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DOJ's Possible Antitrust Chief's Senate Confirmation Hearing

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Last month, we discussed Makan Delrahim's background, including his experience litigating antitrust and intellectual property matters at the Department of Justice during the George W. Bush administration and his extensive lobbying work at Brownstein, Hyatt, Farber and Schreck. On May 10, senators from the Senate Judiciary Committee held a hearing and asked Delrahim about several matters that pose potential challenges should he be confirmed as Assistant Attorney General of the Antitrust Division of the DOJ. For the most part, Delrahim provided candid answers, at one point even offering, "I'm an open book on this issue." Three discussions were particularly insightful.

Pledged to Recuse Himself from Past Matters

As we noted in last month's article, Delrahim faces a number of potential conflicts if confirmed to the Antitrust Division. From August 2005 to January 2017, Delrahim lobbied on behalf of a number of large corporate clients facing controversial merger review such as health insurer Anthem in its proposed (and now defunct) combination with rival Cigna. Delrahim also represented clients in other high-profile transactions including 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.

Chairman Chuck Grassley's first question for Delrahim was, "What recusal policy would you follow to avoid conflicts?" Delrahim responded that he would consult with ethics officials in the Department of Justice as well as the Antitrust Division. When Grassley probed further to determine how Delrahim would handle the Antitrust Division's investigation into the Anthem/Cigna merger, Delrahim pledged to recuse himself from that matter, noting (perhaps presciently), "I understand the merger is now on appeal to the Supreme Court, and we will see what happens." When Sen. Amy Klobuchar later returned to the topic of recusal, Delrahim affirmed his commitment to meet with ethics officials, noting in particular the potential ethical problems posed by "past clients, and clients of my former employer, my law firm."

DOJ officials are bound by a number of overlapping ethical obligations, including criminal provisions of the U.S. Code as well as executive-wide and department-specific codes of conduct. Delrahim specifically invoked Title 18

U.S.C. Section 208 during his hearing, saying, "I have three little children. I have no intention of going to jail." Section 208 prohibits an executive-branch employee from participating "in a judicial or other proceeding ... in which, to his knowledge, he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee ... has a financial interest." But as a political appointee, Delrahim will be subject to ethics rules that may impose even more stringent limitations than Section 208. For example, executive order No. 13770, issued Jan. 28, requires executive agency appointees to pledge that they "will not for a period of two years from the date of their appointment participate in any particular matter involving specific parties that is directly and substantially related to their former employer or former clients" or "participate in any particular matter on which they lobbied within the two years before the date of their appointment or participate in the specific area in which that particular matter falls."

Promised Independence from the White House

Another major topic probed by Klobuchar was whether Delrahim would maintain the Antitrust Division's historic independence from the White House. Noting that President Donald Trump had previously commented on pending mergers, Klobuchar asked, "What would you do, if you're in this job, if the president, or the vice president, or a White House staffer calls, and wants to discuss a pending investigation of an antitrust matter?" Delrahim responded, "Politics will have no role in the enforcement of the antitrust matters." As Delrahim further explained, the Antitrust Division serves an independent law enforcement function and "there are procedures in the White House in how you communicate with the Justice Department, and who are the—there's a handful of senior officials who can communicate through the White House Counsel's office, and senior officials at the Justice Department for any pending matters."

