Lowenstein Sandler

Sometimes Confession Is Good for the Soul, but Only If You're the First to Confess!

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What You Need To Know:

- **A company in a criminal price-fixing investigation will be much better off if it is the one that blew the whistle to start the investigation.**
- **The first company to report illegal conduct that isn't already known will avoid fines for the company and the individuals involved, and will also avoid jail time for the individuals.**
- **A company that is not the whistleblower will face fines and civil class action trebled damages, and individuals who were involved will face fines, jail time, and likely loss of their jobs.**

No matter how novel a scheme about "coordinating" with competitors to instill "discipline" in the market may seem, odds are that the antitrust enforcers have seen it before and eventually will prosecute it.

Take the recent example of a number of commercial flooring executives who pled guilty to agreeing to rig bids and to fix prices by working together to submit "complementary" bids. (Click here.)

What is a complementary bid? A complementary (or "cover") bid is one form of bid rigging. It results from an agreement among competitors about which one should win a particular bid. Once they've agreed, all the bidders submit bids (the cover bids) intentionally higher than the bid of the agreed winner.

Other variants of bid rigging include bid rotations (or allocations), where competitors agree to take turns on winning bids, and bid suppression (or limitation), where competitors agree to take turns refraining from bidding.

The net effect of each is the same—the winning bid is for higher prices than if the bidding had not been rigged.

How long did the commercial flooring bid rigging last? The bid rigging went on for eight years before the executives got caught.

How did they get caught? The usual way: someone blew the whistle.

Sometimes customers blow the whistle. They see bids increasing across the board or patterns emerging in the bids received. Worse still, similarities in the language used in the bids (including typos) suggest a ringleader preparing the bids.

The risk that customers will blow the whistle on bid rigging may seem bad enough, but an even higher risk is that one of the conspirators is the whistleblower. Why would one of the conspirators blow the whistle when by doing so, he or she would be confessing to the crime?

This is where it turns out the antitrust enforcers are one step ahead of the price fixers. The Antitrust Division of the U.S. Department of Justice has created powerful incentives for price fixers to blow the whistle on their own conspiracies.

Under the Antitrust Division's Leniency Program, companies and individuals involved in price fixing and other criminal conduct can self-report—confess and provide evidence against their fellow conspirators—but still avoid fines for the company

and people involved as well as jail time for their executives.

But there's a catch: to get those immunity benefits, the company or individual self-reporting *must be the first to report* and must be reporting conduct about which the Antitrust Division was not already aware.[1] So it's a great deal—if you're first.

Those incentives create a dynamic that results in whistleblowing; no matter how long a conspiracy has been successful at making extra money and avoiding detection, no one in it can be sure that one of the other conspirators is not *already* cooperating with the government, wearing a wire, and reporting on the meetings. Each person in the conspiracy has to constantly wonder whether he or she will be seated at the defendant's table or sitting on the witness stand narrating the video when the government plays the videotapes of the meetings for the jury.

But the risk of revealing a conspiracy is even broader than a customer or conspirator whistleblower. Sometimes a company's own transformative once-in-a-decade transaction may blow the whistle.

Take the "canned tuna" case. Market leaders Bumble Bee and Chicken of the Sea proposed a $1.5 billion merger. Given their market positions, the Antitrust Division served a second request, asking for years of emails and other documents. While reviewing those documents, lawyers for Chicken of the Sea's parent company found evidence of a long-running price fix. With their guidance, Chicken of the Sea reported the price fix, confessing to their own participation.

That sequence of events is interesting and has several additional lessons to teach.

First, the two companies and their attorneys had to know—as every grocery shopper does—that the market for canned tuna was already concentrated and that the Antitrust Division was likely to look closely at a combination of two market leaders, with a strong likelihood of a second request. As then-Assistant Attorney General Bill Baer explained when the parties called off their deal, "Our investigation convinced us—and the parties knew or should have known from the get-go—that the market is not functioning competitively today, and further consolidation would only make things worse."

Second, knowing that a second request is likely in the cards, it's a good idea for a company to know what's in the emails and documents it will have to turn over to the government *before* filing to do the deal. Unfortunately, many companies don't want to spend the money on a document review like that until *after* they get the second request.

What did Chicken of the Sea get in return for blowing the whistle besides seeing its merger with Bumble Bee crater? For one thing, it got leniency, saving itself and its employees from felony criminal convictions, fines, and jail time for the executives.

While Chicken of the Sea avoided paying millions in fines and seeing its executives in jail, the other two conspirators more than made up for it. StarKist paid a $100 million fine. Bumble Bee was fined more than $100 million, but because of its inability to pay that amount, the government conditionally agreed to allow it to pay $25 million, but it still was driven into bankruptcy by the criminal case and the related civil suits.

In addition to those large corporate fines, Christopher Lischewski, Bumble Bee's former CEO (the big tuna in the case, so to speak), was convicted in a jury trial at which three other executives who had pled guilty testified against him. Lischewski was sentenced to 40 months in jail plus a $100,000 fine.

And in parallel with criminal investigation and trial, all the companies—including whistleblower Chicken of the Sea—are defendants in ongoing civil litigation brought by their customers, in which they face the possibility of paying damages of up to three time the amount by which they actually overcharged their customers. But even here, Chicken of the Sea benefits from being the whistleblower; under the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA) (which was reauthorized on Oct. 1), as it is a successful leniency applicant, Chicken of the Sea's civil damages exposure will be reduced from treble damages to actual damages.

The lessons for companies and individuals are clear.

- First, a company in a criminal price-fixing investigation will be much better off if it is the one that blew the whistle to start the investigation.
- Second, a company that is not the whistleblower can face enough out-of-pocket costs defending itself, paying fines, and paying customers, to force it into bankruptcy.
- Third, in addition to the out-of-pocket costs of the investigation, fines, and damages, a criminal antitrust investigation imposes significant "soft" costs, including the emotional toll on its executives and their distraction from running the business.
- And finally, a guilty individual who does not work for the whistleblower may end up paying a fine, going to jail, and losing his or her job. And the higher up that individual is in the company, the more certain it is that he or she will face all three: jail, fines, and unemployment.

So while confession is good for the soul, in criminal antitrust prosecutions, as in so many other parts of life, the race goes to the swiftest—and the best informed.

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[1] There are some benefits to being second or even third, but they don't compare to the benefits of being first.

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