

information provided by whistleblowers since the program's inception.⁷ The Commodity Futures Trading Commission ("CFTC")⁸ and Internal Revenue Service⁹ have also made large awards to whistleblowers whose cooperation has resulted in large settlements.

The SEC and other agencies have legislation providing for whistleblower awards. There is no such legislation for reporting a price fixing scheme or bid rigging antitrust crime. As discussed below, however, *if the government, not a private party, is the victim of illegal price collusion*, the False Claims Act provides a vehicle for a whistleblower to file a qui tam case and receive an award. To remedy this unacceptable anomaly and to strengthen cartel enforcement overall, we advocate passage of an SEC-style "cartel" whistleblower statute.¹⁰ It is our contention that there are scores of lower level employees—sales managers, estimators—who may come forward, risk losing their job and incur significant legal fees—*if* there is a mechanism by which they may be compensated—i.e. receive a reward for this difficult and life changing act. Public policy and vigorous cartel enforcement favors rewarding lower level cartel players to expose cartel ringleaders.

In this article we discuss the current options for being a whistleblower for criminal antitrust cartels; anti-retaliation protections for whistleblowers; and a proposal for antitrust whistleblower reform by creating criminal cartel whistleblowing opportunities similar to those offered by the SEC.¹¹

II. WHISTLEBLOWING UNDER THE FALSE CLAIMS ACT ("FCA")¹²

Currently, a person can blow the whistle on financial crimes fraud if the *government* is the victim of the fraud, such as bid rigging on federally funded contracts.¹³

7 *Id.*

8 Commodity Futures Trading Press Release, *Commodity Futures Trading Commission Announces Approximately \$2.5 million Whistleblower Award*, June 24, 2019, <https://www.cftc.gov/PressRoom/PressReleases/7943-19> (last visited Sept. 16, 2019).

9 During fiscal year 2018, the IRS awarded \$312 million to tax fraud whistleblowers and whistleblowers enabled the IRS to recover \$1,441,255,859. See *IRS Whistleblower Program, Fiscal Year 2018 Annual Report to Congress*, https://www.irs.gov/pub/whistleblower/fy18_wo_annual_report_final.pdf (last visited Sept. 16, 2019).

10 The authors have previously written shorter articles on this topic. See *It's a Crime There Isn't a Criminal Antitrust Whistleblower Statute*, ANTITRUST LAW DAILY, April 5, 2019, http://business.cch.com/ald/ALD_Criminal-Antitrust-Whistleblower-Statute_04-05-2018_final_locked.pdf (last visited Sept. 16, 2019); *The Political Stars Align for a Criminal Antitrust Whistleblower Statute*, ANTITRUST LAW DAILY, February 2019, http://business.cch.com/ald/ALD_Criminal-Antitrust-Whistleblower-Statute_20190208.pdf (last visited Sept. 16, 2019).

11 This article is only a primer on what a lawyer should consider before advising a client about becoming a whistleblower and taking on a case. Becoming a whistleblower can be a life changing experience for the individual involved in both negative and positive ways.

12 False Claims Act, 31 U.S.C. §§ 3729–3733.

13 This article discusses claims under the FCA. Almost every state has statutory provisions similar to the FCA to allow for recovery for false claims when that state is a victim of financial losses. The California False Claims Act provisions can be found at https://leginfo.ca.gov/faces/codes_displaySection.xhtml?lawCode=GOV§ionNum=12650.&article=9.&highlight=true&keyword=False%20Claims%20At (last visited Sept. 16, 2019). The State of California Department of Justice has a False Claim Unit website with additional information, <https://oag.ca.gov/cfs/falseclaims>.

A. The FCA

A whistleblower can file a claim under the FCA. The FCA's qui tam provision, § 3730(b), allows a private person, known as a "relator," to bring an action on behalf of the United States if the government has suffered monetary damages due to fraud.¹⁴ The whistleblower can receive a percentage of the government's recovery if the litigation results in a damage award for the government. Successful relators may receive a reward of up to 25 percent of a settlement if the government intervenes and prosecutes the case and 30 percent if the government does not but the relator prevails after moving ahead on her own. The FCA also provides reimbursement for attorney's fees, costs, and expenses.¹⁵

Qui tam actions are initially filed under seal for an initial 60 day period.¹⁶ At the time of filing the suit, the relator serves upon the DOJ a "relator statement" explaining the allegations in the suit and the evidence the relator has to support the suit. The defendant is not served during the time the government investigates to determine if it will intervene. During this time the identity of the relator remains confidential.¹⁷ As discussed below, however, the complaint will eventually be unsealed and become public.