While Klobuchar's concern may seem melodramatic, historical context suggests that political pressure poses an attractive alternative to resolving antitrust issues on the merits. In 1902, financial titan JPMorgan approached then- President Teddy Roosevelt about withdrawing the infamous antitrust lawsuit against Morgan-controlled Northern Securities Co., an organization that then-Attorney General Philander Knox accused of gaining monopoly power through controlling stock acquisitions over two competing railroad companies. Roosevelt immediately rebuffed Morgan's business-as-usual offer, eventually cementing his place in history as a "trust buster." Roosevelt later observed that Morgan "could not help regarding me as a big rival operator, who either intended to ruin all his interests or could be induced to come to an agreement to ruin none." Trump campaigned on a platform that emphasized his business acumen and deal-making clout. Although his campaign rhetoric alone does not necessarily suggest that he will intervene in Division business, Trump raised eyebrows in January when he met with CEOs of proposed merging companies Monsanto and Bayer. A week after that meeting, Trump publicly touted the potential up-side of the deal, announcing that the combination would create thousands of jobs. Trump has also met with the CEO of AT&T, which is currently seeking approval for its proposed acquisition of TimeWarner, a deal that Trump has criticized as "consolidating too much power in the media industry." Whether Trump will continue these White House forays into antitrust merger investigations without guidance or input from the Antitrust Division is unclear. If confirmed, Delrahim will likely have his hands full dealing with this White House.

Expressed His Belief in Judicial Restraint on Antitrust Immunity

Finally, Klobuchar asked Delrahim about his involvement in the U.S. Court of Appeals for the Second Circuit case Billing v. Credit Suisse First Boston , 426 F.3d 130 (2005), a case in which Delrahim apparently helped draft an amicus brief (signed and submitted by then-Assistant Attorney General R. Hewitt Pate) during his first stint at the Antitrust Division. The issue in Credit Suisse was whether the securities laws, which, among other things, regulate the underwriting of equity securities, impliedly immunize underwriting practices from antitrust scrutiny. The Antitrust Division's brief argued that there was no conflict between the securities laws and the antitrust laws because both statutory schemes prohibited the conduct at issue: laddering, in which an underwriter requires a purchaser of securities to buy additional shares of the security later at escalating prices, and tying, in which an underwriters bundles less desirable securities with a popular issue of securities.

Taking a similar position as the Antitrust Division, the Second Circuit concluded there was no implied immunity because there was "no legislative history indicating that Congress intended to immunize anti-competitive [securities underwriting practices]"; application of the antitrust laws to the alleged anti-competitive conduct did not "create the potential for irreconcilable mandates"; none of the securities laws were "rendered nugatory" by the antitrust laws; and the SEC had never authorized the specific anti-competitive behavior at issue. Therefore, the Second Circuit - rejected implied immunity and held that the Sherman Act applied to the allegedly anti-competitive underwriting practices. The Supreme Court granted certiorari and reversed, stressing that "underwriters' efforts jointly to promote and to sell newly issued securities—is essential to the proper functioning of well-regulated capital markets." Writing for the majority, Justice Stephen Breyer concluded that "the securities laws are clearly incompatible with the application of the antitrust laws in this context." Even if

the conduct at issue violated the securities laws, Breyer reasoned, "there is no practical way to confine antitrust suits so that they challenge only activity of the kind the [investor-plaintiffs] seek to target." According to the court, a number of factors counsel against application of the antitrust laws: "the fine securities-related lines separating the permissible from the impermissible; the need for securities-related expertise (particularly to determine whether an SEC rule is likely permanent); the overlapping evidence from which reasonable but contradictory inferences may be draw; and the risk of inconsistent court results."

When Klobuchar raised the Credit Suisse issue, Delrahim encouraged her questioning by commenting, "I'm an open book on this issue." As could be predicted, Delrahim registered his disagreement with the Supreme Court in a way that reflected his fundamental preference for judicial restraint on issues of antitrust immunity. Delrahim explained that "the Second Circuit which rejected immunity]wrote a well-reasoned opinion." "In my views on the Antitrust Modernization Commission, if there are immunities from the antitrust laws, I think it should be done by this body, not impliedly by the courts." Klobuchar responded, "Good answer."

Delrahim's committee hearing appears to have been largely a success. His answers appeased the questioning senators and provided reassurances that he will run a competent, scrupulous and independent Antitrust Division. Once Delrahim is finally voted out of committee, his nomination will be sent to the Senate for a floor vote. Stay tuned.

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