Praise, But Not Excitement, for the Proposed Criminal Antitrust Anti-Retaliation Act

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By nature cartel activity is secretive and their effects are often difficult to identify, which makes their detection notoriously elusive. The United States’ Department of Justice (DOJ) and the Congress have taken numerous steps hoping to curtail cartel activity through the DOJ’s leniency programs, which grants amnesty to those that self-report their own cartel activity, and through Congress’ 2004 legislation, the Antitrust Criminal Penalty Enhancement Reform Act, which aims to enhance the incentives of the DOJ’s leniency programs. Currently, Congress is considering another piece of legislation, the Criminal Antitrust Anti-Retaliation Act (CAARA), that would provide whistleblower protections to innocent bystanders of cartel activity to encourage them to report witnessed illegal activity. CAARA, as proposed, stops short of providing any further monetary incentives to encourage antitrust whistleblowers to report crimes, which many think will limit its effectiveness. However, these criticisms are misguided as information from whistleblowers is often unreliable and cartel activity is best detected by encouraging its participants to come forward and self-report. CAARA is, therefore, appropriate legislation that will provide common-sense whistleblower protections to the likely very small number of innocent bystanders to cartel activity that are also in a position to report it.


On January, 22, 2013, the 113th Congress proposed the Criminal Antitrust Anti-Retaliation Act, an amendment to The Antitrust Criminal Penalty Enhancement and Reform Act
(ACPERA) of 2004, that will provide anti-retaliation protections to antitrust whistleblowers.¹ Specifically, the law will protect any person that is discharged, demoted, suspended, threatened, harassed, or otherwise discriminated against for filing or providing information relating to any violation that the whistleblower reasonably believes is a violation of Sections 1 or 2 of the Sherman Act or any other similar state law.² Remedies provided to whistleblowers under this new law include reinstatement, back pay with interest, and any other special damages suffered as a result of any discrimination including “litigation costs, expert witness fees, and reasonable attorney’s fees.”³

**The Current Enforcement Scheme: DOJ Leniency Programs & ACPERA**

If CAARA is passed as described, it will supplement the existing regime of cartel enforcement that is anchored by the DOJ’s Corporate and Individual Leniency Programs. Under these programs, corporations and individuals that self-report their cartel activity before the DOJ begins an investigation will automatically be granted amnesty from prosecution as long as the company or individual immediately stops participating in the illegal activity and meets other additional conditions.⁴ Those additional conditions include continuing cooperation with the DOJ throughout the ensuing investigations, confessing violations as “truly corporate” acts, and making restitution with the injured parties.⁵ The DOJ will also grant leniency if an investigation has already started if a corporation or individual looking to self-report complies with the above

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¹ [Criminal Antitrust Anti-Retaliation Act, 2013 CONG US § 42, 113th CONGRESS, 1st Session](https://www.govinfo.gov/content/pkg/CHRG-113htg_hr3349/pdf/CHRG-113htg_hr3349.pdf)
² 2013 CONG US § 42(a)(1).
⁵ *Id.* pt. A (3-6).
conditions and as long as it does not already have sufficient evidence to obtain a conviction and the leniency is not unfair to the other companies and individuals involved.6

These policies are implemented by the DOJ “so that the maximum number of applicants will be eligible” in order “to provide conspirators with the greatest incentive to cooperate and to do so early.”7 According to the DOJ, its leniency program “has been responsible for detecting and prosecuting more antitrust violations than all of our search warrants, consensual-monitored audio or video tapes, and cooperating informants combined.”8 This provides evidence that the leniency program encourages cartel participants to self-report and is one of the few ways to increase the detection of cartel activity.

