Is the Korean Innovation of Individual Informant Rewards a Viable Cartel Detection Tool?* 15–18 (ESRC Ctr. for Competition Policy, Working Paper No. 14-3, 2014)

stand to make financial gains from collusion—through bonuses, promotions, etc.—they are less likely than someone in the secretary's position to come forward unless the threat of criminal investigation is present.[4]

Under its present-day structure, the Division's Corporate Leniency Program (Leniency Program) grants the first applicant of an unlawful cartel willing to report anticompetitive conduct amnesty from criminal prosecution and criminal fines.[5] Further, Congress passed the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA)[6] to expand amnesty incentives by eliminating treble damages and joint and several liability if an applicant provides "satisfactory cooperation"[7] with civil claimants.[8]

By implementing these measures, the Division can prosecute a larger number of cartels by motivating cartel members to confess rather than face criminal and civil repercussions.[9] However, Congress omitted two proposed provisions to ACPERA, which would have provided innocent third-party whistleblowers with financial compensation and protection.[10]

In centralizing cartel enforcement around amnesty, the Division has only targeted individuals and corporations involved in violating antitrust laws.

(discussing the social and financial threats whistleblowers face).

3. A cartel is a group of independent firms whose goal is to increase profits by fixing prices, limiting output, dividing sales territories, or otherwise impeding on competition in violation of criminal antitrust laws. *See infra* Part II.A.

4. *See generally* Cécile Aubert et al., *The Impact of Leniency and Whistleblowing Programs on Cartels*, 24 INT'L J. OF INDUS. ORG. 1241, 1243 (2006).

5. *See* U.S. DEP'T OF JUSTICE ANTITRUST DIV., LENIENCY PROGRAM, https://www.justice.gov/atr/leniency-program (last visited Aug. 10, 2016).

6. Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA), Pub. L. No. 108-237, § 213(b), 118 Stat. 665, 666–67 (codified as amended at 15 U.S.C. § 1) (2012).

7. ACPERA states that "satisfactory cooperation" is met when a court determines that an applicant (1) provides a full account to a claimant of all the known facts relevant to the civil action; (2) furnishes all documents or other items in the applicant's possession that are relevant to the proceeding; (3) makes best efforts to partake in interviews, depositions, and testimony at trial in connection with the civil action. *Id.*

8. *See id.*; Kevin R. Sullivan et al., *The Potential Impact of Adding a Whistleblower Rewards Provision to ACPERA*, ANTITRUST SOURCE 1 (2011).

9. *See* Joshua P. Davis & Robert H. Lande, *Toward an Empirical and Theoretical Assessment of Private Antitrust Enforcement*, 36 SEATTLE UNIV. L. REV. 1269, 1272 (2013) (describing the Division's anti-cartel program as "appropriately acclaimed"); *see also* Christopher R. Leslie, *Replicating the Success of the Antitrust Amnesty*, 90 TEX. L. REV. 171, 172 (2012) (referring to the Division's post-'93 program as "wildly successful" and citing it as the most successful program in U.S. history at uncovering large-scale commercial crimes).

10. *See* Sullivan et al., *supra* note 8, at 1.

ACPERA and the Division's Leniency Program are not directed at family members, friends, or employees of cartels, like the secretary, who may have valuable information about cartel behavior but lack the incentive or protection needed to disclose such information to DOJ.[11]

Part I of this Comment examines the Division's mission and authority; it also surveys the Division's history, specifically focusing on its Leniency Program. Part II briefly looks at the nature of price-fixing cartels, their economic impact, and the government's ability to detect them. Part III provides an overview of whistleblower programs at DOJ, the Securities and Exchange Commission (SEC), and abroad. Part IV discusses the pros and cons of implementing a rewards program in antitrust and looks at previous statements by experts in the field. Finally, Part V elaborates on measures the Division should take to implement a whistleblower program.

I. THE DIVISION'S MISSION AND HISTORY

A. Mission and Goals

Within DOJ, the Division has sole authority to bring criminal actions for violations of federal antitrust laws.[12] The Division defines its mission as the "promotion and maintenance of competition in the American economy."[13] Through its work, the Division seeks to ensure that government action is "procompetitive or not unnecessarily anticompetitive."[14] As stated in the Division's manual, the main goals and functions of the Division include enforcement of the Federal antitrust and other laws related to the protection of marketplace competition.[15] The Division also advocates for procompetitive policies before other government branches, including the development and presentation of legislative proposals relating to antitrust laws.[16] Addi-

11. *See* Gordon Schnell, *Bring in the Whistleblowers and Pay Them—The Next Logical Step in Advancing Antitrust Enforcement*, 11 COMPETITION POL'Y INT'L, Nov. 2013, at 2.

12. *See* 28 C.F.R. § 0.40 (2017); *see also* WILLIAM BURNHAM, INTRODUCTION TO THE LAW AND LEGAL SYSTEM OF THE UNITED STATES 615 (5th ed. 2011); ALBERT A. FOER, AM. ANTITRUST INST., THE FEDERAL ANTITRUST COMMITMENT: PROVIDING RESOURCES TO MEET THE CHALLENGE 6–18 (1999); E. Thomas Sullivan, *The Antitrust Division as a Regulatory Agency: An Enforcement Policy in Transition*, 64 WASH. U. L. Q. 997, 1002–18 (1986).

13. U.S. DEP'T OF JUSTICE ANTITRUST DIV., MANUAL I-2, [hereinafter ANTITRUST DIVISION, MANUAL] https://www.justice.gov/atr/file/761166/download (last updated Apr. 2015).

14. *Id.*

15. *Id.* at 2–3.

16. *Id.*

tionally, the Division participates with other agencies in actions involving antitrust laws or policies.[17]

B. Establishing the Division

The Division's origins can be traced to March 1903, when President Theodore Roosevelt and Attorney General Philander Knox appointed an Assistant to the Attorney General to take charge of all lawsuits filed under the antitrust and interstate commerce laws.[18] With the growth of the economy in the first half of the 20th Century, it became clear that DOJ needed its own group of specialists in antitrust to handle the evolving and increasing caseload in competition enforcement.[19] In 1933, under President Franklin D. Roosevelt and Attorney General Homer S. Cummings, DOJ established the Antitrust Division.[20]

Experts generally view the appointment of Thurman Arnold as head of the Division in 1937 as a pivotal moment in antitrust enforcement.[21] Under Arnold, the Division's budget increased considerably, the number of lawyers more than doubled from 59 to 144, and economists were added to the Division for the first time.[22] Consequently, the number of processed complaints rose markedly.[23] Arnold's time at the Division, and the organizational and policy changes that he made, are widely believed to mark the beginning of the modern Antitrust Division.[24]

On an institutional level, antitrust enforcement grew from Arnold's time through the 1970s.[25] At that point, however, conservative reform began to assert itself at the Federal Trade Commission (FTC), the Division, and in academic circles like the Chicago school of economics.[26] As a result, the country slowly became comfortable with the idea of deregulating certain industries such as airlines, trucking, railroads, and oil.[27] This sentiment would carry itself into the next decade with the election of President

17. *Id.*

18. *Id.* at 2.

19. *Id.*

20. *Id.*

21. *See, e.g.*, SUZANNE WEAVER, DECISION TO PROSECUTE: ORGANIZATION AND PUBLIC POLICY IN THE ANTITRUST DIVISION 28 (1977).

22. *Id.* at 28–29.

23. *Id.* at 29.

24. *Id.*

25. *See* FOER, *supra* note 12, at 10–15.

26. *Id.*

27. *Id.* at 15–18.