B. Anti-Retaliation Protection Under the FCA

Whistleblowers understandably worry about potential retaliation for coming forward. The FCA contains an anti-retaliation provision to address this legitimate concern. Employers are prohibited from discriminating against employees, contractors, and agents "because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop one or more violations" of the FCA.¹⁸ Prohibited retaliation includes: termination, suspension, demotion, harassment, or any other discrimination in the terms and conditions of employment. To state a claim for retaliation, a plaintiff must demonstrate that: (1) he engaged in activity protected under the statute; (2) the employer knew the plaintiff engaged in a protected activity; and (3) the employer discriminated against the plaintiff "because he . . . engaged in protected activity."¹⁹

14 *Id.*

15 31 U.S.C. 3730(b). For a recent Ninth Circuit FCA case, see *United States ex. rel. Campie v. Gilead Scis., Inc.*, 2015 WL 3659765 (N.D. Cal. June 12, 2015), *rev'd and remanded sub nom. United States ex rel. Campie v. Gilead Scis., Inc.*, 830 F.3d 890 (9th Cir. 2017). This case has taken an unusual turn in that the United States is seeking to dismiss the case on the grounds that it has and will continue to require a large and unwarranted investment of government resources. See also Valerie Bauman, *Gilead Suit Tests Government's Authority to Dismiss Fraud Cases*, BLOOMBERG LAW, August 22, 2019, <https://news.bloomberglaw.com/health-law-and-business/gilead-suit-tests-governments-authority-to-dismiss-fraud-cases> (last visited Sept. 16, 2019).

16 31 U.S.C. § 3730(b)(2).

17 This decision is rarely made within 60 days. The government routinely seeks extensions of the seal of up to six months. The government's investigation while the case remains under seal can sometimes take several years.

18 31 U.S.C. § 3730(h).

19 *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1103 (9th Cir. 2008) (holding that the heightened pleading requirements of Rule 9(b) do not apply to a retaliation claim). See also *United States ex rel. Campie*, 862 F.3d 890, for a fuller discussion of the elements of a retaliation suit under the FCA.

C. No Whistleblower Anonymity Under the FCA

The strong presumption that court proceedings are open to the public means that a whistleblower complaint, and the whistleblower's identity, will eventually become public. The significant public interest in open judicial records will almost always outweigh the relator's desire to limit access to her identity. In essence the laws say that if you come forward as a whistleblower, you have the potential for a large monetary reward and you have anti-retaliation protection under the FCA (even if you think it is inadequate), but if you file a lawsuit it will become matter of public record. Nonetheless, relators have tried (almost always unsuccessfully) other means to file a suit while keeping their identity concealed even after the case is unsealed.

1. John Doe Plaintiffs

Federal Rule of Civil Procedure 10(a) requires that "[t]he title of the complaint must name all the parties."²⁰ This apparent prohibition of anonymous filings stems from the strong presumption in favor of transparency in judicial proceedings. A plaintiff's use of a pseudonym "runs afoul of the public's common law right of access to judicial proceedings."²¹ Anonymous filings are permitted in very limited circumstances, such as sexual assault, national security issues, or other compelling reasons. That a plaintiff may suffer embarrassment or economic harm is not enough.²² Instead, a plaintiff must show "both (1) a fear of severe harm, and (2) that the fear of severe harm is reasonable."²³ Fear of retaliation from a drug cartel for being a government informant is one example of the showing of the severity of the harm that will justify keeping a party's name anonymous.²⁴

2. Sealing the Case Docket

Relators have also failed to permanently seal the record of dismissed FCA claims. In *US v. Apothetech Rx Specialty Pharmacy Corp.*,²⁵ relators claimed they would face potential retaliatory actions if the case was not permanently sealed. The court held, however, that such "generalized apprehensions of future retaliation" were not enough to overcome the strong public right of access to judicial proceedings.²⁶ The court denied the relators' motion for a permanent seal. Noting that such closed proceedings "must be rare and only for cause shown that outweighs the value of openness," the court held that the relators' concerns alone, even if well-founded, "are insufficient to overcome the public

20 Fed. R. Civ. P. 10 (a); *Caption; Name of Parties*.

21 *Does I Thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1067 (9th Cir.2000).