The DOJ’s leniency policies are effective because they create a “race to the door” for firms violating the antitrust laws attempting to avoid litigation. In 2004, Congress looked to provide even more incentive for companies to be “first in the door” with the Antitrust Criminal Penalty Enhancement Reform Act (ACPERA).9 This law allows a firm that is first to report antitrust violations to not only escape criminal penalty, but also to limit its civil liabilities to actual damages, as opposed to treble, while it increases the potential fines of any co-conspirators.10 To be eligible for ACPERA’s benefits, a firm first to report an antitrust violation must also be considered in “cooperation” with the DOJ, which it can do through the following:

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6 Id. pt. B (1-7).
8 Id. at 1441.
10 Id. at §§ 213, 215.
(1) providing a full account to the claimant of all facts known to the applicant or cooperating individual, as the case may be, that are potentially relevant to the civil action; (2) furnishing all documents or other items potentially relevant to the civil action that are in the possession, custody, or control of the applicant or cooperating individual, as the case may be, wherever they are located; and

(3) (A) in the case of a cooperating individual—

   (i) making himself or herself available for such interviews, depositions, or testimony in connection with the civil action as the claimant may reasonably require; and

   (ii) (A) responding completely and truthfully, without making any attempt either falsely to protect or falsely to implicate any person or entity, and without intentionally withholding any potentially relevant information, to all questions asked by the claimant in interviews, depositions, trials, or any other court proceedings in connection with the civil action; or

   (B) in the case of an antitrust leniency applicant, using its best efforts to secure and facilitate from cooperating individuals covered by the agreement the cooperation described in clauses (i) and (ii) and subparagraph (A). 11

While these provisions may encourage antitrust violators to seek leniency, some think they still generally fail to actually increase cartel detection. 12 However, a report from the Government Accountability Office (GAO) provides evidence that even though ACPERA did not increase the total number of leniency applications, it did cause an increase in the number of successful

11 Id. at §§ 213.

12 Bennett, supra note 7, at 1440 (“the amnesty program is indispensable to DOJ's criminal enforcement against cartel behavior […] [w]hat may not be quite so clear, however, is the importance of the amnesty program to deterrence more generally”).
applicants reporting violations of which the DOJ had no prior knowledge. It can be inferred that although ACPERA did not increase the total amount of self-reporters, it did increase the quality of information the DOJ received from self-reporters.

CAARA Rightly Provides No Bounties To Encourage Whistleblowers

Whistleblower protections typically incentivize individuals to come forward with information by containing either or both of the following two provisions: (1) “whistleblower protections,” which are designed to encourage reporting by prohibiting firms from retaliating against an employee who reports suspected cartel activity to a regulator; and/or (2) “whistleblower bounties,” modeled loosely on laws, such as the Sarbanes-Oxley and False Claims Acts, which give the whistleblower a cut of any fine obtained from the whistleblower's report. The Criminal Antitrust Anti-Retaliation Act opted to only include “whistleblower protections” that insulate individuals who report antitrust violations from retaliation from his or her employer, but provides no economic incentives for reporting these violations.1516

There is ongoing debate over whether the CAARA should have provided a whistleblower bounty to further incentivize individuals to come forward with knowledge of antitrust violations. According to the GAO, in an interview of 14 antitrust attorneys and 7 academics...
regarding such a provision, consensus was split, with nine stakeholders supporting a bounty and eleven opposing.\textsuperscript{18} According to those that opposed a bounty provision, they feared it “could hinder [the] DOJ’s enforcement program by jeopardizing witness credibility, undermining companies’ internal compliance programs, generating more claims that do not result in prosecutions, or requiring additional DOJ resources to administer.”\textsuperscript{19} Senator Leahy, one of CAARA’s principal sponsors, appears to agree with those opposing a whistleblower bounty as he announced, after proposing CAARA, that the bill was “carefully drafted to ensure that whistleblowers have no economic incentive to bring forth false claims.”\textsuperscript{20}

Those that support a bounty provision think that a bounty could aid the goal of cartel detection merely through “increasing uncertainty and fear of detection among cartel members […] [which] could result in the weakening” of cartels or deter their formation.\textsuperscript{21} Bounty supporters also believe the expressed concerns over witness credibility are overblown because the vast majority of antitrust cases, ninety percent or so, never go to a jury trial and that without financial incentives, there is concern that CAARA will have “‘nominal, if any’ effectiveness in encouraging whistleblowers to step forward.”\textsuperscript{22}

