

Delrahim Pick Signals Traditional Republican Antitrust Tack

By **Melissa Lipman**

Law360, New York (March 27, 2017, 8:50 PM EDT) -- White House deputy counsel Makan Delrahim will bring decades of policy and lobbying experience to the U.S. Department of Justice as the president's pick to lead the Antitrust Division, a move experts say likely heralds a return to a traditional Republican enforcement approach.

President Donald Trump named Delrahim, who has been overseeing nominations for the administration, as his pick for the assistant attorney general role on Monday. The long-time D.C. attorney brings a wide-ranging resume into the role, including a stint at the division under the last Bush administration, government experience with trade and intellectual property issues, and years serving as counsel to Republicans on the Senate Judiciary Committee.

And colleagues who have worked with him on the Hill, in private practice and on the Antitrust Modernization Commission, described Delrahim as a thoughtful attorney who won't shy away from bringing cases when the evidence supports it.

"He is just eminently well-qualified. He's really smart. He has a breadth of experience," said Davis Polk & Wardwell LLP's Jon Leibowitz, the former Federal Trade Commission chairman who has known Delrahim since the two served as counsel to opposite sides of the Senate's antitrust subcommittee in the late 1990s. "He understands the value of antitrust enforcement to real consumers and ... when it's appropriate to bring a case."

"There's no doubt he's a conservative, but I think he'd be willing to bring cases if the facts and the law require it," Leibowitz added.

Delrahim has worked in and out of government since the 1990s. He did a stint as deputy director for intellectual property rights at the Office of the U.S. Trade Representative in 1994 before moving to Patton Boggs LLP. In 1998, he went to work for the Senate Judiciary Committee before joining the Antitrust Division, where he served as a deputy assistant attorney general for international, policy and appellate matters during the Bush administration.

He then spent more than a decade as a partner at Brownstein Hyatt Farber Schreck LLP, handling a range of matters including lobbying the government on behalf of Google Inc. when it was trying to get its \$3.1 billion tie-up with DoubleClick Inc. through antitrust review at the FTC in 2007. He has also had a number of other clients in the tech industry, including Microsoft Corp., Apple Inc. and Qualcomm Inc.

"Obviously, Makan hasn't been an antitrust litigator throughout his career, so I think it's going to be important for him to select [deputies] with the requisite experience," said Wilson Sonsini Goodrich & Rosati PC's Jonathan Jacobson, who served on the Antitrust Modernization Commission with Delrahim. "I have every confidence that he'll do that, and that he'll want to do that."

Delrahim's past colleagues described him as far from an ideologue; indeed, he prefaced his modernization commission statement on his concerns about IP and antitrust with a praise of the "general consensus" the commission reached on most issues before issuing its 2007 report on the state of antitrust law.

"My time serving in the legislative and executive branches in the government taught me that the best way to advance policy is to have as broad consensus on issues as possible," Delrahim wrote at the time. "This is often possible if the position advocated is principled and those determining the policy approach the issue in a principled and serious manner."

Assuming he is confirmed by the Senate, Delrahim will inherit a division that is reviewing a number of major mergers, including Bayer AG's \$66 billion buyout of Monsanto Co. and a \$130 billion merger between DuPont and The Dow Chemical Co.

Amid that environment, Delrahim could prove to be a "pro-enforcement Republican," Leibowitz said. Others predicted a return to a Bush-era level of merger challenges while emphasizing that generally the differences between the two parties on antitrust enforcement tend to be at the margins.

"Is he overly hostile to merger enforcement? No. Is he going to be a let's-sue-them-all kind of guy? Certainly not," Jacobson said. "I suspect we'll see a traditional 'less is more' approach from a Republican Antitrust Division ... but the big case comes in, the big case you had no idea was going to happen a year ago, and all bets are off."

But there is one thing the antitrust bar is unlikely to see from Delrahim: Behavioral remedies. The merger settlements, in which parties agree to limitations on their behavior often with government monitoring, aren't especially popular on either end of the political spectrum, but the Obama administration's Antitrust Division did use them in some cases. That includes Comcast Corp.'s acquisition of NBCUniversal, in which the cable giant promised to abide by net neutrality rules.