Ronald Reagan and his appointments at the FTC and DOJ.[28]

Although enforcement decisions at the Division have shifted over the years, according to the political leanings of the Executive branch, generally speaking, cartel prosecution has remained a bipartisan goal.[29] For instance, in the 1980s, under an unquestionably conservative era at the Division, the Reagan antitrust regime focused on horizontal price-fixing schemes, while vertical relationships went unrestrained, and predatory pricing was exceptionally rare and unworthy of prosecution.[30]

C. The Division's Leniency Program

The Division's Leniency Program is the cornerstone of its cartel enforcement initiative.[31] First enacted in 1978, and later revised in 1993 and 1994,[32] the Leniency Program allows a corporation to avoid a criminal conviction and fines by being the first to confess its involvement in a criminal antitrust violation while cooperating with the Division.[33]

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28. *Id.*

29. *See* Marlene Koury, *Making It Easier to Whistle While You Work*, LAW360 (Feb. 16, 2012, 2:00 PM), http://www.law360.com/articles/305643/making-it-easier-to-whistle-while-you-work.

30. *See* FOER, *supra* note 12, at 6–18.

31. *See* U.S. DEP'T OF JUSTICE, CORPORATE LENIENCY POLICY [hereinafter LENIENCY POLICY], https://www.justice.gov/atr/corporate-leniency-policy (last updated July 29, 2015); Koury, *supra* note 29.

32. Prior to 1993, the Leniency Program was responsible for roughly one case per year; however, after the 1993 amendments, the program was responsible for more than twenty cases per year, with fines totaling $5 billion over the next ten years. *See* Sae Ran Koh & Jinook Jeong, *Leniency Program in Korea and its Effectiveness*, 10 J. OF COMPETITION L. & ECON. 1, 2 (2014). The present-day success of the Leniency Program can be credited to three major changes in the 1993 overhaul: (1) leniency is now automatic for qualifying companies so long as they are the first to report; (2) leniency may still be available even if cooperation begins after an investigation is started; and (3) all officers, directors, and employees of an applicant who come forward and work with the Division are protected from criminal prosecution. *See* JAMES M. GRIFFIN, DEPUTY ASSISTANT ATT'Y GEN., U.S. DEP'T OF JUSTICE, THE MODERN LENIENCY PROGRAM AFTER TEN YEARS: A SUMMARY OVERVIEW OF THE ANTITRUST DIVISION'S CRIMINAL ENFORCEMENT PROGRAM (Aug. 12, 2003), https://www.justice.gov/atr/speech/modern-leniency-program-after-ten-years-summary-overview-antitrust-divisions-criminal; *see also* U.S. DEP'T OF JUSTICE, LENIENCY POLICY FOR INDIVIDUALS, [hereinafter LENIENCY POLICY FOR INDIVIDUALS] https://www.justice.gov/sites/default/files/atr/legacy/2006/04/27/0092.pdf (last visited Aug. 10, 2017); LENIENCY POLICY, *supra* note 31.

33. U.S. DEP'T OF JUSTICE ANTITRUST DIV., FREQUENTLY ASKED QUESTIONS

Through the Leniency Program, the Division may offer amnesty to a corporation that comes forward to confess a criminal antitrust violation before the Division starts its investigation.[34] The Division will offer leniency if DOJ has not already received information regarding the criminal activity, and the corporation stops its participation in the illegal scheme.[35] The corporation must then make restitution where possible and cooperate fully with the Division.[36] The confession must also be a corporate act and not the isolated confessions of individual executives.[37] Lastly, to obtain leniency, the corporation must not have led the cartel nor convinced others to participate.[38]

Furthermore, leniency is still available after the Division has begun its investigation when an applicant is the first cartel member to come forward, and DOJ does not already have information against the applicant that is likely to result in a conviction.[39] In such an event, the corporation must cease illegal activity before discovery, make restitution where possible, and cooperate fully with the Division.[40]

By most accounts, the Leniency Program is a major success and has led to the breakup of numerous major international price-fixing schemes, resulting in the government recovering billions of dollars in fines and sending dozens of executives to prison.[41] In the United States, companies faced fines totaling over $5 billion for antitrust violations between 1996 and 2010, with over 90% of such fines tied to the participation of leniency applicants.[42] When it started in 1978, the Leniency Program was the only one of

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REGARDING THE ANTITRUST DIVISION'S LENIENCY PROGRAM AND MODEL LENIENCY LETTERS (2008), https://www.justice.gov/atr/file/810001/download. For a brief history of the Division's Leniency Program, see Constance K. Robinson & Kilpatrick Stockton, *Get-Out-Of-Jail-Free Cards: Amnesty Developments in the United States and Current Issues*, 8 SEDONA CONF. J. 29, 30-33 (2007).

34. *See* LENIENCY POLICY, *supra*, note 31.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*; *see also* DOUGLAS BRODER, U.S. ANTITRUST LAW AND ENFORCEMENT 185 (2010).

39. *See* LENIENCY POLICY, *supra* note 31.

40. *Id.*

41. *See* SCOTT D. HAMMOND, DEPUTY ASSISTANT ATT'Y GEN., DEP'T OF JUSTICE, RECENT DEVELOPMENTS, TRENDS, AND MILESTONES IN THE ANTITRUST DIVISION'S CRIMINAL ENFORCEMENT PROGRAM (Mar. 26, 2008), https://www.justice.gov/atr/file/519651/download.

42. *See* SCOTT D. HAMMOND, DEPUTY ASSISTANT ATT'Y GEN., DEP'T OF JUSTICE, THE

its kind in the world of antitrust enforcement; however, presently there are more than fifty similar programs worldwide.[43]

D. ACPERA and Potential Whistleblower Reform

Despite the benefits of the Leniency Program, until 2004 reporting corporations still faced sizable civil repercussions, leaving them open to enormous damages because treble damages are often available in antitrust suits, as well as joint and several liability for a co-conspirator's conduct.[44] To resolve this issue and improve enforcement, Congress passed ACPERA in 2004, giving accepted Leniency Program applicants amnesty from treble damages and joint and several liability in civil actions if they provide civil claimants with "satisfactory cooperation."[45] In 2010, President Barack Obama signed legislation extending ACPERA until 2020.[46]

Congress, however, omitted the only third party whistleblower provisions of ACPERA because of a general lack of consensus among experts in the field: one provision offered whistleblowers protection, while the other offered whistleblowers rewards for stepping forward.[47] Before rejecting the provisions, Congress commissioned the Government Accountability Office (GAO) to study their appropriateness and provide an extensive report.[48] The report found that there was no consensus among officials in the Division, or among antitrust scholars and practitioners, regarding a rewards provision; however, a whistleblower protection provision was enthusiastical-

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EVOLUTION OF CRIMINAL ANTITRUST ENFORCEMENT OVER THE LAST TWO DECADES 3 (Feb. 25, 2010), https://www.justice.gov/atr/file/518241/download.

43. *See* Jesse W. Markham, Jr., *The Failure of Corporate Governance Standards and Antitrust Compliance*, 58 S.D. L. REV. 499, 512 (2013); *see also* BRENT SNYDER, DEPUTY ASSISTANT ATT'Y GEN., DEP'T OF JUSTICE, REMARKS AT THE SIXTH ANNUAL CHICAGO FORUM ON INTERNATIONAL ANTITRUST 1 (June 8, 2015), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-brent-snyder-delivers-remarks-sixth-annual-chicago (stating that "the Corporate Leniency Program revolutionized cartel enforcement, led to the successful prosecution of many long-running and egregious international cartels, and served as a model for leniency programs subsequently adopted in dozens of jurisdictions around the world.").

44. Antitrust Criminal Penalty Enhancement and Reform Act of 2004 Extension Act, Pub. L. No. 111-190, § 3(a), 124 Stat. 1275 (2010); *see also* Sullivan et al., *supra* note 8, at 1.

45. ACPERA, Pub. L. No. 108-237, § 213(b), 118 Stat. 665, 666–67 (codified as amended at 15 U.S.C. § 1) (2012).

46. *See* Sullivan et al., *supra* note 8, at 1.

