

# Trump's Pick for Department of Justice Antitrust Division Chief

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Last month we discussed Supreme Court Justice Neil Gorsuch's confirmation hearings. Specifically, we noted the Senate Judiciary Committee's failure to nail Gorsuch down on key antitrust issues, including issues he handled as an experienced antitrust lawyer and decided as a judge on the U.S. Court of Appeals for the Tenth Circuit, which we also wrote about. At one point, Gorsuch invoked the so-called "Ginsberg Rule" and simply declined to answer Sen. Amy Klobuchar's question regarding, not a pending or prior case, but the Department of Justice's 2008 report on monopolization, responding, "Oh, senator, I—there's no way you're [going to] get me to." Klobuchar quickly changed the subject. Despite the senators' reluctance to fulfill their "advise and consent" obligations under the Constitution by pressing Gorsuch on contemporary antitrust issues, the Judiciary Committee voted to send Gorsuch to the full Senate on April 3. Less than a week later, on April 7, the Senate confirmed him by a 54-45 vote, cementing Gorsuch's place in history as the 113th justice of the Supreme Court.

A key player in shepherding Gorsuch through the confirmation process was Makan Delrahim, whom President Donald J. Trump nominated on March 27 to head the Department of Justice's Antitrust Division. Since January, Delrahim has served the administration as deputy assistant and deputy counsel to the president, advising the Trump administration on the selection of a replacement for former Supreme Court Justice Antonin Scalia. Delrahim had reportedly taken on the role of "quarterback," handling the administration's Supreme Court strategy and acting as a liaison between the White House and the Senate. Delrahim attended the Senate Judiciary Committee hearings with Gorsuch.

As a nominee to a key post in the Department of Justice, Delrahim will also need to be confirmed by the Senate before he takes office. Given the antitrust division's important role in prosecuting and regulating competition, the Senate Judiciary Committee (who will be responsible for Delrahim's hearing) will likely push Delrahim to take a position on antitrust issues, unlike the Supreme Court justice he helped to confirm. As a nominee to the executive branch (not the judiciary), hopefully, he will not invoke the troublesome (and ill-founded) "Ginsberg Rule" and instead answer the antitrust questions that his charge Justice

Gorsuch would not. Two aspects of Delrahim's career will play a large role in his confirmation: his government experience, including a stint at the Department of Justice during the George W. Bush administration and his extensive lobbying work for some corporations that are currently engaged in litigation with the Department of Justice.

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## Delrahim's Government Experience

In 1994, Delrahim joined the Office of the U.S. Trade Representative as a deputy director for intellectual property rights, where he was responsible for negotiating foreign trade deals involving intellectual property issues. After a short hiatus as an associate at Patton Boggs, Delrahim transitioned to the Senate Judiciary Committee from 1998 to 2003, working closely with Committee Chairman Orrin G. Hatch, where he was eventually elevated to staff director and chief counsel (perhaps the rationale for the White House's decision to tap him for the Supreme Court selection process). In 2003, he accepted a position with the George W. Bush administration as a deputy assistant attorney general in the Department of Justice's Antitrust Division where he worked on appellate, international and policy matters. He also served on the Intellectual Property Task Force under former Attorney General John Ashcroft, which was created to assess the DOJ's approach to intellectual property issues and to make recommendations on how to improve the agency's efforts.

While working with the federal government, Delrahim developed considerable expertise in intellectual property law and its relationship to the Sherman Antitrust Act. For example, while working at the Department of Justice, he made a speech in Shanghai in 2004 titled, "Contemporary Issues at the Intersection of Intellectual Property and Antitrust," and at the 2004 American Bar Association Antitrust Spring Meeting he spoke at a seminar called, "US and EU Approaches to the Antitrust Analysis of Intellectual Property Licensing: Observation from the Enforcement Perspective." Then-acting Antitrust Division Chief R. Hewitt Pate once referred to Delrahim as a "patent lawyer."

