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Trump Antitrust Appointees Finally Set: What to Expect

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Leadership at the top of the Department of Justice Antitrust Division and Federal Trade Commission appears to be set – nine months into the Trump Administration – with the confirmation of Makan Delrahim as Assistant Attorney General at DOJ and the announcement of the intention to nominate Joseph Simons to chair the FTC.

President Trump announced on October 19 that he would nominate Simons as well as Rohit Chopra, a Democrat backed by Senate Minority Leader Chuck Schumer and Senator Elizabeth Warren, to fill one of three open seats at the FTC. The move will leave two Republicans and one Democrat on the five-member Commission, which by law can have no more than three commissioners from the same political party.

Both Delrahim and Simons served in senior antitrust enforcement positions in the George W. Bush Administration – Delrahim as Deputy Assistant Attorney General at DOJ and Simons as Director of the Bureau of Competition at the FTC – and both tout the importance of taking an economic-focused approach to analyzing antitrust issues. These appointments suggest that the antitrust agencies will follow a traditional, less-interventionist Republican approach to enforcement, but not a laissez-faire, hands-off approach.

Companies should still expect to see challenges to horizontal mergers between competitors in highly concentrated markets likely to lead to price increases and enforcement actions against conduct that results in a cognizable harm to consumers, even if cases "at the margin" are less likely to attract enforcement. And if federal officials let some conduct pass, state officials have made clear they are ready to "step up" to take action.

Makan Delrahim

The Senate confirmed Delrahim by a 73-21 vote on September 27, six months after his nomination.

Delrahim served in the White House, as Deputy Assistant to the President and Deputy Counsel to the President, at the beginning of the Trump Administration, to help guide the Gorsuch nomination through the Senate Judiciary Committee.

Earlier in his career, Delrahim served as Chief Counsel and Staff Director to the Senate Judiciary Committee, working for Senator Orrin Hatch, before serving as Deputy Assistant Attorney General for Antitrust during the Bush Administration, overseeing the Appellate, International and Policy sections of the Division. He also served on the Antitrust Modernization Commission, created by Congress in 2002 to examine the need to modernize the antitrust laws. More recently, he was in private practice, focused on antitrust and intellectual property issues, and was an adjunct professor of law at Pepperdine University.

Delrahim is known as a strong advocate for international convergence on antitrust issues, respect for IP rights in antitrust enforcement, and vigorous criminal antitrust enforcement.

He recently said he would use his new position to "promote fair, transparent, and consistent application of competition principles for the benefit of American consumers, businesses, and workers." These efforts will likely involve advocating for an economic-focused approach to competition law enforcement around the world.

Delrahim is also an advocate for strong intellectual property rights. He noted recently that one challenge in dealing with international enforcers is that they "may not necessarily place the same value on intellectual property rights" that the United States does or that "they may enforce their antitrust laws in ways that could stifle innovation." He has advocated caution in cases alleging antitrust violations based on misuse of IP rights, and is likely to be more skeptical of any such matters that cross his desk.

Under Delrahim's leadership, we should also expect continued vigorous criminal antitrust enforcement. Indeed, during his time as a Deputy Assistant Attorney General, Delrahim said that anti-cartel enforcement "should be a top priority for every antitrust agency." His more recent statements suggest he will even continue the Obama administration's criminal enforcement efforts to prevent employers from colluding on wages or entering illegal anti-poaching agreements.

Joseph Simons

Simons has practiced antitrust law for nearly 35 years, with multiple stints at the FTC, and brings an economic focus to his work.

Simons served as a staff attorney and as Associate Director for Mergers and the Assistant Director for Evaluation at the FTC during the 1980s and as Director of the Bureau of Competition from 2001 to 2003. He has been in private practice in DC since then, representing clients before the DOJ and FTC and in antitrust litigation.

Simons' biography reports that under his leadership as Bureau Director at the FTC, "the Commission pursued a strong bipartisan enforcement agenda" and that he "was responsible for overseeing the re-invigoration of the FTC's non-merger enforcement program … producing more non-merger enforcement actions in one year than in any year in the prior two decades." He also reports initiating "a new emphasis at the FTC on administrative litigation, substantially increasing the number of trials before the agency, including merger, monopolization and horizontal restraint cases."

Notably, as Bureau Director, Simons oversaw the issuance of a complaint alleging that a patent holder harmed competition by misleading a standard-setting organization. At the time, he said the complaint was intended to send a message that: "If you are going to take part in a standards process, be mindful to abide by the ground rules and to participate in good faith."

Simons' work demonstrates his strong focus on economics. For example, together with a former senior DOJ economist, he developed a technique used in defining markets called "Critical Loss Analysis," which is now incorporated in the government's *Horizontal Merger Guidelines*. It is used to compare the sales a hypothetical monopolist must lose to make a price increase unprofitable to a prediction of the actual loss of sales from the price increase, to identify the bounds of a relevant market.

Trump announced his intent to nominate Simons to the FTC seat currently held by Commissioner Terrell McSweeny, a Democrat whose term expired last month. The move means that, as long as Maureen Ohlhausen continues to serve, the Republicans will have a 2-1 majority after Simons' and Chopra's nominations are confirmed, leaving two Commission seats unfilled.

Rohit Chopra

Rohit Chopra will bring consumer protection and financial services experience to the FTC, which is responsible for consumer protection as well as antitrust enforcement.

Chopra is currently a Senior Fellow at the Consumer Federation of America and a Visiting Fellow at the Roosevelt Institute. He was previously Assistant Director of the Consumer Financial Protection Bureau, where he focused on issues related to students and young consumers. He was also the Treasury Department's first Student Loan Ombudsman, a position created by the Dodd-Frank Wall Street Reform and Consumer Protection Act.

Chopra is not a lawyer; he has an MBA from the Wharton School at the University of Pennsylvania. His background in consumer protection should complement Simon's antitrust-focused background.

Implications for the coming years

With the leadership of the federal antitrust agencies set and "tea leaf" reading in full swing, companies can start to set their strategies for the coming years. In doing so, companies should consider likely enforcement under the new leadership:

- Merger enforcement – parties can expect continued scrutiny of horizontal mergers in concentrated markets, with a focus on economic analysis. Deals "on the margin" are likely to receive a more receptive audience, particularly to efficiencies arguments, and companies can expect less scrutiny of vertical mergers.
- Criminal enforcement – the DOJ is likely to pursue an active criminal enforcement agenda, continuing the expanding probe of generic pharmaceutical pricing and focusing attention on foreign companies.
- Intellectual property – the agencies may be more skeptical of cases alleging antitrust violations based on misuse of intellectual property rights, though companies should not expect a "free pass" for any activity involving intellectual property.
- Unilateral conduct – the agencies are likely less inclined to challenge unilateral conduct by a company, but conduct that can be proven to lead to higher prices to consumers will still draw enforcement.
- Administrative litigation – the FTC is likely to bring more cases in administrative litigation and is less likely to seek disgorgement, including in challenging settlements of patent litigation in the pharmaceutical industry.
- "Hot" industries – the healthcare and pharmaceutical industries should expect continued vigorous enforcement. Indeed, Simons has advocated that agencies "focus on sectors in the economy that have the biggest impact on consumers."
- State attorneys general may step up to fill any perceived drop off in enforcement in all areas of antitrust. For example, the New York Attorney General Antitrust Bureau Chief expressed a willingness to bring enforcement actions if there is a drop off in enforcement under the Trump Administration, stating, "[w]e are in a world where state attorneys general need to step up for the rule of law and strong competition policy."

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