22 *Id.*

23 *Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate*, 596 F.3d 1036, 1043 (9th Cir.2010). *See also Doe v. Megless*, 654 F.3d 404, 409 (3d Cir. 2011) (district court should determine whether a litigant has a reasonable fear of severe harm that outweighs the public's interest in open litigation.).

24 In *United States v. Doe*, 870 F.3d 991, 998-1000 (9th Cir. 2017), the Ninth Circuit reversed the district court's denial of a defendant's motion to seal all sentencing documents that would reveal his identity and that he informed on a drug cartel. The appellate court found that Doe had provided useful information against a large drug cartel and that he and his family would be endangered should his cooperation become known.

25 2017 WL 1100818, Civ. No. 3:15-CV-588 (S.D. Miss. Mar. 20, 2017).

26 *Id.* at *2.

right to access judicial records.” The court also noted that the FCA provided a remedy for retaliation²⁷ and relators had other remedies like tortious interference with business relations and defamation.²⁸

3. Corporate Relators

Courts have ruled that various types of legal entities are also a “person” for purposes of the FCA’s qui tam provision.²⁹ A corporation, therefore can be the whistleblower plaintiff but the organization must have been in existence at the time of the alleged fraud³⁰ in order to have the “direct and independent” knowledge needed to file a case.³¹ There will be limited opportunities to use a corporate relator and even then, the identity of the individual whistleblowers will likely come to light at some point in the litigation. Keeping individuals’ names out of the case captions, however, provides some anonymity from online search engines.³²

D. The FCA and Government Purchasers

As mentioned, a whistleblower may be able to collect a reward *if* the government is the victim of a criminal antitrust violation. For example, a whistleblower recently exposed a cartel that fixed prices and rigged bids on U.S. Department of Defense fuel oil contracts in South Korea. Bid rigging is a criminal per se violation of the Sherman Act. Submitting a rigged bid to the United States also violates the FCA because the companies must certify that the bids were independently arrived at, when in fact they were the product of collusion. Three South Korea-based oil companies pled guilty in November 2018 to the misconduct alleged by the whistleblower. The defendants agreed to pay a total of approximately \$82 million in criminal fines and approximately \$154 million to the United States for civil antitrust and FCA violations related to the bid-rigging conspiracy.³³

27 *Id.* (citing 31 U.S.C. § 3730(h) (relator has recourse to FCA for retaliation)).

28 For the same reasons, the court also denied relators’ motion to redact all identifying information from the complaint. For a discussion of the case written by a member of the law firm involved, see Chelsea M. Rutherford, *Relators Denied Permanent Seal on FCA Case Record after Voluntary Dismissal*, April 21, 2017, <https://www.fcaupdate.com/2017/04/relators-denied-permanent-seal-on-fca-case-record-after-voluntary-dismissal/> (last visited Sept. 16, 2019).

29 See, e.g., *Minnesota Ass’n of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1048 (8th Cir. 2002) (“There is no hint in the history of the 1986 Amendments Act that Congress intended to disqualify organizational relators.”).

30 See *U.S. ex rel. Precision Co. v. Koch Indus. Inc.*, 971 F.2d 548, 553–54 (10th Cir. 1992) (“Precision did not come into existence as a corporate entity until June 1988. . . . Therefore, Precision cannot seriously argue it qualifies as an original source of the . . . information upon which its FCA allegations are based.”).

31 See, e.g., *U.S. ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 656–57 (D.C. Cir. 1994).

32 R. Scott Oswald and David Fullernborn, *Shielding Relator’s Identity in Qui Tam Actions: The Landscape After ACA Changes to the False Claims Act*, December 2016, at THE FEDERAL LAWYER, http://www.fedbar.org/Resources_1/Federal-Lawyer-Magazine/2016/December/Features/Shielding-Relators-Identity-in-Who-Tam-Actions-The-Landscape-After-ACA-Changes-to-the-False-Claims.aspx?FT=pdf (last visited Sept. 16, 2019).

33 See DOJ Press Release, *Three South Korean Companies Agree to Plead Guilty and to Enter into Civil Settlements for Rigging Bids on United States Department of Defense Fuel Supply Contracts*, November 14, 2018, <https://www.justice.gov/opa/pr/three-south-korean-companies-agree-plead-guilty-and-enter-civil-settlements-rigging-bids> (last visited Sept. 16, 2019).

Moreover, the companies that have pled guilty are cooperating, resulting in two additional companies agreeing to plead guilty and pay over \$75 million in criminal fines and over \$50 million in civil settlements.³⁴ The whistleblower will collect between 15 and 25% of these recoveries. This has been a tremendously positive demonstration of the power of potential awards under the FAC to incentivize whistleblowers to come forward and disclose corporate fraud and misconduct.