## Delrahim's Private Practice Experience

In 2005, after leaving the Bush administration's Department of Justice, Delrahim returned to private practice at Brownstein, Hyatt, Farber and Schreck. There, he lobbied on behalf of high-profile clients such as Google in its now consummated acquisition of Doubleclick, an online advertising company that was formerly owned by private equity firms. Also on his resume is the proposed \$48 billion merger of Anthem Corp. and rival health care company Cigna Corp. (the second and third largest medical health insurance carriers). Delrahim was responsible for lobbying the Senate and House of Representatives on antitrust issues germane to the proposal. That deal was recently blocked on appeal to the U.S. Court of Appeals for the D.C. Circuit which affirmed the decision of Judge Amy Berman Jackson of the District Court for the District of Columbia, that, "the proposed combination is likely to have a substantial effect on competition in what is already a highly concentrated market." Other Delrahim clients have reportedly included AMC Entertainment in its merger with Loews Cineplex Entertainment, T-Mobile in its merger with MetroPCS Communications, US Airways in its failed merger with Delta Airlines, and Comcast in its merger with NBC Universal, as well as other corporate clients such as Microsoft, Oracle, Apple, Qualcomm, Pfizer, Neiman Marcus, Merck and Johnson & Johnson.

Delrahim's work for large corporate clients presents a challenge as he may eventually represent, if confirmed, the government in cases brought against those same clients, or, in the case of the Anthem/Cigna merger, could represent the government concerning a merger on which he formerly worked. Sen. Klobuchar, ranking member of the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, will surely question Delrahim about how he will handle such conflicts, including whether he will recuse himself from matters related to his lobbying work. Delrahim, for his part, has reportedly pledged to recuse himself from participating in the Anthem/Cigna matter, as he should.

As an experienced antitrust policymaker, regulator, litigator, and lobbyist, Delrahim, unlike some former division heads, is sure to bring a unique viewpoint to the antitrust division if confirmed. Moving over from the Trump White House, he certainly does not hesitate to speak his mind and share his views on antitrust issues. In October 2016, Trump, as one of his many populist campaign promises, publicly opposed the tie-up of AT&T and Time Warner, explaining, "as an example of the power structure I'm fighting, AT&T is buying Time Warner

and thus CNN, a deal we will not approve in my administration because it's too much concentration of power in the hands of too few." Delrahim, on the other hand, commented in October 2016, before he joined the Trump transition team administration or the Trump administration, "I don't see [the AT&T/Time Warner deal] as a major antitrust problem," noting that the combination would be "more of what we call a vertical merger, content with distribution, rather than two competitors merging" (AT&T is a telecommunications company while Time Warner is a media and entertainment company). He continued: "Just the sheer size of the deal and the fact that it's media, I think it will get a lot of attention." The Senate Judiciary Committee should question Delrahim about this seeming inconsistency with the views of his nominating president and how independent he will be as antitrust division head.

Delrahim's would certainly bring a plethora of real-world antitrust experience to the division. As Seth Bloom, former general counsel of the Senate Antitrust Subcommittee put it, "I know Makan Delrahim to be a smart, energetic ... expert in antitrust law. He is certainly no pushover." But the Senate is unlikely to give Delrahim a pass on antitrust issues like it did in Justice Gorsuch's case. That is especially true given the number of large mergers currently slated for review by the Department of Justice, such as Bayer AG's \$66 million buyout of Monsanto and a \$130 merger between DuPont and Dow Chemical. Delrahim may decline to comment specifically on mergers currently under DOJ review that he would handle if confirmed, but the committee should thoroughly test his antitrust acumen and question him on his antitrust views in general to reveal his position on pressing contemporary antitrust issues. Delrahim's Senate hearing was initially scheduled for Wednesday, April 26, but, according to Judiciary Committee Chairman Chuck Grassley, the hearing was postponed because some of Delrahim's paperwork was incomplete. His hearing will likely be rescheduled in short order, which we will report on next month. Stay tuned.

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