

PUBLICATION

Antitrust Division May Name Individual Employees as Defendants in Civil Actions Brought Against Corporations

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In September, Department of Justice (DOJ) Deputy Attorney General Sally Yates announced that, going forward, when the DOJ brings an action against a corporation, it will give more serious consideration to asserting claims against the corporate employees responsible for that conduct as well. Not surprisingly, the announcement got the attention of corporate officers and board members serving on corporate boards all across America.

The subsequently issued "Yates Memo" provided further details on the DOJ's intentions, including the fact that, henceforth, individual actions would be considered in both criminal and *civil* matters. Notably, with respect to antitrust claims, this would constitute a radical departure from traditional practice; while the Antitrust Division has long considered, and occasionally brought, parallel actions against corporate defendants and their culpable employees in *criminal* matters, it has traditionally *not* done so in *civil* matters. This policy decision was based upon the view that many civil actions involve conduct that can have uncertain competitive effects, and thus imposing personal liability on those making such decisions was viewed as being unfair and unwarranted. Accordingly, some uncertainty lingered after the Yates announcement regarding how the Antitrust Division would respond to the Yates Memo.

In late November, corporate America got its answer, as DOJ Assistant Attorney General William Baer, who leads the Antitrust Division, made clear that the Antitrust Division supported the principles set forth in the Yates Memo. Moreover, Baer expressly confirmed that the Antitrust Division would consider bringing claims against individuals in *civil* antitrust matters, stating, "We will be looking, going forward, at whether there ought to be individual accountability" in such matters. He continued, "It doesn't mean we're going to do it, but it is, I think, a fair thing for the Deputy Attorney General to ask all components [of the DOJ] to look at [whether] there is an additional deterrent effect that comes with holding responsible the individuals who adopt a policy that is in violation of the antitrust laws."

It remains uncertain at this point whether Assistant Attorney General Baer's statement was intended to be little more than a show of support for Deputy Attorney General Yates's announcement, or a signal that individual actions against corporate employees in civil matters are on the way. In any event, Deputy Attorney General Yates and Assistant Attorney General Baer have likely already accomplished a large part of what they intended with their announcements: they appear to have gotten the attention of corporate officers all across the nation, with many corporations resolving to put antitrust compliance training at the top of their "to do" lists for 2016. Stay tuned.