If the same whistleblower had information about price fixing/bid rigging on fuel supply contracts sold to businesses and/or homeowners, however, there would be no government damages and no vehicle to file a false claims whistleblower suit. Why should there be an incentive for a whistleblower to come forward and expose bid rigging on government contracts, but not bid rigging against consumers at large? There shouldn't be; businesses and consumers deserve the same protection as the government.

III.A PROPOSAL FOR REFORM

Our proposal is simple: legislation should be passed that mirrors the current SEC whistleblowing regime to allow an individual who has original, timely and credible information about a price fixing or bid rigging cartel, whether the victims are public or private entities, to report that information. If a successful enforcement action results from that information, the whistleblower should receive a financial award.

Now is a great time to consider this proposal because there is already some Congressional action on antitrust whistleblower reform. On July 24, 2019 Senators Charles Grassley (R-Iowa) and Patrick Leahy (D-Vt.), reintroduced legislation to extend whistleblower protection for employees who provide information to the DOJ related to criminal antitrust violations. The Criminal Antitrust Anti-Retaliation Act³⁵ seeks to protect whistleblowers in criminal antitrust cases by prohibiting employers from retaliating against an employee who provides information to the Department of Justice regarding conduct that violates the criminal antitrust laws. Senator Grassley noted: "Just as whistleblower protections for government employees help root out waste, fraud and abuse, they can also help prevent misconduct in the private sector."³⁶ The Senate unanimously passed a similar version of the legislation in 2013, 2015 and 2017³⁷, but the bill was never even taken up by the House of Representatives. With the House now in Democratic hands, and a renewed interest in the benefits of whistleblower to expose fraud, the bill

34 See DOJ Press Release, March 20, 2019, *More Charges Announced in Ongoing Investigation into Bid Rigging and Fraud Targeting Defense Department Fuel Supply Contracts for U.S. Military Bases in South Korea*, <https://www.justice.gov/opa/pr/more-charges-announced-ongoing-investigation-bid-rigging-and-fraud-targeting-defense> (last visited Sept. 16, 2019).

35 The text of the proposed Criminal Antitrust Anti-Retaliation Act is available at <https://www.grassley.senate.gov/sites/default/files/116.S19075%2C%20the%20Criminal%20Antitrust%20Anti-Retaliation%20Act.pdf> (last visited Sept. 16, 2019).

36 United States Senator Charles Grassley Press Release, *Grassley Leahy Reintroduce Criminal Antitrust Retaliation Act*, July 24, 2019, <https://www.grassley.senate.gov/news/news-releases/grassley-leahy-reintroduce-criminal-antitrust-anti-retaliation-act> (last visited Sept. 16, 2019).

37 *Id.*

has a much improved chance of becoming law.³⁸ Makan Delrahim, head of the Antitrust Division of the DOJ, just recently expressed support for the bill while testifying before a United States Senate antitrust oversight hearing.³⁹

The Grassley-Leahy bill is a good bill, but it's only a start. The prospect of some anti-retaliation protection is unlikely to draw out many people to take the enormous risk of becoming an industry whistleblower. A financial incentive is needed to compensate for the risks involved of coming forward and just as importantly, the ability to hire a lawyer who can help navigate the often lengthy process of becoming an antitrust whistleblower.

A. Are There Potential Criminal Antitrust Whistleblowers?

There are many potential whistleblowers in virtually every price-fixing/bid rigging conspiracy.⁴⁰ Price fixing/bid rigging cartels by definition involve at least two companies and most have numerous individual cartel participants. As one example, in the Antitrust Division's international cartel prosecution against AU Optronics in the thin-film transistor liquid crystal display panels ("TFT-LCD") industry, besides the two corporate defendants AU Optronics Corporation and AU Optronics Corporation of America, the indictment charged 6 individual defendants from the companies.⁴¹ Numerous other employees in those companies had some participation in the cartel as well. There were also seven other corporate defendants who pled guilty.⁴² All told, there were dozens of individuals who could have been whistleblowers in this case—and of varying culpability. Cartels often even have nomenclature designating the culpability level of the conspirators i.e., Masters (top-level) to sherpas (working group level).⁴³ Even in a local bid rigging case, the estimators

38 See Robert Connolly and Kimberly Justice, *The Political Stars Align for a Criminal Antitrust Whistleblower Statute*, ANTITRUST LAW DAILY, February 2019, http://business.cch.com/ald/ALD_Criminal-Antitrust-Whistleblower-Statute_20190208.pdf (last visited Sept. 16, 2019).

