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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

DOJ's Former Criminal Antitrust Chief Discusses Transitions

By **Matthew Perlman**

Law360 (October 28, 2022, 4:02 PM EDT) -- Richard A. Powers joined Fried Frank Harris Shriver & Jacobson LLP last month after more than a decade at the U.S. Department of Justice, where he headed criminal antitrust enforcement and also served as the antitrust division's acting head during the beginning of the Biden presidency.

Powers, who started his career in public service with five years of active duty in the U.S. Army as an infantry officer, spoke to Law360 about overseeing **criminal antitrust** enforcement at the DOJ across two presidential administrations and the changes he helped usher in.

He also talked about **servicing** as acting assistant attorney general for antitrust from February to November last year during the transition to the current administration and President Joe Biden's **executive order** calling on federal enforcers to better protect competition across the economy.

This interview has been edited for length and clarity.

I know you were in the military before you joined the DOJ. I wanted to talk to you a little bit about that transition, going from the armed forces to antitrust enforcement. What was that like?

I'm privileged to have had a pretty long career in public service that started in the military and I always think of myself as having grown up professionally in the Army. So, when I left the military, went to law school and then came to the Antitrust Division right after that, it was definitely a big change for me, but I think there were some similarities.

Both are types of public service, which provides a strong sense of mission. You believe what you're doing is important. And I think as you drill down a little bit, both settings require teamwork to be successful. I faced complex problems and challenges in both and I think what I learned in the military helped me to be organized, to think strategically about what we're trying to accomplish, and then also to have a process for accomplishing those goals that includes being pretty self-critical.

The last point I wanted to make about their similarities is what I learned in the military about culture, organizational culture. That's something I saw a lot of at the Antitrust Division both in terms of the culture of the organization you're working with, but also when it comes to investigating companies. You hear it all the time, the idea of tone at the top, the tone coming from the top of the organization. The military has a concept called command climate. What is the climate set by the leaders, set by the commanders? I think getting that right for any company, or any organization, is essential to the long-term success of that organization.

You helped implement a number of policy changes at the Antitrust Division while you were in charge of criminal enforcement. What were some of the more significant changes that you oversaw?

The antitrust division has a long track record of success when it comes to criminal enforcement going back several decades. And I think over the years the enforcement landscape had evolved and so it was important from my perspective to keep the antitrust division's approach to criminal enforcement current, while at the same time trying to preserve some of the key aspects of what helped make it

successful for so many years.

We took a hard look at what was happening in our cases and investigations, what was working and wasn't, plus what we were hearing from the bar in our many public discussions. With that backdrop, we made some important changes to practices and policies to move the criminal program forward in a way that reflects the reality of the case work and the enforcement landscape.

For example, we focused on building out the litigation capabilities at the antitrust division. We added the director of criminal litigation, criminal litigation counsel. We tried to find more trial opportunities outside of the antitrust context for attorneys. What you see now at the antitrust division in the criminal program is a deep bench of trial attorneys and section managers, assistant chiefs and chiefs, who can litigate really tough cases.

Another big one was that we updated the **leniency policy**, which included revamping the frequently asked questions for the first time in many years. We made those changes so that leniency applicants from companies understand the commitments and the approach that's going to be taken by the Antitrust Division when a company self-reports.

Another initiative was ... **establishment and launch** of the Procurement Collusion Strike Force, which has done a tremendous amount of work in the government contracting space.

Some observers have noticed in recent years a shift in criminal antitrust enforcement from a focus on large international cartels to more enforcement against domestic cartel activity. Could you talk about the cyclical nature of enforcement and what we're seeing?

There is a cyclical nature to the work ... There are times when you have more cases in one area than another, but I don't know that I would read too much into that in terms of saying what the priorities are.

The Antitrust Division generates cases in different ways and to a certain extent you prosecute the cases that you have. You see enforcement rise and fall in different industries depending on what's going on.

You helped to lead some of the division's first criminal labor-side antitrust cases, including its first criminal wage-fixing case and its first criminal case targeting no-poach agreements that prevent companies from hiring workers from one another. How do they fit in with the agency's enforcement program and how important are those cases to the division?