The DOJ already accounts for this aspect of cartel detection through its leniency program and evidence shows that providing financial incentives to whistleblowers may not be worth the trouble. At least one study indicates that “somewhere between 75-94% of reports submitted

\begin{itemize}
\item[\textsuperscript{18}] Id.
\item[\textsuperscript{19}] Id.
\item[\textsuperscript{21}] United States Government Accountability Office, \textit{supra note} 13 at 36.
\item[\textsuperscript{22}] Id.
\end{itemize}

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under the Dodd-Frank [whistleblower] program will be non-meritorious.”23 This statistic highlights the troubling fact that while whistleblowers lost little by being wrong, the government must still spend valuable resources investigating their claims. One senior DOJ official estimated that he spent “20,000 hours investigating ... 150 qui tam cases that were [later] dismissed by the courts or not pursued” after the DOJ declined to intervene.24 A whistleblower bounty in an antitrust context could yield even worse results because cartel activity, which is inherently secretive, is rarely uncovered by innocent bystanders.25 It appears that CAARA’s lack of financial incentives for whistleblowers may not be a hindrance, but, instead, an asset.

Though CAARA may not significantly increase cartel detection it still has value as a common sense provision that protects the rare innocent bystander that witnesses and reports cartel activity. The tale of Marty McNulty, the executive that uncovered and reported the antitrust violations of his then employer Arctic Glacier International, Inc., serves as the poster child for CAARA’s provisions.26 In 2005, McNulty discovered that Arctic Glacier had been conspiring with Home City Ice, Co. to keep the prices of its packaged ice artificially high and he reported this information to the FBI.27 Eventually both companies were ordered to pay $9 million in fines, and McNulty soon found himself fired from his job at Arctic Glacier and blackballed from the industry of selling packaged house, which also led to him losing his home.28 CAARA would have protected McNulty and allowed him to keep his job and recover any actual damages he may have incurred along the way. Though McNulty’s story may be rare,

24 Id.
25 Simmons & O’Rourke, supra note 14 at 33-34.
27 Id.
28 Id.
it serves as a testament that it can occur and that the most common of sense dictates that individuals in his position deserve protection. However, his story does not provide an anecdote that should be used to support adding a whistleblower bounty to the current bill.

Consider a scenario slightly different from McNulty’s where an employee, incentivized by a whistleblower bounty, misunderstands the Sherman Act and reports to authorities a company behavior’s that is actually not indicative of the presence of a cartel. Unless a court finds that reporting the information was “reasonable,” the employee’s attempts to be a Good Samaritan would actually leave them vulnerable to all of the consequences CAARA intended to protect if his or her employer uncovers that the employee had reported its behavior. Under these facts, that will likely occur more often than facts similar to McNulty’s story, two major consequences result: (1) an employee is vulnerable to falling outside of CAARA’s protections, and (2) the DOJ has spent valuable resources investigating what will be, more often than not, unreliable information. This scenario, and its likelihood to occur if CAARA were passed with a bounty, demonstrates why CAARA’s limited provisions are entirely appropriate.

**CONCLUSION**

Although CAARA fails to contain the types of provisions required to maximize its effectiveness for cartel detection, its measured provisions act as common sense protections to the likely rare occurrence of the innocent employee witnessing and reporting cartel activity. Other whistleblower programs have shown that maximizing incentives for whistleblowers to come forward often leads to unreliable information that disproportionately eats up government resources. For now, the fact remains that the DOJ’s most effective tools for detecting cartel activity are its corporate and individual leniency programs. In addition to these programs, the
government should monitor closely whether CAARA’s limited protections result in more employees being willing to come forward to report their company’s behaviors, as this may suggest that CAARA could warrant future amendment that increases its incentives encouraging whistleblowers to come forward.