39 Testimony of Makan Delrahim, Assistant Attorney General Antitrust Division, DOJ, at the Senate Judiciary Subcommittee on Antitrust, *Antitrust Enforcement Oversight Hearing*, September 18, 2019, available at C-Span, <https://www.c-span.org/video/?464378-1/antitrust-enforcement-oversight-hearing> (47:05-47:50) (last visited Sept. 18, 2019).

40 Government employees cannot be whistleblowers on bid rigging matters because their job requires them to report fraud, waste and abuse. See *United States ex rel. Fine v. Chevron, U.S.A.*, 72 F.3d 740, 744 (9th Cir. 1995) (en banc) (Agreeing with the district court that the fact that a relator "was employed specifically to disclose fraud is sufficient to render his disclosures nonvoluntary."); see also *Wercinski v. IBM Corp.*, 982 F. Supp. 449, 461-62 (S.D. Tex. 1997) (same); *United States ex rel. Foust v. Grp. Hospitalization & Med. Servs., Inc.*, 26 F. Supp. 2d 60, 73 (D.D.C. 1998) (same); Webster's 2564 ("voluntary implies freedom from any compulsion that could constrain one's choice" and defining it as "produced in or by an act of choice").

41 A copy of the indictment of AU Optronics and six of its executives, *US v. AU Optronics Corporation, et al.* No CR-09-0110 (N.D. Cal. 2010)(SI), is available at <https://www.justice.gov/atr/case-document/superseding-indictment-1> (last visited Sept. 16, 2019).

42 Don Clark and Brent Kendall, *AU Optronics Fined \$500 Million in Price-Fixing Case*, WALL STREET JOURNAL, September 20, 2012, <https://www.wsj.com/articles/SB10000872396390444032404578008420937555176> ("The Justice Department previously has secured negotiated guilty pleas against seven other Asian companies accused of LCD price-fixing in the case, including LG, obtaining combined fines of \$890 million.") (last visited Sept. 16, 2019).

43 See Kurt Eichenwald, *US Wins A Round Against Cartel*, NEW YORK TIMES, January 30, 1997, available at, <https://www.nytimes.com/1997/01/30/business/us-wins-a-round-against-cartel.html> (last visited Sept. 16, 2019).

at the conspirator companies and salespeople usually know about any collusion. Dangling a potential whistleblower award into cartel waters will typically have many “little fish” contemplating the bait.

Without a potential whistleblower award, however, it will be rare for an individual to come forward. Even the lowest level employee who knows his company is fixing prices and takes any act to carry out the price fixing agreement (like the salesman who is told to check prices with a competitor) is subject to a maximum 10-year jail sentence.⁴⁴ In order for a low-level cartel participant to come forward, he needs to engage a qualified attorney and negotiate a non-prosecution agreement with the Antitrust Division. This is an expensive, potentially life changing decision. Long-term unemployment may well follow. Hefty attorney fees surely will. Even the most desirable whistleblower—one with no culpability at all, such as a secretary, or customer—will not ensnare herself in a cartel investigation without some means to cover significant attorney costs and reap some compensation for doing “the right [but very costly] thing.”⁴⁵ A potential whistleblower award allows engagement of an attorney on a contingency fee and provides the possibility that the whistleblower will have the financial means to withstand potential retaliation by the industry.

The FCA, the Dodd-Frank Act, and other whistleblower statutes are successful, in part, because individuals with actionable information can engage an attorney to guide them through the process in exchange for a possible award of attorney fees and a contingency fee. The whistleblower’s attorney can develop the potential whistleblower’s claim, negotiate with the government, and represent the potential whistleblower throughout the process, all without an upfront cost to the potential whistleblower. A former employee, for example, maybe one who has been fired or downsized—would have a way to report illegal conduct without assuming a tremendous legal bill—and even have a financial incentive to do so.

