

President Trump Appoints Makan Delrahim to Lead the Antitrust Division

March 27, 2017

Today the Trump Administration announced the selection of Makan Delrahim, currently Deputy Counsel to President Trump for Nominations and Oversight, to be the next Assistant Attorney General (“AAG”) for Antitrust at the U.S. Department of Justice (“DOJ”). We expect a Senate hearing for Mr. Delrahim in the next several weeks, with confirmation likely.

Mr. Delrahim’s antitrust views are generally in line with previous Republican-appointed AAGs, leaning towards a more flexible, industry-specific approach with greater willingness to consider the potential for conduct or transactions to increase innovation or expand markets. In what would be a major change from his most recent predecessors, we expect a greater focus on, and willingness to credit, anticipated procompetitive benefits and benefits to the U.S. economy from merger transactions and other conduct, particularly with regard to intellectual property and innovation.

Mr. Delrahim has taken several positions that indicate he is not rigidly ideological and will take a pragmatic, case-by-case approach to enforcement, evidenced by his stance on protecting innovation, his role in previous antitrust investigations during an earlier stint at the Antitrust Division, and his experience in the political sphere.

Finally, through his prior role at the Senate Judiciary Committee and his current role in the Trump Administration, Mr. Delrahim has more political experience and more direct experience inside the administration than most prior antitrust AAGs. As a result, he is likely to have a keen understanding of, and ability to navigate, the political attention and competing agendas that major deals and antitrust investigations can—and may increasingly—involve.¹

Biography

Mr. Delrahim began his career in private practice before moving to the Senate Judiciary Committee, where he ultimately served as Chief Counsel to then-Chairman Hatch. At the Committee, Mr. Delrahim was involved in several significant antitrust projects, including the 2000 amendment to the Hart-Scott-Rodino Antitrust Improvements Act and the DOJ’s investigation of Microsoft. Mr. Delrahim next served

¹ For example, there has been some speculation in the trade press that the new Administration may take a fresh look at the Anthem-Cigna deal, even though the merger has been preliminarily enjoined by a federal district judge at the behest of the Obama Administration’s antitrust regulators. If a settlement offer is brought to the DOJ, Delrahim likely will recuse himself if, as has been reported, he lobbied in favor of the deal on behalf of Anthem. C. Ryan Barber, *Anthem, in DC Circuit, Fights to Save \$54B Cigna Merger*, *National Law Journal* (Mar. 24, 2017). Either way, it will be interesting to see how the leadership at the DOJ evaluate and credit the various claims of efficiencies and long-term systemic benefits when healthcare costs are very much front and center in Washington. See Eric Kroh, *Anthem Merger Appeal Could Be Sideshow to DOJ Deal*, *Law360* (Mar. 23, 2017) (reporting on speculation that political considerations may be involved in Anthem’s effort to revive the transaction via a settlement with the DOJ).

with the Antitrust Division as Deputy Assistant Attorney General for operations with a portfolio that included international and appellate matters. From 2005 until he became Deputy Counsel to President Trump, Mr. Delrahim worked as an antitrust attorney and lobbyist. In that role he represented numerous technology companies as well as other major corporations, including health insurer Anthem, in connection with its ongoing bid to acquire Cigna. Mr. Delrahim also served as a Commissioner to the Antitrust Modernization Commission, a bipartisan commission tasked during President George W. Bush's administration to examine the need to modernize the antitrust laws and the agencies' approach to antitrust enforcement. This range of experience and perspectives equips Mr. Delrahim with a broad base of knowledge that should position him to be an effective antitrust AAG.

Traditional Republican Leanings

In line with previous Republican-appointed AAGs, Mr. Delrahim has supported a pragmatic, economically-based approach to antitrust enforcement, stating that “over-zealous enforcers and courts run a significant risk of deterring hard—yet legitimate—competition.”² During his prior tenure with the Antitrust Division, Mr. Delrahim expressed the belief that mergers are typically beneficial, and he repeatedly noted the need to promote and preserve efficiency-maximizing collaborations, including joint ventures. More recently, Mr. Delrahim expressed a preliminary view that AT&T's proposed acquisition of Time Warner Cable was largely vertical and thus should not pose significant antitrust concerns,³ suggesting a departure from recent agency decisions that have imposed remedies in several vertical mergers and even blocked such mergers during the Obama Administration. Such comments suggest that, even if the Antitrust Division conducts an in-depth investigation of a transaction or conduct, Mr. Delrahim may be more willing to consider favorably business arrangements that provide real benefits to consumers. (This would represent a significant shift from the view expressed by the last Acting AAG during the Obama Administration, who stated that the Antitrust Division was “skeptical” about proclaimed benefits and efficiencies.⁴)

Not Reflexively Anti-Enforcement

Mr. Delrahim has also recognized, however, that antitrust enforcement has a role to play, suggesting that he will not be reflexively opposed to bringing enforcement cases.