47. *Id.*

48. *Id.*

ly welcomed.[49]

Although Congress chose not to pass the whistleblower provisions in light of the GAO's report, its recognition of the need for enforcement reform when dealing with cartels was nonetheless laudable. Moreover, the Division's mission to maintain competition, as carried out through its Leniency Program, indicates that incentivizing individuals can lead to an increase in cartel prosecution.[50] Therefore, an enticing whistleblower rewards program would be in line with the Division's current outlook on enforcement practices. After discussing the nature of price-fixing cartels, this Comment will delve into policy debates surrounding whistleblower rewards in greater depth.

II. THE PROBLEM WITH PRICE-FIXING CARTELS

A. A Basic Understanding of How Cartels Function

Generally speaking, price fixing involves an agreement between competing sellers to maintain prices at a certain level rather than competing to determine the price.[51] Although the Division prosecutes a number of offenses as criminal violations of the Sherman Antitrust Act,[52] including market allocation and bid-rigging schemes, price fixing is by far the most common form of conduct the Division criminally prosecutes.[53] Over 90% of criminal actions brought by the Division are for price fixing, and 90% of price-fixing cases are criminal, rather than civil, actions.[54]

Horizontal price fixing often involves an agreement among rival firms to artificially raise the price or restrict the output to increase profits collectively.[55] Although raising prices may cause each cartel member to lose sales, if the cartel is successful, lost sales are more than outweighed by additional profits a cartel member makes through selling each unit at a rate higher

49. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-619, CRIMINAL CARTEL ENFORCEMENT: STAKEHOLDER VIEWS ON IMPACT OF 2004 ANTITRUST REFORM ARE MIXED, BUT SUPPORT WHISTLEBLOWER PROTECTION 36–37 (2011) [hereinafter STAKEHOLDER VIEWS], http://www.gao.gov/assets/330/321794.pdf.

50. *See* Hammond, *supra* note 42.

51. *See Price Fixing*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-competitors/price-fixing (last visited Aug. 10, 2017).

52. Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (2012).

53. *See* JOHN M. CONNOR, GLOBAL PRICE FIXING 419 (2d ed. 2007).

54. *Id.*

55. *Id.* at 21, 25.

than direct competition would dictate.[56] For example, in a town with only two donut shops, the donut store owners may agree to collectively raise the price of their donuts from $2.00 to $2.50 per donut, knowing full well that on average only seventeen—instead of the previous twenty—donuts will now be sold on a given day due to the increase in price. Although each store has lost sales, it has increased its revenue from $40.00 to $42.50.

The harm in such an instance is that the $2.50 of additional revenue each seller makes per day by raising the price of donuts is money that would have stayed with consumers in a competitive market. Furthermore, a smaller number of donuts are being purchased than would otherwise be the case but-for the price increase. This results in an allocative efficiency loss—also known as deadweight loss—and injures society by restricting socially beneficial transactions.[57]

B. The Impact of Cartels on Consumers

Although the financial effect of price fixing in the example above is small to make the concept easily understood, consumers lose billions of dollars a year through massive price-fixing schemes.[58] In the famous vitamins cartels, which involved a global conspiracy to raise the price of human and animal supplements like vitamins A, C, and E, the defendants agreed to pay U.S. consumers more than $1 billion in damages.[59] In extreme instances, price-fixing cartels have been successful in raising the price of goods 60%–70% through collusion.[60] Furthermore, price fixing can injure consumers by reducing innovation and purchasing options, since cartels no longer need to innovate or diversify once they have apportioned sales amongst themselves.[61]

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56. *See* Thomas A. Piraino, Jr., *Regulating Oligopoly Conduct Under the Antitrust Laws*, 89 MINN. L. REV. 9, 16, 16 n.33 (2004).

57. *See* Christopher R. Leslie, *Antitrust Damages and Deadweight Loss*, 51 ANTITRUST BULL. 521, 521 (2006).

58. *See* CONNOR, *supra* note 53, at 467 (stating that between 1989 and 1999 consumers globally lost a total of $10.9 billion dollars because of detected price-fixing cartels in the sales of lysine, citric acid, and bulk vitamins alone).

59. *See* Griffin, *supra* note 32, at 2.

60. *Id.*

61. For instance, the Supreme Court previously noted that a group of doctors' attempt to set a ceiling for fees charged for health services provided to customers could have considerable non-price effects. *See* Arizona v. Maricopa Cty. Med. Soc'y, 457 U.S. 332, 348 (1982). Such restraints provided the same financial gains to all doctors, regardless of their skillset or ability to implement innovative procedures in individual cases, which disincentiv-

C. Market Structure

Price fixing is much more likely to take place in an oligopoly, i.e., an industry with a small number of sellers.[62] In an oligopoly only a few sellers need to reach an agreement to fix prices; whereas, in general, in a competitive market encompassing many sellers, it is harder to reach an agreement because more firms may refuse to collude or else agree and later undercut the cartel's price increase through selling at a price below the agreed-upon figure.[63] Nevertheless, if a price-fixing cartel is highly effective,[64] the members of the cartel will succeed in reaping profits close to what a monopolist would experience in the same industry.[65]

D. Proving Intent and the Need for Cartel Enforcement Reform

Overt agreement that coordinates pricing and raises prices violates antitrust laws.[66] Tacit coordination—when one firm follows another's change in price absent an agreement—is not unlawful.[67] As the Supreme Court previously stated, price fixing is not a strict liability crime but rather requires intent in a criminal suit.[68] Not surprisingly, competition authorities find it challenging to determine whether a price increase is the result of an overt agreement or simply tacit coordination.[69]

Because price fixing continues in practice, though there is very little recidivism among convicted cartels, the Division's goal in penalizing cartels is general deterrence.[70] Even so, scholars have estimated that detection levels for price-fixing cartels are anywhere from 10%–20%, indicating that the

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ized experimentation. *Id.* The majority also noted that the restraint may create entry barriers to the market, further diminishing the potential for medical innovations. *Id.*

62. *See* CONNOR, *supra* note 53, at 19–20.

63. *See* Piraino, Jr., *supra* note 56, at 16.

64. *See* CONNOR, *supra* note 53, at 22–23 (stating that in order to be successful, every cartel must (1) agree on a way to apportion sales among cartel members; (2) prevent members of the cartel from cheating, e.g., by selling at a lower price point; and (3) bar entry, or take advantage of existing barriers to entry, so that new firms cannot enter the market and undercut the cartel's fixed price).

65. *Id.* at 21–22.

66. *See* United States v. U.S. Gypsum Co., 438 U.S. 422, 443 (1978).

67. *See* CONNOR, *supra* note 53, at 21.

68. *See U.S. Gypsum Co.*, 438 U.S. at 443.

69. *See* Piraino, Jr., *supra* note 56, at 13.

70. *See, e.g.*, *Antitrust Modernization Commission Hearings on Criminal Remedies* at 5, 6–7 (Nov. 2015) (statement of Scott D. Hammond, Deputy Assistant Att'y Gen., Dep't of Justice), https://www.justice.gov/sites/default/files/atr/legacy/2009/06/29/247499.pdf.

majority of cartels are getting away with price fixing despite the Division's best efforts.[71] Therefore, the Division needs to consider alternative avenues for detection. Before examining what the impact of adding a whistleblower rewards program would have on cartel enforcement, it is worth looking at how similar rewards programs have impacted enforcement in their respective fields.

III. CURRENT WHISTLEBLOWER PROGRAMS

A. Dodd–Frank Act

Congress passed the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank) in 2010 in response to the economic crisis from 2007–2010.[72] Dodd–Frank addressed a number of important issues: it consolidated regulatory agencies and established oversight committees for institutions with high systemic risks; it also applied more regulations to financial markets—such as regulations regarding highly risky transactions.[73] Generally speaking, Dodd–Frank implemented consumer protection reforms and addressed the dire need for institutional mechanisms in the event of a future financial crisis.[74]

Dodd–Frank's whistleblower provision applies to any form of securities violation, such as insider trading, fraudulent reporting, and breaches of the Foreign Corrupt Practices Act of 1977 (FCPA).[75] Whistleblower incentives under Dodd–Frank, however, only apply to information culled from the whistleblower's independent knowledge and cannot be known to the relevant governmental agency through any other means.[76]

SEC whistleblowers, who remain anonymous by law, receive 10%–30%

71. *See* Maurice E. Stucke, *Morality and Antitrust*, 2006 COLUM. BUS. L. REV. 443, 459 (2006) (stating that the likelihood a cartel will be detected is less than 10%); *see also* Christopher R. Leslie, *Trust, Distrust and Antitrust*, 82 TEX. L. REV. 515, 655 (2004) (stating that 80% of cartels in existence go undetected).