B. The SEC Whistleblowing Legislation Should Be Imitated

The SEC’s successful whistleblower program has returned hundreds of millions of dollars to investors as a result of actionable whistleblower information over the past six years. In 2018, the SEC announced a “record-breaking year” for its whistleblower program, after receiving more than 5,200 whistleblower tips and distributing more than \$168 million in awards to 13 individuals.⁴⁶ The success story told in the CFTC’s latest annual report is similar, including reporting the largest-ever CFTC whistleblower award

44 Under conspiracy law, if an estimator, or a salesperson knows his company is involved in a price-fixing agreement, he is liable as a “coconspirator” if he takes any act in furtherance of the conspiracy (prepares a bid; quotes a fixed price). Consequently, virtually 100% of witnesses who cooperate with the Antitrust Division demand immunity. But, these “culpable” individuals would make ideal whistleblowers. A financial reward to low-level cartel participants—given the considerable expenses such a witness will incur in providing cooperation—seems like a reasonable exchange.

45 Cartel Capers, *A Whistleblower Story—Hypothetical*, September 25, 2018, <http://cartelcapers.com/blog/a-whistleblower-story-hypothetical/> (last visited Sept. 16, 2019).

46 See SEC, *2018 Annual Report to Congress, Whistleblower Program*, p. 9, available at <https://www.sec.gov/sec-2018-annual-report-whistleblower-program.pdf>.

of approximately \$30 million.⁴⁷ The IRS paid one whistleblower more than \$100 million for information that helped the government uncover a massive tax evasion scheme and led to a \$780 million settlement.⁴⁸

Andrew Ceresney, the former SEC Director, Division of Enforcement has stated:

“The bottom line is that in its short history, our whistleblower program has had tremendous impact. And, as imitation is the sincerest form of flattery, other domestic and foreign regulators have sought to replicate the successes of our program.”⁴⁹ It is time for SEC style cartel whistleblower legislation to allow the Antitrust Division to enjoy similar success.⁵⁰

C. The Basic Elements of A Cartel Whistleblower Statute

1. Payment of Award

The SEC whistleblower program allows for a reward, in “any covered judicial or administrative action, or related action.”⁵¹ The Antitrust Division does not have administrative actions but an antitrust whistleblower would be eligible for an award based on the level of fines imposed after criminal convictions.

2. Amount of Award

The SEC provides for a whistleblower award of between 10 and 30 percent, but only where the penalties exceed \$1 million.⁵² In our view, this may not be an appropriate award schedule for an antitrust whistleblower. The \$1 million threshold should be eliminated. A rigged electrical contract at a local hospital that would have been \$750,000 with competitive bidding but has a low fixed bid of \$1 million is as worthy of a whistleblower award as an international cartel where each consumer suffers a relatively small loss, but cumulatively the loss will easily exceed \$1 million. Also, the 10 to 30 percent award range

47 See CFTC, *2018 Annual Report on the Whistleblower Program and Customer Education Initiative*, p. 2, <https://whistleblower.gov/sites/whistleblower/files/2018-10/FY18%20Annual%20Report%20to%20Congress%20Final.pdf> (last visited Sept. 16, 2019).

48 See David Kocieniewski, *Whistleblower Awarded 104 Million by I.R.S.*, NEW YORK TIMES, September 11, 2012, <https://www.nytimes.com/2012/09/12/business/whistle-blower-awarded-104-million-by-irs.html> (last visited Sept. 16, 2019).

49 Andrew Ceresney, SEC Director, Division of Enforcement, “*The SEC’s Whistleblower Program: The Successful Early Years*,” September 16, 2016, <https://www.sec.gov/news/speech/ceresney-sec-whistleblower-program.html> (last visited Sept. 16, 2019).

50 William Kovacic, a leading commentator in the antitrust world, has publicly endorsed the whistleblower idea: “I think it would be a good idea to do this,” he said. Although he did not expect the U.S. to adopt it soon, Kovacic predicted that with around 100 competition agencies around the world “sooner or later someone is going to try this.” David Lawsky, *Big Payoffs Eyed for Whistleblowers*, REUTERS, November 20, 2007, <https://www.reuters.com/article/us-antitrust-whistleblowers/big-payoffs-eyed-for-antitrust-whistleblowers-idUSL2045531920071120> (last visited Sept. 16, 2019).

51 15 U.S.C.A. ¶ 78u-6.

52 *Id.*

may be excessive in a large cartel case. These are details to be negotiated in any potential cartel whistleblowing legislation.