If you go back to late 2016 with **the H.R. guidance** coming out at the end of the Obama administration, that was a moment when the Antitrust Division made clear that prosecution of violations in labor markets would be a priority. That position has not changed since then despite the changes in administration. As with any industry, there's always a learning curve when it comes to investigations. I saw this first-hand in the financial markets when we were working on those cases. As you're going through that, you're trying to figure out what sorts of investigations you should look for and what you shouldn't.

In terms of impact, I think the enforcement efforts have changed employer behavior across the economy. I think there's much greater awareness about the legal risks with these types of agreements, which means there's likely fewer of them. That sort of outcome is important in terms of promoting competition and ensuring that workers receive the benefits of competition for their services. I expect this will continue to be a priority area for antitrust enforcement moving forward.

You were serving as the acting assistant attorney general for antitrust when President Biden issued an executive order calling for more attention to competition issues across the economy. What effect did that have from your perspective?

First, big picture, the executive order was a clear message that antitrust enforcement would be a top priority for the administration. It lifts up the Antitrust Division's work and makes it a priority. Second, and really in more practical terms, is the executive order pushes all federal agencies to consider competition as part of their mandate for regulatory action.

I think the executive order also opened up pathways for more regular communications between federal agencies and the Antitrust Division, especially with things like memorandums of understanding. Those types of agreements can have a real impact on enforcement. They lead to more information sharing about possible practices that the regulators are seeing, and can enable the Antitrust Division to help other agencies understand the competitive impact of certain practices.

You worked at the DOJ through a few presidential administrations. Antitrust is an area where historically we haven't seen major policy changes from administration to administration but do you think that's still true? Is the Biden transition different?

The short answer is yes. I think historically that the differences in enforcement from administration to administration were probably only perceptible to those of us who spend our days thinking about antitrust enforcement. That's not to say those differences weren't important, but I would say they fall under a continuum that has largely been unchanged for 30 years plus.

In that sense, I think there is a purposeful shift underway in the current administration to attempt to depart from that enforcement spectrum. I think you can see it in the discussions on things from the **consumer welfare standard**, the merger guidelines, to criminal Section 2 enforcement. The leadership of the Antitrust Division and the FTC have been clear that they view their jobs as leading a change in the approach, really reverting back to first principles of competition enforcement.

Was it challenging to serve as the unit's "acting" head during that transition?

We faced some real challenges during that time. It wasn't just the lack of having a permanent assistant attorney general, we didn't have any political appointees in the front office at the Antitrust Division. So, the senior career leadership had to do a lot of work that those folks usually do. That was everything from the nuts-and-bolts operational work, to working with department leadership, and of course all of the enforcement actions that were going on.

One of the things that really enabled us to be successful during that period was that we did have the support of department leadership, starting with Attorney General Merrick Garland. Having his support and the support of the leadership team allowed us to work quickly and aggressively rather than sitting idle and waiting for the new team to arrive. And from an enforcement perspective, that first year was incredibly busy.

In addition to the enforcement piece, we worked hard on the organization itself. That was everything from really bolstering our diversity and inclusion efforts, to working through all of the challenges caused by the pandemic.

I'm incredibly proud of what we were able to accomplish in that year. It was truly the result of a huge team effort from all the career leadership.

The antitrust division did hit a couple of setbacks in its criminal enforcement efforts while you were at the agency, particularly with a string of cases alleging price fixing among the country's major chicken producers, as well as a pair of the labor market cases. Since you can't discuss the cases individually, can you talk about the importance of bringing hard cases generally?

To really do the job right you have to be willing to bring tough cases. As a general matter, when you bring principled but tough cases, you are going to have a mixed trial record. To use a historic example, we had mixed litigation results in the financial market cases over a 10- to 15-year period. We had convictions at trial, there were acquittals, cases were reversed on appeal, cases were

affirmed on appeal. You really saw the whole spectrum of outcomes. And that was an area, financial markets, especially post-financial crisis, where it was incredibly important to make sure we were enforcing the antitrust laws. They were important cases but they were hard ones.

In the financial market cases, I never considered, whatever the outcome was, a setback. The mixed record is the price you pay for being willing to take on tough cases.

And I don't think that the Antitrust Division leadership will view outcomes as referendums on the decision to bring a case. They're going to continue to make enforcement decisions on the facts and the law for each case as they come up.

--Editing by Alyssa Miller.

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