72. *See* Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376 (2016); *see also* Samuel C. Leifer, Note, *Protecting Whistleblower Protections in the Dodd–Frank Act*, 113 MICH. L. REV. 121, 122–23 (2014).

73. *See* Ben Kerschberg, *The Dodd–Frank Act's Robust Whistleblowing Incentives*, FORBES (Apr. 14, 2011, 9:20 AM), http://www.forbes.com/sites/benkerschberg/2011/04/14/the-dodd-frank-acts-robust-whistleblowing-incentives/#596000991193.

74. *Id.*

75. *Id.*

76. *Id.*

of recovery over $1 million that the agency obtains from a guilty party.[77] When determining the amount a whistleblower should receive, the SEC considers three factors: the significance of the information conveyed, "the degree of assistance provided by the whistleblower, and the extent to which the government wants to deter the violations in question."[78] Furthermore, under Dodd–Frank, whistleblowers enjoy the benefit of anti-retaliation provisions; such provisions include a private right of action and the guarantee of anonymity if represented by counsel.[79] Since 2011, SEC awards to whistleblowers have surpassed $142 million, and enforcement actions stemming from whistleblower tips have resulted in more than $935 million in financial remedies—an impressive figure given that the whistleblower program has only been in place a short time.[80]

B. False Claims Act

As perhaps the United States' most famous whistleblower system, the False Claims Act[81] implements civil liability for anyone who knowingly submits a false payment claim to the government, conspires to defraud the government to pay a false claim, or knowingly uses a false statement to mitigate a responsibility to pay money to the government.[82] The False Claims Act permits the DOJ and any "private persons" the ability to prosecute.[83]

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77. *Id.* For instance, in 2014, the Securities and Exchange Commission (SEC) announced that an anonymous whistleblower received over $30 million, the highest Dodd–Frank award to date, for contacting the agency regarding an ongoing fraud scheme that would have been difficult for authorities to detect. *See* Press Release, SEC, SEC Announces Largest-Ever Whistleblower Award (Sept. 22, 2014), https://www.sec.gov/news/press-release/2014-206#.VC8sUvldXDs. According to SEC whistleblower policy, the agency posts a notice for every SEC action where resulting sanctions exceed $1 million. *See* SEC, CLAIM AN AWARD, OFFICE OF THE WHISTLEBLOWER, https://www.sec.gov/about/offices/owb/owb-awards/2016-nocas.shtml#nocas (last visited Aug. 10, 2017). Once posted, whistleblowers, like the anonymous tipster mentioned above, have ninety days to apply for an award by submitting the required form to the SEC's Office of the Whistleblower. *Id.*

78. *See* Kerschberg, *supra* note 73.

79. David Freeman Engstrom, *Whither Whistleblowing? Bounty Regimes, Regulatory Context, and the Challenge of Optimal Design*, 15 THEORETICAL INQUIRIES IN L. 605, 612 (2014).

80. WHISTLEBLOWER AWARDS FOR TIPS RESULTING IN ENFORCEMENT ACTIONS, SEC, https://www.sec.gov/page/whistleblower-100million (last modified Jan. 23, 2017).

81. False Claims Act, 31 U.S.C. §§ 3729–33 (2006).

82. *Id.* § 3729.

83. *Id.* § 3730(a)–(b).

Courts have ruled that the False Claims Act provides standing to a considerable range of private "relators," including individual citizens, employees of institutions that receive funding from the government, and private companies.[84] The "original source" exception to the False Claims Act allows an individual to bring suit who has both direct and independent knowledge regarding "the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action . . . which is based on the information."[85] Such a *qui tam* action allows a private actor to sue on behalf of the government.[86]

Under the False Claims Act, DOJ collects treble damages plus between $5,000 and $10,000 of fines for each violation.[87] If DOJ proceeds with the relator's claim and prosecutes, the relator collects 15%–20% of the money DOJ recovers, plus reasonable attorneys' fees.[88] On average, a relator collects roughly 17% of what the government obtains.[89] If DOJ does not

84. William E. Kovacic, *Private Monitoring and Antitrust Enforcement: Paying Informants to Reveal Cartels*, 69 GEO. WASH. L. REV. 766, 768–69 (2001).

85. 31 U.S.C. § 3730(e).

86. *See* Kovacic, *supra* note 84, at 768–69. For example, in 1995, Richard Miller, the Vice President of J.A. Jones Construction Company (Jones), filed a *qui tam* action under the False Claims Act alleging that Jones and other construction companies were all part of a conspiracy to rig bids for sewer construction projects in Egypt paid for by the United States government. *See* United States *ex rel.* Miller v. Bill Harbert Int'l Const. Inc., 608 F.3d 871, 875 (D.C. Cir. 2010). Miller filed the complaint in the United States District Court for the District of Columbia, which placed it under seal while the government pursued criminal actions against the alleged conspiracy. *Id.* at 876. In 2001, the government allowed Miller to unseal the complaint. *Id.* Subsequently, Miller and the United States settled with two of the defendants; however, the case proceeded to trial, where a jury found that the remaining defendants owed the United States $90.4 million in damages. *Id.* at 877. However, the United States Court of Appeals for the District of Columbia Circuit vacated and remanded the case because the lower court erred in allowing testimony regarding the wealth of the defendants, amongst other reasons. *Id.* at 907. The parties' retrial was stayed after the sides began settlement agreements, which ended with the defendants agreeing to pay the United States $47 million. *See* Press Release, U.S. Dep't of Justice, Harbert Companies Agree to Pay $47 Million to Resolve False Claims Act Allegations (Mar. 20, 2012), https://www.justice.gov/opa/pr/harbert-companies-agree-pay-47-million-resolve-false-claims-act-allegations. Under the *qui tam* lawsuit, Miller received 15%–25% of the $47 million settlement. *See id.;* Kovacic, *supra* note 84, at 772.

87. *See* Kovacic, *supra* note 84, at 771.

88. *Id.* at 772.

89. *See* Paul Sullivan, *The Price Whistle-Blowers Pay for Secrets*, N.Y. TIMES, Sept. 21, 2012, http://www.nytimes.com/2012/09/22/your-money/for-whistle-blowers-consider-the-risks-wealth-matters.html (stating that under the False Claims Act the government usually pays

prosecute, the relator's bounty stands somewhere between 25%–50% of the amount recovered.[90]

According to the False Claims Act, a relator cannot collect if he or she takes part in the challenged conduct or if the relator is convicted of criminal conduct that violates the False Claims Act.[91] Even if there is no conviction, a court can still reduce the bounty of a relator who committed violations.[92] Furthermore, the False Claims Act provides whistleblowers with protections against retaliations, including a private right of action, though whistleblowers do not enjoy anonymity.[93] Since the mid-1980s, the False Claims Act *qui tam* system has been hugely successful, with fines in recent years totaling over three billion dollars per year.[94]

C. South Korea's Monopoly Regulation and Fair Trade Act

Although the Division currently lacks a whistleblower system similar to the False Claims Act or Dodd–Frank, in recent years a small number of countries overseas have begun to introduce whistleblower programs into antitrust. South Korea is the first and arguably most successful country to use whistleblower rewards in competition enforcement.[95] Within the government, the Korea Fair Trade Commission (KFTC) handles antitrust cases from the investigatory period through prosecution.[96] The KFTC introduced its cartel whistleblower policy in 2002.[97] Originally, rewards under the program had a maximum payment of $19,000 USD, and the level of success of the program fell short of authorities' expectations.[98] In 2004, the

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whistleblowers 16.8% of what it recovers, and the average False Claims Act recovery is $2 million to $3 million).

