

CLIENT ALERT

DOJ Names New Head Criminal Antitrust Enforcer

May.17.2018

On May 15, 2018, the Department of Justice's Antitrust Division appointed Richard Powers as its new Deputy Assistant Attorney General (DAAG) for Criminal Enforcement. The selection of Mr. Powers – who will be serving on an acting basis until his appointment receives all the necessary administrative approvals – concludes a nearly yearlong process to fill the Antitrust Division's most senior criminal enforcement position. As the DAAG for Criminal Enforcement, Mr. Powers will oversee the day-to-day operations of the Antitrust Division's criminal enforcement program and will be a key decisionmaker in determining whether the Division brings criminal charges against a corporation and/or its employees.

Prior to being appointed the Antitrust Division's DAAG for Criminal Enforcement, Mr. Powers was serving as a trial attorney in the DOJ's Criminal Division. Consequently, his appointment represents the first time that the Antitrust Division has not selected one of its current career prosecutors to serve as the head of its criminal enforcement program. Nonetheless, Mr. Powers will not be a complete stranger to the Antitrust Division or antitrust prosecutions because he spent the first six years of his career with the Division and has been working on investigations being jointly conducted by the Antitrust and Criminal Divisions during the past two years. Moreover, Mr. Powers has significant experience prosecuting antitrust crimes in the financial services sector and thus will likely continue the Antitrust Division's vigorous enforcement efforts in this sector, which have resulted in the imposition of over \$5 billion in fines since 2011.

Background and Prosecutorial Experience

Since graduating from the University of Alabama Law School nearly 10 years ago, Mr. Powers has been a criminal prosecutor in the DOJ. Mr. Powers graduated from West Point and served in the U.S. Army for five years, where he achieved the rank of Captain and was awarded the Bronze Star for his service in the Iraq War.

Between 2009 and 2015, Mr. Powers served as a criminal trial attorney in the Antitrust Division and spent most of this time in the Division's New York office. During this period, Mr. Powers primarily worked on investigations and prosecutions involving the financial services industry. Among other matters, Mr. Powers played a leading role in the Antitrust Division's LIBOR (whether financial institutions conspired to manipulate their LIBOR submissions), Foreign Exchange (whether financial institutions conspired to manipulate the foreign exchange spot market), and Municipal Bonds (whether financial institutions conspired to rig bids in the municipal bonds investment market) investigations. These investigations have resulted in criminal charges against nearly 60 corporations and individuals and the imposition of more than \$5 billion in fines.

In 2016, Mr. Powers left the Antitrust Division to join the DOJ's Criminal Division, where he has been assigned to the Medicare Fraud Task Force and detailed to the U.S. Attorney's Office for the Eastern District of New York. In this role, Mr. Powers has prosecuted various healthcare providers for submitting fraudulent Medicare and Medicaid claims. Mr. Powers has also continued to be involved in the LIBOR investigation, which is being jointly conducted by the Criminal and Antitrust Divisions. In working on this investigation, Mr. Powers has played a leading role in securing court approval of the guilty plea entered by a

major financial institution – which included a \$150 million fine – and the indictment of two of its traders, who are scheduled to be tried later this year.

Potential Enforcement and Policy Priorities

While Mr. Powers has yet to provide any insights into his enforcement and policy priorities, the Antitrust Division will likely continue to be very active in the financial services sector under his leadership because: (i) most of his antitrust enforcement experience has been focused on the financial services industry; (ii) the Antitrust Division has invested heavily in its New York office, which has taken the lead in the Division’s financial services investigations and has developed significant expertise in conducting these types of investigations; (iii) the Antitrust Division has established close working relationships with several agencies responsible for regulating and prosecuting financial crimes; and (iv) the Antitrust Division will be prosecuting several individuals later this year as part of its ongoing LIBOR and Foreign Exchange investigations. Indeed, this month the Antitrust Division indicted another trader in its Foreign Exchange investigation. In announcing this indictment, the head of the Antitrust Division (Assistant Attorney General Makan Delrahim) stated that that “today’s indictment demonstrates [that] the Antitrust Division remains committed to holding individuals accountable for anticompetitive conduct that violates the integrity of global financial markets.”

