

DOJ Antitrust Division Names New Criminal Deputy Assistant Attorney General

Skadden

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Richard A. Powers has recently joined the Department of Justice (DOJ) Antitrust Division as the acting deputy assistant attorney general (DAAG) for criminal enforcement and is expected to take on the role permanently. This is important because Mr. Powers will serve as the Antitrust Division's new criminal enforcement leader and could stay in the role for an extended period of time — well beyond this administration — because he is a career attorney and not a political appointee like the other deputies. Historically, this DAAG position has been reserved for career attorneys to help ensure that criminal enforcement is divorced from political influence. Mr. Powers' appointment is also notable because, for the first time in many years, the criminal DAAG will come from outside the Antitrust Division.

For the past three or so years, Mr. Powers has been a trial attorney in the DOJ's Criminal Division, Fraud Section, where he has handled several fraud cases related to the financial services industry. Prior to his stint in the Criminal Division, Mr. Powers served as a trial attorney for six years in the Atlanta and New York field offices of the Antitrust Division. While Mr. Powers was in Atlanta, the Antitrust Division charged several executives of Japanese airlines in the air cargo price-fixing investigation that spanned the late 2000s and resulted in significant guilty pleas and fines. He brought the first bid-rigging charges in the still-ongoing public real estate foreclosure auction investigation. Mr. Powers also focused on conspiracy and fraud matters in the financial services industry, including the investigation into manipulation of municipal bonds and Libor. As part of this investigation, Mr. Powers worked on teams that tried and secured convictions of several individuals, secured guilty pleas from three banks and oversaw deferred prosecution agreements with two other banks. Mr. Powers joined the Antitrust Division out of law school in 2009.

This is the first time since the early 2000s that the position has been filled from outside the Antitrust Division ranks. Mr. Powers will bring with him his Criminal Division enforcement experience, which differs in some respects from Antitrust Division practices. The two divisions' approaches differ in that the Antitrust Division offers a highly successful leniency program that provides complete amnesty for a company and any employee who blows the whistle on price-fixing and market allocation conspiracies.

In its third decade, the leniency program is responsible for the Antitrust Division's success in uncovering and prosecuting dozens of international conspiracies resulting in billions of dollars of fines. It is successful because it is transparent and predictable. Companies and employees seeking leniency know they will be immune from prosecution as long as they cooperate fully. Even when — as frequently happens — a company and culpable employees do not qualify for leniency because a co-conspirator already obtained leniency for informing on their involvement in one conspiracy, they may be immune from prosecution in additional conspiracies that they self-report. The Antitrust Division calls this "leniency plus." Under those circumstances, the company and employees receive reduced sentences for the first conspiracy if they plead guilty and amnesty for any additional conspiracies, subject to their full cooperation.

In contrast, the Criminal Division has no leniency program. Companies and individuals are expected to cooperate fully in investigations but often remain subject to prosecution. Moreover, in the era of the Yates memorandum, companies receive no credit for cooperation unless they disclose all factual information about all employees involved in the alleged conduct. This may cause a breakdown in cooperation between an employer, who needs information to cooperate, and an employee, who may incriminate himself by providing information. In antitrust investigations, the leniency program incentivizes employers and employees to cooperate together.

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The Criminal Division also is more likely than the Antitrust Division to require companies to waive attorney-client privilege on subjects of interest as part of their cooperation. The Antitrust Division tends to avoid waiver requests, understanding that waiver will render the information discoverable and disadvantage a company in the inevitable follow-on private class actions.

Despite Mr. Powers' experience in the Criminal Division and with its different procedures, we do not expect a significant policy shift in the Antitrust Division. The leniency program, thanks in particular to companies and individuals that take advantage of "leniency plus," uncovers often hard-to-detect conspiracies and results in high rates of corporate guilty pleas in many investigations. The Antitrust Division's policy of recommending short prison sentences has also caused many individuals to opt for guilty pleas rather than risk criminal trial. The Antitrust Division is not likely to alter its successful enforcement practices in any meaningful way.

Mr. Powers begins his tenure in the midst of a few high-profile criminal enforcement efforts. Assistant Attorney General for Antitrust Makan Delrahim made clear earlier this year that the Antitrust Division will, for the first time, criminally prosecute companies and individuals that enter into "naked" no-poaching or wage-fixing agreements. These are agreements among companies not to hire employees away from each other or not to compete

on salaries if those agreements are not connected to a legitimate collaboration like a joint venture or merger discussion. The Antitrust Division now plans to treat such "naked" agreements like price-fixing or market allocation conspiracies. If the Antitrust Division brings charges, Mr. Powers and staff will have to decide how to determine the "volume of commerce" affected by the alleged agreement to calculate fines. Mr. Powers also will grapple with whether to require at least a short prison term for individuals pleading guilty, as the Antitrust Division does as a matter of policy in price-fixing cases.

Criminal enforcement in the health care industry has and will continue to be a top priority for the Antitrust Division. Since 2014, the Antitrust Division has been investigating potential price-fixing and market allocation in the generic pharmaceuticals industry. The investigation is wide-ranging and has prompted follow-on private and state attorneys general civil actions against 29 manufacturers for alleged conspiracies affecting 30 drugs. After four years of investigation, however, only two executives — and no companies — have agreed to plead guilty. Given the leniency program's incentives to self-report illegal conduct, the lack of guilty pleas four years into a price-fixing investigation is unusual. Earlier this year, Mr. Delrahim suggested that civil suits seeking federal government agency damages are a possibility. Mr. Powers likely will play a significant role in assessing the status of the investigation and its future direction.

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