Delrahim, however, is "more thumbs up or thumbs down on mergers," according to Allen Grunes of the Konkurrenz Group, who worked with Delrahim at Brownstein Hyatt.

"He's not a believer in regulatory remedies that involve a lot of government entanglement in a market," Grunes said. "Divestitures are still going to be in his mind as a remedy, but I think you're going to see a change away from the willingness to do behavioral remedies with him."

And at least in private practice, Delrahim was opposed to agencies using their investigative powers to delay deals indefinitely in the hopes a transaction will fall apart, Grunes said, citing one transaction the pair worked on where the parties had negotiated a consent with FTC staff only to have it repeatedly sent back with questions by the front office.

"At some point there was frustration with that," Grunes said, and the parties eventually went to the Hill with their concerns to prompt an agency action.

Then there's AT&T Inc.'s \$85.4 billion bid to take over Time Warner Inc.

Trump famously remarked on the campaign trail that his administration would not approve the transaction "because it's too much concentration of power in the hands of too few," pointing specifically to Time Warner's CNN ownership. But not long after that, Delrahim told Canada's Business News Network that the transaction was a vertical merger that he didn't "see ... as a major antitrust problem."

Delrahim will likely face questions about Trump's comments from lawmakers at his confirmation hearing, but attorneys said there was no reason to think Delrahim would cave to White House pressure for a challenge if he didn't think the evidence warranted one.

"At the end of the day, it's a law enforcement agency," Grunes said. "It has to be independent and it has to be run by somebody who's got a lot of integrity and who is not going to be questioned on issues of political influence."

Moreover, it wouldn't be the first time the division had to deal with a president commenting on whether a particular transaction should go through. During the Reagan administration, the president told the press he didn't see what was wrong with a major steel industry merger, recalled Covington & Burling LLP's Deb Garza, who also worked in the division's front office during the George W. Bush administration.

"Our perspective [in the division] was, well, the president might say that, but then again his Justice Department hadn't fully vetted the transaction," Garza said. "Staff just did what staff does. We didn't pull punches. I suspect that will be the case here too."

Indeed, Delrahim's ties to the White House could ultimately make him more confident in pursuing his own course.

"It just makes you a little freer to do what you want," Leibowitz said.

Beyond the enforcement space, Delrahim also might opt to take a more active interest in antitrust legislation than some of his predecessors. Given his experience, any views he offers on proposals like the SMARTER Act to align merger injunction standards at the FTC and DOJ "will be highly respected on the Hill," Jacobson said.

While the FTC has been more active in bringing cases that wade into the world of IP rights than the DOJ has, Delrahim's self-declared passion for the issue might see him choosing to take advantage of the bully pulpit the AAG role offers.

And Delrahim has called for more restraint when it comes to antitrust enforcement targeting the way companies use their patents. Indeed, he objected to the modernization commission's recommendations dealing with the standard setting process, saying the commission didn't have the opportunity to do an in-depth review of the matter.

"Only when the holders of intellectual property rights go beyond the legitimate exercise of these rights should antitrust law be used to constrain their activities, and only then in a manner that is based on sound economic policies," Delrahim wrote in 2007.

While former enforcers cautioned that it can ultimately prove difficult to put theoretical priorities into practice once at the agency, at the very least the tone of the division on IP issues will likely shift.

"There was a sense by some, whether or not it was warranted ... that the balance of respect for intellectual property rights and preserving the ability of patent owners to fully exploit those patent rights had been giving way a little bit to antitrust issues," said Garza, who served on the commission with Delrahim. "That's one area where I think potentially Makan as leader might make a difference."

Another issue that Delrahim might be eager to push to the fore at the division is international cooperation.

"It's very important for the Justice Department as part of the executive branch to be front and center on these issues," Garza said. "For whatever reason, there's a perception that the FTC had taken up the lead on that, [but] I think Makan having that focus may bring that energy to it that may have been lacking."

Given his work on the modernization commission, legal policy issues may take on a bigger role at the division than they do now, according to Grunes.

"Right now there's a serious issue with regulation that interferes with competition ... and he's somebody who may want to tackle that problem," Grunes said, offering the example of federal or state rules that make it harder for competitors to enter certain markets. "It's attractive from a Republican viewpoint, but it's also attractive from a consumer viewpoint."

--Editing by Philip Shea and Emily Kokoll.