

ANTITRUST TRADE AND PRACTICE

Expert Analysis

## Trump's Antitrust Enforcers: Limited Intervention Remains Likely Approach

A slew of departures from the two agencies with shared responsibility for federal antitrust enforcement followed the entrance of the new administration into office, presenting President Donald J. Trump with an unprecedented opportunity to reconfigure the U.S. antitrust landscape through several key appointments. For months, President Trump left the antitrust community in suspense as he prioritized immigration, health care and trade issues and did not fill the vacancies at the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC). The Antitrust Division is responsible for enforcing the antitrust laws of the United States, including criminal actions. The FTC works in parallel with the



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Antitrust Division to enforce antitrust law, including merger review. Eager observers speculated as to who would be chosen for these important roles and whether with his nominations President

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Trump would, in some fashion, further the unique brand of economic populism he voiced on the campaign trail or instead follow a more traditional conservative path. These observers need not speculate much longer, however,

as the Trump administration has finally begun filling a number of permanent leadership positions in the Antitrust Division and FTC.

### Appointments To the Antitrust Division

Starting in June, the Antitrust Division started to take shape. Principal Deputy Assistant Attorney General Andrew Finch was holding the fort down as Acting Assistant Attorney General, but that month the Senate Judiciary Committee voted overwhelmingly in favor of Makan Delrahim as permanent Assistant Attorney General of the Antitrust Division. The DOJ also named Donald G. Kempf Jr. and Bryson Bachman as a Deputy Assistant Attorneys General of Litigation and Civil Enforcement, respectively. Matthew Perlman, "DOJ Names 2 New Antitrust Division Deputies," Law360 (June 21, 2017). Over the next few months, Luke M. Froeb took his post as Deputy Assistant Attorney General of

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Economic Analysis and Roger Alford started as Deputy Assistant Attorney General of International Affairs, rounding out all four of the top deputies in the Antitrust Division. And though it was not until Sept. 27, 2017—exactly six months after President Trump announced his intent to formally nominate White House Deputy Counsel Makan Delrahim—the Senate finally confirmed Mr. Delrahim as the head of the Antitrust Division. Ted Johnson, “Senate Confirms Makan Delrahim as Antitrust Chief,” *Variety* (Sept. 27, 2017).

Because of the delay in his confirmation, Mr. Delrahim took control of a division that was already staffed with experienced practitioners with backgrounds in both the private and public antitrust realms. Mr. Kempf has been a major player in merger litigation since the 1980s and is known to generally reject the supposition that increasing concentration necessarily leads to decreasing competition. Mr. Bachman served as chief counsel for Sen. Mike Lee (R-Utah), who heads the Senate Judiciary Committee’s antitrust subcommittee, and has prior Antitrust Division experience (including litigating the *Anthem/Cigna* trial). Dr. Froeb’s record of favoring case-by-case analysis over reliance on presumptions as Director of the Bureau of Economics at the FTC suggests

he will be an advocate of a thorough, evidence-based approach to enforcement recommendations. Roger Alford joined the Antitrust Division as a longtime law professor and Associate Dean for international and graduate programs at Notre Dame Law School who has focused on international economic law throughout his career, with the link between trade and antitrust law as a primary interests. Mr. Alford will lead a reinvigorated effort toward international cooperation at the DOJ with a goal to “ensure that other countries are enforcing their antitrust laws with due regard for transparency, due process, and nondiscrimination.” Kevin Allen, “Associate Dean Roger Alford Appointed to Leadership Role at U.S. Department of Justice,” *University of Notre Dame* (Aug. 10, 2017).

Mr. Delrahim has held a number of leading antitrust roles, including Commissioner on the U.S. Antitrust Modernization Commission, Chairman of the Merger Working Group of the International Competition Network and Staff Director and Chief Counsel to the U.S. Senate Judiciary Committee, where he worked on merger reform legislation. Having also served as Deputy Assistant Attorney General at the Antitrust Division during the George W. Bush administration and being known to have ties to

Attorney General Jeff Session, Mr. Delrahim was presumed to subscribe to a more traditional, non-interventionalist antitrust philosophy. His first public remarks as head of the Antitrust Division confirmed this, but with a few wrinkles.

In his speech, Mr. Delrahim argued for a balance between the values of economic liberty and effective, vigilant enforcement for “market failures.” Makan Delrahim, Assistant Attorney General, Antitrust Division U.S. Dept. of Justice, Remarks as Prepared for Delivery at “Antitrust in Developing Countries: Competition Policy in a Politicized World,” *International Antitrust Policy: Economic Liberty and the Rule of Law* (Oct. 27, 2017). This means, Mr. Delrahim explained, the criminal enforcement program will remain a core priority to ensure the integrity of the competition process. As for merger review, Mr. Delrahim is wary that “blocking a procompetitive transaction which can be as dangerous as clearing an anticompetitive one.” Interestingly, Mr. Delrahim is no great fan of consent decrees, historically endorsing more of an “up or down” approach to antitrust enforcement. He announced that the DOJ will be scrutinizing the approximately 1,400 old consent decrees to see whether they are still relevant, as the government should not be

involved where the “competitive process” is properly functioning and “self-regulating.” Pallavi Guni-ganti, “Delrahim Emphasises Trade and “Innovative” Enforcement,” GCR (Oct. 30, 2017).