3. No Recovery for One Convicted of the Violation

No SEC whistleblower award can be made to “to any whistleblower who is convicted of a criminal violation related to the judicial or administrative action for which the whistleblower otherwise could receive an award under this section.”⁵³ An antitrust whistleblower statute should certainly retain this provision. This will give the Antitrust Division significant control over who can become a whistleblower. If the potential whistleblower has a level of culpability such that the Antitrust Division is not comfortable accepting that person as a whistleblower, the simple answer is to not grant non-prosecution protection. Another possible scenario is that the Antitrust Division grants non-prosecution protection to a highly culpable individual (making them eligible for an award because there would be no conviction) but include in the cooperation agreement that the cooperator waive the right to a potential “bounty.” Culpability lessens SEC whistleblower awards.⁵⁴ In practice, potential criminal prosecution will make the Antitrust Division the gatekeeper of whistleblower awards.

4. Anonymous Reporting

Under SEC procedures, a whistleblower must have an attorney and the complaint can be filed anonymously through the attorney.⁵⁵ Anonymity may affect whether the SEC acts on the tip and can also diminish the credit a whistleblower might get for cooperation. But a whistleblower might stay anonymous through the entire proceeding. Anonymity cannot be guaranteed, however, as a whistleblower’s identity may be disclosed if required in connection with a federal court or administrative action. A similar procedure for anonymity should be part of cartel whistleblower legislation, also understanding that a whistleblower’s identity may become public as a result of the prosecutor’s duty to turn over evidence at trial or other legal requirements.

Potential long-term anonymity in filing a whistleblower complaint, as opposed to certain public disclosure in a full blown FCA lawsuit, is one of the most attractive features of the SEC whistleblower program. It allows an individual to report wrongdoing with at least a reasonable possibility that his identity will not be revealed. Requiring that the information be reported through an attorney helps weed out frivolous claims. SEC-style cartel whistleblower legislation should be made available to whistleblowers on government contracts as an alternative to an FCA *qui tam* suit.

53 *Id.* at ¶ 78u-6 (c)(2)(B) (no award to any whistleblower who is convicted of a criminal violation related to the action for which the whistleblower otherwise could have received an award).

54 *See SEC to Whistleblowers: Report Promptly and Expect a Minimal Award if You are Culpable*, NATIONAL LAW REVIEW, September 17, 2018, <https://www.natlawreview.com/article/sec-to-whistleblowers-report-promptly-and-expect-minimal-award-if-you-are-culpable> (last visited Sept. 16, 2019).

55 *See* SEC Whistleblower, Frequently Asked Questions, <https://www.sec.gov/whistleblower/frequently-asked-questions#faq-10> (last visited Sept. 16, 2019; *see also* 17 C.F.R. ¶ 240.21F-9 (setting forth procedures for submitting original information to the SEC)).

D. The Objections Raised Against a Potential Cartel Whistleblower Statute Are Weak

In July 2011, the General Accounting Office issued a report on *Criminal Cartel Enforcement*⁵⁶ and found support for legislation protecting a whistleblower who comes forward, but little support for the idea that the whistleblower should be financially rewarded.⁵⁷ Nine of 21 key stakeholders stated that adding a whistleblower reward in the form of a bounty could result in greater cartel detection and deterrence, but 11 of 21 noted that such rewards could hinder the DOJ's enforcement program. In 2011, Antitrust Division officials did not take a position on anti-retaliation legislation but were opposed to providing a whistleblower bounty. The position of the current administration is not known.

The concerns about how a whistleblower reward could harm cartel enforcement can be grouped into these categories:

1. Credibility

There is concern that a whistleblower witness will lose credibility if he is eligible for a financial reward. But, a whistleblower would generally just “get the ball rolling” and allow subpoenas and search warrants to go out to subject companies. The whistleblower's usefulness may end or greatly diminish after the investigation begins. Moreover, in which scenario are consumers better off: When the government has no knowledge of a secret cartel? Or when a cartel is exposed by a whistleblower who will be eligible for a financial reward? It is better to have a witness who may have a credibility issue because of a possible reward than no witness at all.

2. Onslaught of Frivolous Claims

Another concern is that a potential whistleblower reward will lead to frivolous claims. There may be many leads, but Antitrust Division attorneys are skilled enough to know the difference between a report of simultaneous price increases and an insider who has knowledge of a cartel. Private antitrust attorneys will help play a screening role because they are not likely to take on a case on a contingency fee that is frivolous. Finally, the extra resources needed to review whistleblower complaints will be more than offset by the resources saved when a credible “insider” whistleblower lays out the facts exposing a cartel. The Antitrust Division already adheres to this principle with the successful Corporate Leniency Policy where a company and its cooperating executives can escape any criminal liability in return for whistleblowing on the cartel.⁵⁸

56 U.S. Government Accountability Office, *CRIMINAL CARTEL ENFORCEMENT: Stakeholder Views on Impact of 2004 Antitrust Reform Are Mixed, but Support Whistleblower Protection*, July 25, 2011, <https://www.gao.gov/products/A98263> (last visited Sept. 16, 2019).

