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A New Approach: DOJ Antitrust Division In Wake Of Yates Memo

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For more than five years, the Department of Justice's (DOJ) Antitrust Division and the FBI have had the automotive parts industry under a microscope. In September 2015, the DOJ announced it would undertake a policy shift to focus more ardently on the investigation and prosecution of individuals responsible for company misconduct. This new policy shift may already be influencing the manner in which the Antitrust Division is conducting criminal investigations. The ongoing federal investigation into price fixing, bid rigging, and other anticompetitive conduct has netted at least 38 corporate convictions, 58 indictments of corporate executives, and approximately $2.6 billion in criminal fines. Most recently, INOAC Corp., an auto parts supplier and major player in the advanced materials industry, pled guilty for conspiring to fix prices and rig bids for the sale of plastic interior trim parts to Toyota Motor Corp. As a consequence, INOAC agreed to pay a $2.35 million criminal fine. Alluding to the Antitrust Division's continued commitment to prosecuting anticompetitive conduct in the auto parts industry, Deputy Assistant Attorney General Brent Snyder of the Justice Department's Antitrust Division stated, "the Antitrust Division will continue to protect American car buyers and hold automotive part suppliers accountable for their illegal conduct." In October 2015, just prior to INOAC's plea, a grand jury indicted three Japanese auto parts executives for their alleged participation in a conspiracy to fix prices and rig bids for the sale of automotive body sealing products to Toyota and Honda Motor Company. The executives consist of two current and one former employee of Nishikawa Rubber Co. In announcing the indictment, Snyder said, "[t]oday's indictment is another reminder that antitrust violations are not just corporate offense but also crimes by individuals" and, "[t]he Antitrust Division will continue to vigorously prosecute executives who orchestrate their companies' efforts to break the law." The indictment of the Japanese executives followed in the wake of Deputy Attorney General Sally Quillian Yates' Sept. 9, 2015, announcement that the Department would undertake a reorientation to focus more on the investigation and prosecution of individual corporate wrongdoers. The apparent policy shift was in response to the perception that the DOJ in recent years has failed to adequately prosecute individuals for corporate criminal conduct. The "Yates Memo," as it is widely known, identified six key policy initiatives to strengthen the DOJ's pursuit of individuals, including: (i) the requirement that companies disclose the misconduct of individuals in order to receive full cooperation credit; and (ii) the requirement that investigations of individuals be resolved prior to the conclusion of corporate investigations. Despite the perceived policy adjustment, the Antitrust Division cannot be accused of failing to hold individual bad actors accountable for their actions. In fact, the Antitrust Division has prosecuted 352 individuals in the last five years, in comparison to 123 corporate prosecutions. Prosecuting individuals subsequent to the plea or indictment of a company has been the Antitrust Division's *modus operandi* throughout its investigation of the auto parts industry. Typically, the DOJ indicts executives (or "carve-outs" as they are commonly referred to) a few months to a year following the plea or indictment of their respective

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employers. However, the recent prosecution of the three Nishikawa Rubber executives in the absence of any action against the company marks a rare departure from the norm and may reflect the influence of the Yates memo. Nishikawa Rubber's fate has yet to be determined, but the indictment of its executives prior to action against the company may be a sign of Nishikawa Rubber's intent to receive full cooperation credit from the DOJ, to expedite an ongoing DOJ investigation of the company, or both. The full extent of the impact of the Yates Memo has yet to be seen. Nevertheless, it appears to have had some influence on DOJ methodology since its announcement six months ago. Most interestingly, the Yates Memo may have had an impact on the Antitrust Division – the one Division of the Department of Justice that has never shied away from prosecuting individuals.