90. *See* Kovacic, *supra* note 84, at 772.

91. *Id.*

92. *Id.*

93. *See* Engstrom, *supra* note 79, at 612–13.

94. For instance, in 2015, for the fourth year in a row, DOJ recovered a staggering $3 billion plus from False Claims Act cases. Press Release, U.S. Dep't of Justice, Justice Department Recovers Over $3.5 Billion From False Claims Act Cases in Fiscal Year 2015 (Dec. 3, 2015), https://www.justice.gov/opa/pr/justice-department-recovers-over-35-billion-false-claims-act-cases-fiscal-year-2015.

95. *See* Koury, *supra* note 29, at 1–2.

96. *See* Ran Koh & Jeong, *supra* note 32, at 164.

97. *See* Stephan, *supra* note 2, at 5; *see also* D. Daniel Sokol, *Detection and Compliance in Cartel Policy*, CPI ANTITRUST CHRON., Sept. 2011, at 2, 5.

98. *See* Stephan, *supra* note 2, at 5; *see also* Sullivan, *supra* note 8, at 2 (stating that South Korea's whistleblower program was originally unsuccessful because of inadequate remu-

South Korean government amended the Monopoly Regulation and Fair Trade Act (MRFTA), clarifying that only the first whistleblower of a cartel would receive an award; the amendment also expressly stated situations recognized under the MRFTA and outlined the mechanisms for distributing rewards, while guaranteeing confidentiality by the enforcement decree.[99]

In light of the MRFTA amendment, by 2006 the rewards program had been used eight times, and in several instances led to convictions that likely would not have otherwise occurred.[100] For example, in 2005 the government gave a reward of $62,000 USD to someone who provided information including the names of multiple cartel members, meeting places, and details pertaining to the agreement.[101] In 2012, because of the program's success, authorities raised the maximum award granted to whistleblowers to $2.8 million USD.[102] In the field of antitrust, South Korea's whistleblower program can be viewed as the figurative canary in the coal mine, indicating that incentivizing the public through positive rewards can lead to successful cartel prosecutions.

IV. PROS AND CONS OF ADOPTING A WHISTLEBLOWER PROGRAM FOR ANTITRUST

A number of issues arise when considering whether the Division should implement a whistleblower program. Most experts who disagree with financially incentivizing whistleblowers argue that a rewards program would either be counterproductive or inefficient in the field of antitrust.[103] However, supporters are quick to note that many of the issues raised by detractors are irrelevant or else easily remedied.[104]

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nerations as well as the threat of retaliation).

99. *See* Stephan, *supra* note 2, at 5–6.

100. *Id.* at 6.

101. *Id.*

102. *Id.*

103. One official at the Division commented that "I do have some concerns about a bounty program. . . . I would have some concerns that a false positive could be a real drain on the [D]ivision's resources in pursuing real cartel situations." Brian Mahoney, *DOJ Wary of Offering Bounties to Antitrust Whistleblowers*, LAW360 (Apr. 16, 2014, 6:47 PM), https://www.law360.com/articles/528881/doj-wary-of-offering-bounties-to-antitrust-whistleblowers.

104. Attorney Gordon Schnell, a partner at Constantine Cannon who specializes in antitrust and whistleblower laws, commented that there is no empirical data to support the argument that whistleblower rewards have led to frivolous claims; further, because of the

A. The Question of Witness Credibility

First, detractors argue that whistleblower rewards could jeopardize witness credibility.[105] According to this argument, a jury might not view a witness as credible because he or she stands to gain financially by collecting a bounty reward from a guilty verdict.[106] Conversely, one could argue that a whistleblower who stands to gain positive rewards from a guilty verdict is no less credible than a cartelist currently testifying under the Leniency Program who stands to gain amnesty from prosecution in exchange for his or her cooperation.[107] In both instances, the Division would offer incentives in exchange for testimony. Furthermore, criminal antitrust cases are generally resolved by a plea agreement; therefore, any question of whistleblower credibility would rarely come before a jury.[108]

Moreover, corroborating evidence of cartel behavior brought by the Division would bolster a whistleblower's credibility.[109] Take, for instance, an informant like the secretary first mentioned in the Introduction to this Comment. Without taking the stand, the secretary could provide a number of compelling pieces of evidence to substantiate his or her claims, including internal records regarding the collusive scheme in question, information pertaining to the cartel's organization or operation, the identity of key participants, and a list of records that the Division might obtain through compulsory process.[110] In all these instances, the secretary would help facilitate successful enforcement without credibility becoming an issue in court.

B. Reporting to Compliance Programs

Second, objectors argue that implementing a whistleblower rewards pro-

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threat of Rule 11 sanctions levied against attorneys who file frivolous claims the threat is not realistic. *See* Schnell, *supra* note 11, at 4.

105. *See* STAKEHOLDER VIEWS, *supra* note 49, at 38–40; *see also* Mahoney, *supra* note 103 (citing a Division official as stating "if the individual comes in and is getting financial remuneration for cooperating, it weakens them potentially as a witness for me at a future cartel trial").

106. *See* STAKEHOLDER VIEWS, *supra* note 49, at 38–39.

107. *Id.* at 39. Take, for instance, the case of *United States v. Andreas* in which DOJ successfully based their case on the testimony of Mark Whiteacre, an employee of defendant Archer Daniels Midland (ADM), in exchange for amnesty. 216 F.3d 645, 650 (7th Cir. 2000). ADM was found guilty of price fixing despite attempts to discredit Whitacre's credibility as an informant. *Id.* at 656, 680.

108. *See* STAKEHOLDER VIEWS, *supra* note 49, at 39–40.

109. *Id.*

110. *See* Kovacic, *supra* note 84, at 775.

gram would undermine companies' internal compliance programs. They argue that in the event of suspected wrongdoing, whistleblower rewards could hurt compliance by offering an incentive for employees to contact the federal government rather than the company.[111] When examining other whistleblower rewards programs, it is important to note, however, that the Dodd–Frank Act has a provision that requires whistleblowers with sizable compliance programs to also report conduct internally.[112] In such an event, the whistleblower is still eligible for rewards.[113] A similar provision could be implemented in an antitrust setting.

C. The Potential for False Reporting

Third, related to the issue of witness credibility, some argue that a rewards provision would generate more meritless claims that do not result in prosecution.[114] The theory here is that installing a rewards program would generate a greater number of whistleblowers who lack sufficient information or else make fraudulent claims.[115] Dodd–Frank has resolved this issue by requiring whistleblowers to make statements under penalty of perjury while withholding rewards for whistleblowers who knowingly make false claims.[116] The False Claims Act has addressed this problem through another method: a whistleblower must have legal representation to file a claim.[117] The threat of Rule 11 sanctions[118] against attorneys who file frivolous claims, in turn, may resolve the issue of false reporting. Further, the False Claims Act allows a defendant to sue for attorney's fees if a whistleblower produces an erroneous claim.[119] Therefore, although the threat of false claims in an antitrust setting is noteworthy, the issue is not without potential redress.

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111. *See* STAKEHOLDER VIEWS, *supra* note 49, at 42.

112. *Id.* at 43.

113. *Id.*

114. *Id.* at 40–41.

115. *Id. Contra* Sullivan, *supra* note 89 (quoting former head of the SEC's Office of the Whistleblower, Sean McKessy, as stating, "Not every tip was a home run, but I've been surprised by the quality . . . we require that people sign a declaration under penalty of perjury that the information they are submitting is true. It's a control. We didn't want to be inundated with nonsense.").

116. *See* STAKEHOLDER VIEWS, *supra* note 49, at 41.

117. *Id.* at 42.

118. *See* FED. R. CIV. P. 11 (allowing district courts to sanction parties for submitting pleadings that are frivolous or have no evidentiary support).