Another industry that may receive attention under Mr. Power’s leadership is the healthcare industry. As noted above, Mr. Powers has been serving on the Criminal Division’s Medicare Fraud Task Force for the past two years and Attorney General Sessions has made prosecuting healthcare-related crimes a top DOJ priority. Presently, the Antitrust Division is investigating more than 25 generic drug manufacturers for possibly participating in unlawful price fixing, bid rigging, and customer allocation schemes.

In terms of policy matters, a key issue that will likely require Mr. Powers’ immediate attention is the question of whether companies charged with antitrust crimes should receive credit for having compliance programs in place when these crimes occurred. The Antitrust Division has a longstanding policy of refusing to provide companies any credit for such programs because they proved to be ineffective in preventing criminal antitrust violations. However, in recent public remarks, the Antitrust Division’s senior leadership team has indicated that it has begun reconsidering whether it should provide companies with credit for having robust antitrust compliance programs even if they failed to prevent certain criminal violations as a way to encourage proactive compliance with the antitrust laws and the self-reporting of violations.¹¹ As the DAAG for Criminal Enforcement, Mr. Powers will likely take the lead in determining whether the Antitrust Division should make any changes to this policy and, if so, how these changes are implemented.

The Antitrust Division’s most recent annual Spring Update (which was issued last month) also provides some helpful insights into the Division’s likely criminal enforcement priorities during the upcoming year:

- **No-Poach:** Last month, the Antitrust Division brought its first no-poach prosecution since issuing its human resource guidelines in October 2016, which announced that naked no-poach agreements – where companies agree not to recruit or hire each other’s employees outside of a legitimate transaction or collaboration – will be criminally prosecuted going forward. While the agreements in this case were treated as civil violations, the Antitrust Division made clear that any naked no-poach agreements that were either entered into or continued after the guidelines were issued will likely be

criminally prosecuted. As with other recent public statements, the Antitrust Division’s Spring 2018 Update makes clear that the Division plans to continue to vigorously prosecute unlawful agreements in the employment context: “Market participants are on notice: the Division intends to zealously enforce the antitrust laws in labor markets and aggressively pursue information on additional violations to identify and end anticompetitive no-poach agreements that harm employees and the economy.”

- **Individual Accountability:** The Antitrust Division has a long track record of prosecuting individuals – in addition to their corporate employers – for antitrust crimes. For example, the Antitrust Division has prosecuted nearly 600 individuals over the last 10 years. In its Spring 2018 Update, the Antitrust Division signaled that holding individuals accountable will continue to be one of its top priorities by, among other things, highlighting that it secured prison sentences against 30 individuals during 2017 (the most since 2012) and successfully tried 9 individuals as well. The Antitrust Division also highlighted the fact that it will be trying several individuals during the second half of this year.
- **Electronic Evidence:** In its Spring 2018 Update, the Antitrust Division indicated that it is investing in its capabilities to be able to detect conspiracies that utilize cutting-edge technology, such as chat rooms, encrypted apps, and computer algorithms. The Antitrust Division has also indicated that the information requests in its civil and criminal investigations will be seeking this type of electronic evidence.

¹ In 2015, the Antitrust Division gave two companies credit for instituting robust and effective compliance programs *after* the Division began investigating them for criminal antitrust offenses. In doing so, the Antitrust Division explained that the fine reductions it recommended to the courts were warranted because the companies took significant steps toward preventing future violations by “clearly accept[ing] responsibility for [their] criminal conduct” and by making “substantial improvements to [their] compliance and remediation program[s].” These two instances (which occurred in the Antitrust Division’s Foreign Exchange and Auto Parts investigations) represent the only times that the Division has given companies any type of credit related to their compliance programs in a criminal investigation.

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