57 *Id.*

58 The Antitrust Division also sometimes uses “affirmative leniency,” making a reverse proffer to a potential corporate leniency applicant that the Division staff feels would be a good candidate for corporate leniency.

3. Undermining Compliance Programs

Business groups complain that with a whistleblower reward, an employee who learns about cartel behavior may decide to go directly to the DOJ rather than report the information internally, thus potentially undermining corporate compliance programs. That may happen. An employee may reasonably conclude that the “compliance program” is not really working if senior executives are involved in a cartel, and it may be dangerous to report the information internally. But even if the employee does go directly to the government, all is not lost in terms of a company with a legitimate compliance program. A single whistleblower is highly unlikely to be able to prove a cartel beyond a reasonable doubt. The Antitrust Division may elect to approach the company where the whistleblower worked and offer an early favorable plea agreement or even leniency.

4. Rewarding the Culpable?

There should be no concern that a senior member of a cartel, a “master,” could obtain a whistleblower reward. As discussed, the Antitrust Division would simply either not grant non-prosecution protection to an individual who played a central role in the cartel, or it could negotiate an agreement that precludes a very culpable executive from seeking a whistleblower reward or limits the award to the reimbursement of attorney fees.

E. Create an Antitrust Division Office of the Whistleblower

Our cartel whistleblower proposal requires that legislation be passed. Anyone proposing legislation should have a “Plan B.” The Antitrust Division could immediately create an Office of the Whistleblower. A key aspect behind the success of the SEC whistleblower provision is that the SEC actively promotes the program through its Office of the Whistleblower.⁵⁹ The Antitrust Division has had successful whistleblower prosecutions besides the Korean fuel supply matter discussed above. But, the Antitrust Division does little to publicize the role of the whistleblower and encourage others to step forward.⁶⁰

A Criminal Cartel Office of the Whistleblower would be particularly helpful during times of intense government financed reconstruction after natural disasters. The Antitrust Division and Federal Trade Commission have expressed concern that collusion can emerge following a natural disaster. In a joint statement, the agencies said, “While natural

59 See generally *SEC Office of the Whistleblower*, <https://www.sec.gov/whistleblower> (last visited Sept. 16, 2019).

60 A publicly documented example of this was in 2012 when the Antitrust Division settled a civil bid rigging complaint for a total of \$550,000 for antitrust and FCA violations where two companies were charged with rigging contracts for Bureau of Land Management gas leases. See DOJ Press Release, *Justice Department Settlement Requires Gunnison Energy and SG Interests to Pay the United States a Total of \$550,000 for Antitrust and False Claims Act Violations*, Feb. 15, 2012, <https://www.justice.gov/opa/pr/justice-department-settlement-requires-gunnison-energy-and-sg-interests-pay-united-states> (last visited Sept. 16, 2019). Similarly, there was a FCA case filed in the Antitrust Division’s successful prosecution of the Puerto Rican ocean shipping cartel. That investigation resulted in the longest jail sentence ever received by an individual convicted of a Sherman Act violation—5 years. While there was a whistleblower in that case, the only reference to that fact is in a government post trial brief. See *US v. Frank Peake*, Case No: 16-2356 (filed Feb. 2, 2017), <https://www.justice.gov/atr/case-document/file/936611/download> (last visited Sept. 16, 2019).

disasters often bring out the best in human compassion and spirit, they can also lead to unscrupulous individuals and organizations taking advantage of those in need.”⁶¹ A visible Cartel Office of the Whistleblower would encourage whistleblowers to come forward to combat any collusion.

IV. CONCLUSION

Whistleblower awards work in helping to expose financial crimes where insider cooperation is necessary. Whistleblower awards have helped the SEC achieve remarkable results. Whistleblower awards help the Antitrust Division prosecute bid rigging and price fixing—when the government is the victim. The passage of criminal cartel whistleblower legislation will help expose cartels in both the public and private sector. It is an idea whose time has come.

61 FTC Antitrust Division Joint Statement, *Antitrust Guidance Hurricanes Harvey and Irma*, September 12, 2017, https://www.ftc.gov/system/files/documents/public_statements/1253313/hurricanes_harvey_and_irma_ftc_doj_statement.pdf (last visited Sept. 16, 2019).