119. *See* STAKEHOLDER VIEWS, *supra* note 49, at 42.

D. The Nature and Law of Conspiracies

A fourth issue involves the nature of cartels in general. Usually, only those directly involved in price-fixing cartels know of their existence.[120] Therefore, a whistleblower rewards program for innocent third parties would be ineffectual. However, previous case law indicates otherwise; for instance, the whistleblower in the *Hoffman LaRoche* vitamin cartel was an innocent employee of the defendant's company.[121] In that case, the company pled guilty to price fixing and agreed to pay DOJ $500 million in fines, a record figure at the time.[122] Furthermore, the success of the South Korean whistleblower program has shown that, with proper financial incentives, whistleblowers can be an effective part of antitrust enforcement.[123]

Similarly, some experts argue that the nature of conspiracy jurisprudence in the United States renders a rewards program unnecessary.[124] Because conspiracy charges attach easily to participants in an illegal scheme, those working for companies in violation of antitrust laws cooperate with authorities regardless of positive rewards, once authorities discover wrongdoing.[125] However, as previously mentioned, potential whistleblowers are less likely to come forward and risk financial and physical safety absent some incentive.[126] Therefore, just because many if not most employees would be willing to work with authorities once their firms are under investigation does not mean that those same employees would be willing to blow the whistle on their employers without some form of financial incentive. To increase detection through public reporting, the Division needs to reward whistleblowers.

E. The Toll of Enforcement

Finally, some argue that it would take additional time and effort by the Division to process tips and administer rewards.[127] For example, DOJ only

120. *Id.* at 41.

121. *See* Hoffman-LaRoche Ltd. v. Empagran, 542 U.S. 155, 155 (2004).

122. Press Release, Dep't of Justice, F. Hoffman-La Roche and BASF Agree to Pay Record Criminal Fines for Participating in International Vitamin Cartel (May 20, 1999), https://www.justice.gov/archive/atr/public/press_releases/1999/2450.htm.

123. *See generally* Stephan, *supra* note 2, at 4–7.

124. *Id.* at 12.

125. *Id.*

126. *Id.* at 13.

127. *See* STAKEHOLDER VIEWS, *supra* note 49, at 44.

investigates 25% of claims under the False Claim Act.[128] It is worth noting, however, that with sizable fines involved in antitrust violations, the federal government stands to make considerable gains for its efforts. For instance, two criminal cartel investigations that began through reports under the False Claims Act resulted in $153.6 million in fines and $10.9 million in restitution to injured parties.[129] Further proof that, in the realm of antitrust, whistleblowers can spur successful prosecutions leading to major fines.

F. The Problem with Whistleblowing

The pitfalls of being a whistleblower are myriad. Many whistleblowers lose their jobs or a future in their respective industry, many face bankruptcy or suffer alienation in their communities—and many experience the threat of bodily harm or death.[130] For instance, Jack B. Palmer, an Infosys employee, contacted his company's compliance office with complaints that managers were committing visa fraud within the multi-billion dollar outsourcing firm.[131] In response to his claims, Palmer suffered harassment from coworkers and received death threats.[132] He also suffered depression and became unemployable.[133] Palmer lamented that "the mental and physical challenge one takes on after blowing the whistle is excruciating."[134] In light of his experience, he commented that "it will be hard for me to advise anyone to blow the whistle."[135] Palmer's sentiment seems to be a common one amongst whistleblowers who fall through the cracks of the current United States system.[136] Even those who end up recovering rewards none-

128. *Id.*

129. *Id.*; *see also* Ari Yampolsky, *Whistleblowers in Antitrust Enforcement: Has the Time Come?*, CONSTANTINE CANNON (Sept. 28, 2015), http://constantinecannon.com/whistleblower/whistleblowers-in-antitrust-enforcement-has-the-time-come/#.WC9PjpMrJZ0; Koury, *supra* note 29.

130. *See* Stephan, *supra* note 2, at 16–18.

131. Julia Preston, *Whistle-Blower Claiming Visa Fraud Keeps His Job, But Not His Work*, N.Y. TIMES (Apr. 12, 2012), http://www.nytimes.com/2012/04/13/us/whistle-blower-claiming-visa-fraud-keeps-his-job-but-not-his-work.html?_r=1.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *See* Andrew Smith, *'There Were Hundreds of Us Crying Out for Help': The Afterlife of the Whistleblower*, GUARDIAN, Nov. 22, 2014,, https://www.theguardian.com/society/2014/nov/22/there-were-hundreds-of-us-crying-out-for-help-afterlife-of-whistleblower (discussing a study involving three dozen whistleblowers of which most lost their jobs and never worked

theless pay a heavy cost for standing up to corruption.[137]

V. IMPLEMENTING A WHISTLEBLOWER PROGRAM

A. Reasons to Implement Rewards

Given the heavy burden whistleblowers like Palmer experience, considerable financial incentives and protections would be necessary to lessen the pressures they face for stepping out of the shadows. As whistleblower rewards have been successful in other federal enforcement areas, it seems likely that rewards would increase cartel reporting and potentially the number of cartel prosecutions.[138] Through incentivizing individuals, more whistleblowers would probably come forward, substantially improving cartel detection.[139] The success of the Leniency Program is based upon the same concept: increase detection through motivating private reporting.

Implementing a whistleblower rewards program would also work to destabilize cartels through uncertainty.[140] The Division's mere offer of rewards would help to deter cartels through fear of detection among cartel members.[141] When examining other whistleblower programs in the United States, the numbers indicate that deterrence would be an expected outcome of new increases in reporting—for instance, less than three decades ago only about 30 whistleblower cases were filed under the False Claims Act; comparatively, in 2014, 700 cases were filed.[142] Given the positive trend in whistleblower reporting,[143] and changing the cultural stigma attached to many whistleblowers in the news, the time has never been riper to expand whistleblower programs.

Furthermore, as the Division is currently only aware of an estimated

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in the same field again, many lost their families, and most suffered from depression).

137. *See, e.g.*, Sullivan, *supra* note 89, at 2–3 (citing whistleblower lawyer and author Stephen M. Kohn as stating, "When people talk about the big whistle-blower payouts, I say, you don't get it . . . . You don't see the train of pain I see every day. They can't tell you their story without quivering and crying, even though they're millionaires").

138. *See* Schnell, *supra* note 11, at 3.

139. *Id.* at 4.

140. *See* STAKEHOLDER VIEWS, *supra* note 49, at 37.

141. *Id.*

142. *See* Yampolsky, *supra* note 129.

143. *See* Ben James, *Whistleblower Cases on the Rise, OSHA Stats Show*, LAW360 (Jan. 29, 2013, 8:34 PM), https://www.law360.com/articles/411059/whistleblower-cases-on-the-rise-osha-stats-show (stating that the number of whistleblower cases the Occupational Safety and Health Administration (OSHA) has received in recent years has been on the rise).

10% to 22% of price-fixing schemes currently active,[144] the Division needs to take further steps to engage private citizens. The current Leniency Program is an unquestionable success. However, it only targets guilty parties through offering amnesty, rather than targeting the rest of the population through positive rewards.[145] The main virtue of private monitoring in antitrust is that it gives power to those closest to behavior that, by its nature, is secretive.[146] Obtaining an insider's knowledge of cartel behavior would not only lead to an increase in prosecution numbers, but it would also enable a whistleblower to identify collusive behavior at a lower cost than external monitoring by the Division.[147] Such private monitoring could have a destabilizing impact on cartels as adherence to a common plan or scheme would be harder to achieve if cartelists feared that fellow members or their employees might act as whistleblowers.[148]

B. Financial Restraints

As a part of DOJ and, consequently, the executive branch, the Division is dependent on its money from the White House as well as DOJ, the Office of Management and Budget, and Congress.[149] The appropriations process—through which the Division requests and receives funds from Congress—is very much a political process and can result in reduced funds, if the Division disagrees with the view of the Appropriations Committee.[150] Yet, because of its structure, the Division has some autonomy when it comes to implementing policy.[151] For instance, the Division enacted its current leniency model internally in an exercise of prosecutorial discretion.[152]

However, the Division is limited in the measures it can take regarding positive rewards—as compared to amnesty—absent Congressional action.