He has also rejected using antitrust to advance protectionism, stating that the Antitrust Division “will not seek to protect a company from competition just because the company is headquartered in the United States,” and instead will “look to preserve competition that will benefit consumers regardless of the source of that competition.”⁵

Mr. Delrahim has expressed strong views about ensuring that antitrust does nothing to undermine incentives to invest in innovation. Viewing intellectual property as one of the global economy's most valuable assets—and the United States' biggest export—Mr. Delrahim has argued that enforcement policies must be designed in a way that gives an innovator greater certainty about his or her ability to

² Makan Delrahim, Deputy Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Antitrust Enforcement Priorities and Efforts Towards International Cooperation at the U.S. Department of Justice (Nov. 15, 2004) [hereinafter Delrahim, Antitrust Enforcement Priorities], *available here*.

³ Interview by Business News Network with Makan Delrahim in Cal. (Oct. 2016), *available here*. Mr. Delrahim's preliminary statement takes a position contrary to President Trump's strong public opposition to the merger of AT&T and Time Warner Cable.

⁴ Renata Hesse, Acting Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Opening Remarks at the 2016 Global Antitrust Enforcement Symposium: And Never the Twain Shall Meet? Connecting Popular and Professional Visions for Antitrust Enforcement (Sept. 20, 2016), *available here*.

⁵ Delrahim, Antitrust Enforcement Priorities.

exploit intellectual property rights.⁶ One area where Mr. Delrahim has expressed such views is with regards to standards setting organizations (“SSOs”). In that area he has disagreed with the Antitrust Division’s decision to grant certain SSOs a favorable business review letter (indicating that the DOJ did not intend to challenge the SSOs conduct) because he believed that the conduct could lead to monopsony, decreased incentives to innovate, and higher prices and lower quality products for consumers.⁷

Mr. Delrahim has, at times, actively supported enforcement, further suggesting that he may adopt a pragmatic, case-by-case approach as AAG. For instance, in 2003 Mr. Delrahim was a force behind the DOJ’s investigation of Clear Channel (which was closed following Clear Channel’s decision to spin off its concert management business). Additionally, while he was a counsel on the Judiciary Committee, the Committee played a key role in advancing the government’s investigation and prosecution of Microsoft. In a separate statement to the Antitrust Modernization Committee’s April 2007 Report and Recommendations, Mr. Delrahim took a more expansive enforcement position in advocating for the overruling or repeal of *Illinois Brick*, the Supreme Court case that prohibited indirect purchasers from recovering antitrust damages. Mr. Delrahim took this position notwithstanding the possibility that repeal of *Illinois Brick* could significantly increase private actions and the risk of antitrust liability.

Conclusion

Under Mr. Delrahim’s leadership, businesses interacting with the Antitrust Division may experience a more nuanced and pragmatic/economic approach than that of the Obama Administration with regard to decisions to challenge transactions and conduct. We should not expect, however, an inactive Antitrust Division, or a greater willingness to accept “buzzword” assertions of efficiencies or consumer benefit. Parties should be prepared to engage with the Antitrust Division rigorously on the merits, including during in-depth investigations, and to make a strong case for the benefits of proposed transactions or conduct. We encourage you to contact any of the lawyers listed below, or your regular Davis Polk contact, if you would like to further discuss what Mr. Delrahim’s nomination and confirmation could mean for your business.

⁶ Relatedly, Mr. Delrahim has privately expressed concern about the increasing tendency for foreign competition agencies to use questionable antitrust theories as an excuse to fine and place behavioral remedies on successful American companies.

⁷ Antitrust Modernization Commission, Report and Recommendations, Separate Statement of Commissioner Delrahim 410 (2007), available [here](#).

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The lawyers listed above gratefully acknowledge the assistance of associate Benjamin M. Miller and law clerk Martin Freeman in preparing this memorandum.