Whistleblower Reward Program for COVID-19 Related Antitrust Violations

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COVID-19 Crisis Increases Threat of Antitrust Violations

- The government is spending trillions of dollars to fight COVID-19 on multiple fronts
- The DOJ has cautioned the business community against taking advantage of the health crisis to engage in anticompetitive conduct
- Procurement Collusion Strike Force created to focus on antitrust crimes involving government dollars, including those earmarked for COVID-19
Types of Potential COVID-19 Related Antitrust Violations

- **Price-fixing or bid-rigging of public health products**
  - Coordination of manufacturing, distribution, or sale of personal protective equipment such as face masks, respirators, and diagnostics, as well as upstream value chain components

- **Market allocation schemes**
  - Competitors in markets for public health products and services who agree to allocate among themselves other market participants such as wholesalers, distributors, retailers, and consumers

- **Agreements to modulate prices, wages, output, or quality to harm markets and consumers**
  - Employer coordination of essential workers, including wage-fixing and no-poach agreements
Antitrust Whistleblower Reward and Anti-Retaliationary Protection (WRAP) Act

- A proposed whistleblower bounty statute aimed at COVID-19 related antitrust violations. Bounty between 10-30% of monetary penalty as agreed or adjudicated.

- Focused on criminal enforcement regarding cartels and unlawful agreements under Sherman Act sections 1 and 3(a).

- Includes strong anti-retaliation protections.

- Antitrust Division retains sole investigative and prosecutorial discretion.
Concerns over Establishing Antitrust Whistleblower Reward Program

- Interference with Leniency Program
- Financially rewarding those engaged in anticompetitive conduct
- Encouraging false reports by offering monetary reward
- The number and quality of tips that the Antitrust Division may receive
WRAP Act Complements Antitrust Division’s Leniency Program

- Leniency Program successfully incentivizes those who face criminal liability to come forward
- But insiders in all areas may possess of information about possible criminal activity without having themselves participated
- WRAP Act incentivizes whistleblowers who are aware of antitrust violations but do not face criminal liability
- Leverages suite of governance tools including compliance programs to further enable stakeholders and private and public sector overseers (e.g., controlling shareholders, laborers, lenders, management, and business partners) to protect long-term business interests and broader community
Monetary Reward is Key Component of WRAP Act

- A monetary reward is essential to incentivize those who are not criminally liable to come forward yet still face risk to career, professional and personal relationships.

- False reports can be deterred by encouraging whistleblowers to retain counsel.

- Monetary rewards are critical to the success of other whistleblower programs, are only reached through fulsome decisionmaking process ending in agreement or adjudication, and are well suited for both official tribunals as well as alternative dispute resolution bodies for arbitration and mediation.
Whistleblower Programs with Monetary Rewards are Enormously Successful

- The Federal False Claims Act
  - $60 billion recovered; $7 billion in bounties

- The Securities and Exchange Commission
  - $1 billion recovered; $300 million in bounties

- The Commodity Futures Trading Commission
  - $730 million recovered; $90 million in bounties

- The Internal Revenue Service
  - $4.6 billion recovered; $797 million in bounties
Controls over Number and Quality of Tips are Built into WRAP Act

- Quality of tips are addressed by encouraging whistleblowers to retain counsel for non-anonymous submissions; requiring counsel for anonymous submissions.

- Number of tips are addressed by requiring a minimum monetary penalty of $10 million; discourages tips about relatively small amounts of antitrust harm.
Foreign Antitrust Whistleblower Programs

- The United Kingdom
  - Reward of up to £100,000 for whistleblowers who report illegal cartel activity.

- Hungary
  - Reward of up to 1% of the fine levied for whistleblowers who report illegal cartel activity. Maximum reward is HUF 50 million (around US $ 179,000).

- Slovakia
  - Reward of up to 1% of the fine levied for whistleblowers who report illegal cartel activity. Maximum reward is of €100,000.
Imperative to Enact WRAP Act Now

- Immediate enactment of the WRAP Act is warranted given that COVID-19 related anticompetitive schemes are likely in their inception.

- Antitrust whistleblower program is long overdue:
  - Other reward programs insufficient for majority of antitrust violations; several foreign jurisdictions have enacted successful antitrust whistleblower programs.

- The Leniency Program protections currently expire on June 22, 2020; WRAP Act can be incorporated into an extension.
GW Law
Antitrust Team
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