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144. *See* Stucke, *supra* note 71, at 459; Leslie, *supra* note 71, at 655.

145. *See generally* LENIENCY PROGRAM, *supra* note 5.

146. *See* Kovacic, *supra* note 84, at 774.

147. *Id.*

148. *Id.*

149. *See* WEAVER, *supra* note 21, at 137.

150. *See generally* William E. Kovacic, *Criminal Enforcement Norms in Competition Policy: Insights from U.S. Experience*, *in* CRIMINALISING CARTELS: CRITICAL STUDIES OF AN INTERNATIONAL REGULATORY MOVEMENT 57 (Caron Beaton-Wells & Ariel Ezrachi eds., 2011).

151. *See* HARRY FIRST ET AL., THE DESIGN OF COMPETITION LAW INSTITUTIONS 363 (Eleanor M. Fox, & Michael J. Trebilcock eds., 2013).

152. *Id.*

Antitrust fines collected by DOJ do not remain within the Division but rather become part of the Department of Treasury's (Treasury's) Crime Victims Fund under 42 USC § 10601[153] along with all criminal fines levied against corporate and personal felons.[154] Fines from the Crime Victims Fund are used, in part, to help victims of human trafficking, domestic abuse, and other Violence Against Women Act (VAWA) programs.[155] Since 1996, fines stemming from price-fixing schemes have been the major source of funding for the Crime Victims Fund.[156]

Any award granted to whistleblowers, therefore, could not come from criminal antitrust fines allocated to the Treasury unless Congress amended the relevant statute. The IRS Office of Chief Counsel echoed this sentiment in a 2010 internal memorandum, albeit in a different whistleblower context.[157] The Office of Chief Counsel investigated whether criminal fines should be used as collected proceeds and determined that "criminal fines, which must be deposited into the Crime Victims Fund, cannot be used for the payment of whistleblower awards."[158]

C. Rewards Through Equitable Relief

Although funds from fines are transferred to the Treasury, the Division may be able to provide whistleblower rewards on its own through equitable relief. When a contract is implied-in-fact, a party can obtain damages even though there is no formal agreement.[159] In the context of government con-

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153. Crime Victims Fund, 42 U.S.C. § 10601 (2012).

154. *See* CONNOR, *supra* note 53, at 422; *see also Division Update Spring 2013*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/atr/public-documents/division-update-spring-2013/criminal-program (last updated Aug. 12, 2015).

155. U.S. DEP'T OF JUSTICE, FY 2017 BUDGET SUMMARY (Feb. 6, 2016).

156. *See* CONNOR, *supra* note 53, at 422.

157. *See* Memorandum from Stephan Whitlock, Director, Whistleblower Office, to Whistleblower Office Employees 1, 3 (June 7, 2012), https://www.irs.gov/pub/foia/ig/spder/ig_wo-25-0612-01.pdf.

158. *Id.*

159. *See* Baltimore Ohio R.R. Co. v. United States, 261 U.S. 592, 597 (1923) (stating that a contract is implied-in-fact when an agreement is "founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding."); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 69 (AM. LAW. INST. 1981) (stating that "[w]here an offeree fails to reply to an offer, his silence and inaction operates as an acceptance . . . [w]here an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of

tracting, for a contract to be implied-in-fact, a plaintiff must show that there was mutuality of intent to contract, offer, acceptance, and that the relevant government official had the authority to bind the government.[160] However, the necessary elements of an implied-in-fact contract are inferred from the parties' conduct, in light of the surrounding circumstances.[161] Meaning, an agreement to an implied-in-fact contract does not have to be outlined in any specific statements or writings but can instead be gleaned from the parties' course of dealing.[162] Inducement and encouragement to perform may be enough to constitute an offer to an implied-in-fact contract,[163] and, as with express contracts, the fact that the parties have not determined an agreed-upon price for services does not bar a plaintiff from claiming that a contract is implied-in-fact.[164]

Under the Tucker Act, the United States Court of Federal Claims has jurisdiction over any claim against the United States government based upon an implied-in-fact contract with the United States.[165] Furthermore, under the doctrine of institutional ratification, a government agency as a whole may be viewed as ratifying an agreement to an implied-in-fact contract when the relevant senior official lacks credentials as a contracting officer.[166]

The Division may be able to create a rewards program through equitable relief by using the doctrine of implied-in-fact contracts. Specifically, the Division would need to create a policy that would encourage and induce whistleblowers to come forward in exchange for rewards. The Division

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compensation.").

160. *See, e.g.*, H.F. Allen Orchard v. United States, 749 F.2d 1571, 1575 (Fed. Cir. 1984).

161. *See* Fincke v. United States, 675 F.2d 289, 295 (Ct. Cl. 1982).

162. *See* Klebe v. United States, 263 U.S. 188, 192 (1923) ("A contract implied in fact is one inferred from the circumstances or acts of the parties.").

163. *See, e.g.*, Sperry Corp. v. United States, 13 Ct. Cl. 453, 458 (1987) ("[A]lthough inducement is not an element of a contract implied-in-fact, inducement and encouragement to do work may constitute an implied acceptance.").

164. *See* William L. Boyd III, *Implied-In-Fact Contract: Contractual Recovery Against the Government Without an Express Agreement*, 21 PUB. CONT. L.J. 84, 90 (1991).

165. *See* Tucker Act, 28 U.S.C. § 1491 (2012).

166. *See* Silverman v. United States, 679 F.2d 865, 870 (Cl. Ct. 1982) (finding that although the Secretary of the FTC was not a contracting officer with the authority to make contracts on behalf of the government, the FTC "retained and utilized" the plaintiff subcontractor's services on the basis of the Secretary's promise to compensate the plaintiff for services rendered; therefore, a contract was implied-in-fact); *see also* Boyd III, *supra* note 164, at 120–21.

would be able to memorialize the policy through public release, similar to how it previously handled notifying the public regarding its Corporate and Individual Leniency Program in 1993 and 1994, respectively.[167]

According to the doctrine of implied-in-fact contracts, a rewards policy would not have to specify values for reporting cartel conduct. However, the Division would need to release it to the public using language that would clearly indicate that whistleblowers have the potential to obtain damages as compensation for detailed information leading to successful cartel prosecutions. A court may find that the doctrine of institutional ratification allows plaintiffs to sue the Division under the Tucker Act even though top antitrust officials—those who would be responsible for creating the policy—are not contracting officers capable of procuring goods or services.

If the Division were to adopt such a policy, it would be able to reward whistleblowers without requiring legislation to pass through Congress. Before proceeding with implementation, the Division would have the ability to reach out to the general public, asking for feedback on an implied-in-fact rewards program.[168] Public involvement is often evoked in the notice and comment process, where an agency will sometimes publish an advanced notice of proposed rulemaking in the Federal Register to garner public consensus. Through the notice and comment process, the public would be able to provide potential improvements to the implied-in-fact policy or argue against its implementation.[169] Public input would be useful in determining the potential success rate of such a system during the early stages of the drafting process.

D. A Push for Reform

The Division should also take further initiative when it comes to urging Congress to authorize a bounty rewards program. A bounty program would be much more effective than the implied-in-fact model as money would be deducted directly from criminal antitrust fines; furthermore, a bounty program would not require further adjudication. As the Victims of Crime Act of 1984 allocates all criminal fines collected by the Division for

167. *See, e.g.*, LENIENCY POLICY, *supra* note 31; LENIENCY POLICY FOR INDIVIDUALS, *supra* note 32.

168. *See generally* UNITED STATES OFFICE OF THE FEDERAL REGISTER, A GUIDE TO THE RULEMAKING PROCESS, https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf (last visited Aug. 10, 2017).