Mr. Delrahim also spoke about the Antitrust Division’s international goals of greater procedural and substantive convergence generally, and more specifically, the pursuit of economic opportunity through “free market” competition. He expounded universal principles of nondiscriminatory application of the laws and procedural fairness and transparency in competition enforcement. It is clear from his remarks, that Mr. Delrahim subscribes to a free market philosophy of limited government intervention to ensure the integrity of the competitive process—that is, government intervention only when necessary to remedy market failures such as cartel activity and, if demonstrable, horizontal mergers in highly concentrated industries where competitive dynamics do not ensure a continued robust competitive process to protect ultimate consumers.

When Mr. Delrahim inevitably applies this philosophy to vertical merger and monopolization issues, we can reasonably expect a traditional, less interventionist approach as a starting point, which will put the onus on

complaining parties to show predictable or concrete consumer harm depending on the type of conduct being reviewed. But, no doubt, the Antitrust Division’s actions (or inaction) concerning the AT&T/Time-Warner deal will be informative. Vertical mergers are generally viewed by conservatives as efficiency-enhancing; nor would it appear that the merged company has the economic incentive to limit the distribution of

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Time Warner’s valuable content (or having AT&T/DirecTV, as distributors, block content of Time Warner’s competitors). And this is even without considering whether the Antitrust Division could prove, as required, probable net anticompetitive effects from any foreclosure in well-defined markets.

### Appointments to the FTC

The FTC is led by five commissioners nominated by the President, each serving a seven-year term when confirmed by the

Senate. One commissioner acts as Chairman and no more than three commissioners can be of the same political party. “Commissioners,” Federal Trade Commission (last visited Nov. 3, 2017). The FTC has lagged behind the Antitrust division in appointments, operating with only two commissioners, one from each party, for almost the entire tenancy of the Trump administration. Maureen K. Ohlhausen of the Republican party is currently Acting Chairman and is expected to remain with the FTC until the expiration of her term in September 2018, but as Commissioner once her replacement arrives. Democratic Terrell McSweeney is Commissioner and deeply interested in pressing privacy and data security issues and pursuing consumer protection principles. Ms. McSweeney’s term was set to expire on Sept. 25, 2017 and could leave the FTC in the coming months, leaving yet another vacancy for the Trump administration to fill.

On October 19, President Trump nominated Republican Joseph Simons. If Mr. Simons is confirmed by the Senate, he would assume the chairmanship in lieu of Acting Chair Ohlhausen. Mr. Simons has deep, substantive antitrust experience, and is currently a partner and co-chairman of the antitrust group at Paul, Weiss, Rifkind, Wharton & Garrison LLP.

He also was formerly Director of the FTC's Bureau of Competition under President George W. Bush. Expectations regarding the degree of activity under Mr. Simon's leadership vary somewhat. On one hand, Mr. Simons was responsible for managing the re-invigoration of the FTC's non-merger enforcement program. On the other hand, Mr. Simons has a track record of defending large companies (Brian Fung, "Trump's Pick for a Top Consumer Watchdog Once Represented Microsoft and MasterCard," *The Washington Post* (Oct. 19, 2017)), and we also know that Mr. Simons' approach to antitrust involves careful scrutinizing of the underlying economic dynamics of the conduct in question. Indeed, he was at the forefront of bringing more economic rigor to antitrust enforcement. Among his academic endeavors, Mr. Simons is credited with co-developing "Critical Loss Analysis," a widely used tool for market definition under the hypothetical monopolist test that the DOJ and FTC Merger Guidelines continue to use where the data is available. All considered, we anticipate Mr. Simons will base decisions on economic rigor, which tend to align with the more conservative free market principles expressed by Mr. Delrahim, reserving enforcement for true market failures based on detailed economic analysis.

Evening the count, President Trump also announced on October 19 his nomination for Rohit Chopra, a Democrat, to fill one of the vacant seats. Mr. Chopra was a surprising nomination because he is a non-lawyer with no apparent antitrust experience. If confirmed by the Senate, Mr. Chopra will be the first commissioner without a law degree since Orson Swindle, whose term expired in 2005. But Mr. Chopra has other areas of expertise that bring value to the FTC. He is a consumer financial services expert with a strong history of fighting economic issues facing young people. The White House has indicated that Noah Phillips will be President Trump's nominee for fourth commissioner seat. "Trump to Also Nominate Noah Phillips for FTC," *Politico* (Oct. 19, 2017). Currently Chief Counsel for Sen. John Coryn, Noah Phillips would break the tie, joining the FTC as the third Republican commissioner and bringing the FTC to a Republican majority for the first time in nearly a decade.

### **What These Appointments Mean**

What everyone really wants to know, of course, is whether President Trump, through these appointments, will bring some of his populist predilections to antitrust enforcement, including the desire to make job creation and

the like part of enforcement decisions. Our answer here is that it is unlikely. Not only are such factors inconsistent with the antitrust philosophies of Messrs. Delrahim and Simons, in the United States, at least it is the courts that ultimately define the scope of existing antitrust laws, and courts have long committed to a consumer welfare approach to antitrust enforcement that does not capture these considerations. Hence, while there no doubt will continue to be a large amount of passionate talk of such issues—even from President Trump himself—they ultimately are subjects for the potential legislative action and we doubt the DOJ and FTC will be venturing into uphill battles in the courts to change antitrust common law, irrespective of political objectives. But we all shall see.