169. *Id.*

the Crime Victims Fund,[170] the Division's Policy Section should provide compelling reasons to institute whistleblower legislation that carves out an exception for bounty rewards.[171]

The Legal Policy Section should weigh the following proposals. First, the Division should champion a generous bounty rewards program, similar to the Dodd–Frank Act, for third-party whistleblowers. Such a program would allow whistleblowers to collect a percentage of whatever the government receives in court. One authority noted that, in certain cases, a 20% bounty may potentially suffice.[172]

Unlike Dodd–Frank, the False Claims Act's *qui tam* system would raise numerous legal challenges. Under the False Claims Act, private citizens may bring civil claims on behalf of the federal government.[173] However, the *qui tam* approach would be problematic in criminal antitrust proceedings because "DOJ has the sole authority to prosecute federal criminal cases, so a private right of action in the criminal context would conflict with this authority."[174] Moreover, the system would delay whistleblower rewards as *qui tam* actions are often placed under seal during the duration of criminal proceedings.[175] Thus, the bounty rewards program under Dodd–Frank provides a stronger structural model.

Second, the Division should consider a floor for whistleblower rewards in any proposal. In creating a minimum threshold for rewards, the Division would mitigate frivolous claims and save valuable resources during the investigative process. Further, whistleblowers need to be compensated in a way that would actively incentivize the average person. For instance, one scholar calculated that a reward between $2 million and $5 million would be necessary.[176] When determining whistleblower rewards, the Division should note the success of the South Korean model only after rewards were

170. Crime Victims Fund, 42 U.S.C. § 10601 (2012).

171. Specifically, the Division's Legal Policy Section provides analysis on reform issues, conducts in-depth studies, makes recommendations regarding the Division's enforcement policies, and researches legislative matters. *See* ANTITRUST DIVISION, MANUAL, *supra* note 13, at I-10.

172. *See* Kovacic, *supra* note 84, at 796 (stating that remunerations for informants would perhaps have to total 20% of criminal fines recovered by an agency with the possibility for downward adjustment if the informant participated in the collusive scheme).

173. 31 U.S.C. § 3730(b) (2012).

174. *See* STAKEHOLDER VIEWS, *supra* note 49, at 38.

175. *See, e.g.*, United States *ex rel.* Miller v. Bill Harbert Int'l Const. Inc., 608 F.3d 871, 875 (D.C. Cir. 2010).

176. *See* Stephan, *supra* note 2, at 18.

raised significantly from their original ceiling.[177] The Division should also note the sizeable percentage offered to whistleblowers under the False Claims Act, which allocates a large percentage of any award the government receives to whistleblowers.[178] Furthermore, informants began to bring extensive claims under the False Claims Act only after whistleblower rewards increased in the 1980s.[179] Thus, bounties would need to be considerable for the program to work.

Third, any informant looking to collect rewards through reporting potential antitrust violations should be required to have counsel and forfeit rewards for providing false statements. As the False Claims Act has shown, representation prevents individuals from filing baseless claims due to the threat of Rule 11 sanctions against attorneys who file frivolous claims.[180] Moreover, like Dodd–Frank, a whistleblower system in antitrust that removes eligibility for making false statements would help to resolve the issue of fraudulent claims.[181] Therefore, compelling whistleblowers to obtain counsel and provide honest statements would save the Division valuable resources by removing the threat of false reporting.

Finally, along with a whistleblower rewards provision, the Division should champion reform that protects informants from retaliation. Like whistleblowers under Dodd–Frank, antitrust informants should remain anonymous. Legislators have recently been sympathetic to the retribution many whistleblowers face. In 2013, the Senate unanimously passed the Criminal Antitrust Anti-Retaliation Act (CAARA) after the GAO's 2011 report on ACPERA.[182] CAARA allowed whistleblowers who experienced retaliation to file complaints with the Secretary of Labor, who would have had the ability to reinstate applicants after a positive finding.[183] However, the bill never made it through the House of Representative's (House's) review. In 2015, the Senate passed the bill once more, and the House again refused it.[184]

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177. *See id.* at 5–6.

178. *Id.* at 8–9.

179. *See* Schnell, *supra* note 11, at 3.

180. *See* STAKEHOLDER VIEWS, *supra*, note 49, at 42 n.98.

181. *Id.* at 41.

182. *See* Debra Katz & David Marshall, *The Senate 'Makes Good' On Congress' Antitrust Promises*, LAW360 (Aug. 6, 2015, 12:25 PM), https://www.law360.com/articles/684611/the-senate-makes-good-on-congress-antitrust-promises; *see also* Anant Raut, *Antitrust in the 113th Congress*, ANTITRUST SOURCE 1, 6 (Aug. 2013).

183. *See* Katz & Marshall, *supra* note 182.

184. *See id.*; James M. Burns, *Antitrust "Whistleblower" Protection Legislation Reintroduced in the*

Anonymity, however, would protect an informant's identity from aggrieved employers. Furthermore, in the event that an employer obtained the identity of a whistleblower through independent channels, anti-retaliation measures like those proposed in the Senate would prohibit employer retribution. It is unlikely that a rewards program would be successful without retaliation safeguards. Because whistleblowers would only see rewards in the event of a guilty verdict, most individuals would likely avoid the risk of reporting if it meant the threat of reprisal or unemployment.[185] Therefore, an anti-retaliation provision is vital to the success of a whistleblower system.

E. The Secretary Revisited

As part of the Division's mission is dedicated to developing and presenting legislative proposals related to antitrust laws, the Division should assist Congress in passing a rewards and protection program for whistleblowers.[186] Such a program would greatly benefit the Division's mission and cartel enforcement through enhanced detection, destabilization, and general deterrence while saving the Division valuable resources.[187] The aforementioned proposals present considerations that could prove valuable in the drafting process.

To return to our original inquiry, if you were a secretary unsure whether your boss's conduct violated antitrust laws, would you contact authorities? Without measures to protect your financial and physical safety, you would likely keep your nose down and continue to work, ignoring any red flags your boss's conduct may raise. Society would not judge you for it either; your family and friends would understand. After all, you have responsibilities, too.

However, if the government had a system of incentives and protections to keep whistleblowers safe, you would probably find yourself more inclined to stand up and report what you had witnessed to authorities. In such an event, you would contact DOJ, describing your boss's behavior, providing authorities with all relevant correspondence and business records. The Division would use the records you provided along with your testimony to bolster a case against your boss's cartel. In exchange for your cooperation,

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Senate, BAKER DONELSON (May 1, 2017), https://www.bakerdonelson.com/antitrust-whistleblower-protection-legislation-reintroduced-in-the-senate (last visited Aug. 10, 2017).

185. *See* Katz & Marshall, *supra* note 182.

186. *See* ANTITRUST DIVISION, MANUAL, *supra* note 13, at I-2.

187. *See* Kovacic, *supra* note 84, at 774–75.

authorities would provide anonymity and anti-retaliation measures so that your company—and its members—would be unable to fire or threaten you in any way. With your financial and physical safety intact, you would be able to wait for any potential bounty your reporting may provide. And with such a system in place, you would not be alone. Many others would start to come forward.

CONCLUSION

The key advantages of instituting a whistleblower rewards program include heightened general deterrence and increased detection without the need for considerable additional resources. Furthermore, the use of whistleblower rewards, i.e., paying individuals outside the scope of a conspiracy, is, in a sense, more logical than the use of leniency because—while leniency rewards those involved in an illegal cartel—a rewards program would provide innocent bystanders with compensation and protection from employer retribution.

In short, a whistleblower rewards program would make the Division more dynamic without draining it of significant resources or personnel. A rewards program would also be the right thing to do. Authorities need to provide safety and stability to those willing to speak out against corporate corruption to prevent retaliation and protect consumers from cartels that strip them of huge amounts of money each year. Until potential whistleblowers feel as though they can make their voices heard without the threat of retaliation, many of their experiences will be passed over in silence.

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