

## Opinion

# Delrahim: The Right Captain For The Antitrust Division

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Over the past several years antitrust enforcement has become central to sound economic policy. In the past administration antitrust enforcement has provided substantial benefits to consumers. The Antitrust Division of the [U.S. Department of Justice](#) has used its enforcement tools effectively, aggressively prosecuting international cartels and preventing anti-competitive mergers. At a time where cartel activity keeps proliferating and markets are increasingly concentrated, this type of enforcement could not be more timely.



David Balto

Of course, restoring the strength of the economy is the key priority for President Donald Trump. And to captain the division he has made an excellent choice in Makan Delrahim. There could be no better choice for the job. Delrahim has a well-earned reputation and is pragmatic in his approach to antitrust policy. He was a former deputy assistant attorney general during the Bush administration, a commissioner in the bipartisan [Antitrust Modernization Commission](#), a key staff person in the Senate Judiciary Committee. This experience taught him much of the real-world facts of the importance of competition especially in those markets critical to economic growth. His experience in high-tech, media and health care, especially his work on technology policy for the Senate Judiciary Committee, means he is well-equipped to deal with the pressing issues in modern antitrust enforcement.

The selection of Delrahim likely signals that there won't be a significant change in course for the crucial and nonpartisan work of the Antitrust Division. In Delrahim, Trump has selected a steady captain that will be an excellent guide as the division continues an already effective course while avoiding storms and reefs that could become significant setbacks in the good work of the division.

One respect in which Delrahim will be clearly the best person for the job is in managing the political tasks of enforcement. Fortunately, antitrust enforcement is a bipartisan endeavor. Thanks to the bipartisan leadership of the Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights — Sens. Mike Lee, R-Utah, and Amy Klobuchar, D-Minn. —

both Republicans and Democrats generally agree on the crucial role and increasing challenges of antitrust enforcement. The oversight committee plays an important role on putting a spotlight on the ongoing competitive problems in the market — especially in areas such as pharmaceuticals, health care, high-tech and agriculture. The division needs the kind of steady hand and prudent perspective that Delrahim can provide to navigating the halls of Congress.

Another distinct advantage Delrahim has is a sophistication and understanding of important competition policy issues facing the antitrust enforcement agencies. Delrahim was a member of the Antitrust Modernization Commission, where his contributions — particularly regarding high-tech issues like the interaction of antitrust and patent laws — were instrumental in developing sound recommendations to Congress. This understanding will be crucial as the agency deals with competition issues in dynamic technology industries. These issues will need a leader who can “sort the wheat from the chaff” in determining what actions are truly anti-competitive and what actions are competition neutral or beneficial to consumers. And Delrahim was willing to set his own course in the AMC deliberations, often issuing separate statements on important policy issues.

One of the most crucial issues facing the division is merger enforcement. Many members of Congress and commentators have raised significant concerns about market concentration and the merger wave. In the last year of the Obama administration the division was very aggressive blocking or forcing restructuring of over \$250 billion of deals in 2016 alone. Of course, the ability of any law enforcer depends in essence on its ability to go to court and win (a skill lost during the Bush administration, where the division went five years without stepping into a courtroom in a merger trial). And the Obama DOJ had a stellar record winning all five merger cases it litigated. And last year it successfully litigated two trials against two health insurance megamergers — Anthem/[Cigna](#) and [Aetna/Humana](#). That had never ever occurred before. It currently has several other cases in litigation. This litigation experience and expertise creates “muscle memory” and savvy litigation experience, which makes the division poised to fully enforce the law.

The Antitrust Division’s criminal enforcement program has been no slouch either. Just take two markets critical to the economy — financial services and generic drugs. With this week’s announced \$625 million criminal penalty, the division’s investigation into a conspiracy among banks to manipulate Libor and several currencies has resulted in the four largest corporate fines ever levied in criminal antitrust cases. The Libor case alone has

generated fines of around four times the division's budget. This makes the division one of the most successful government agencies. Not only does the division generate real cost savings for taxpayers, it also more than pays for itself. Generic drugs are essential to delivering high-quality health care and controlling the cost curve. The division also secured guilty pleas in January in a conspiracy involving certain generic drugs, which increased prices for those suffering from diabetes and patients needing antibiotics. Finally, an investigation into a conspiracy to fix prices for capacitors will lead to guilty pleas on criminal charges for six companies and 10 individuals. These investigations continue and are vital to protecting competition in these critical markets.

Delrahim's pragmatism has meant that he is not afraid to disagree with his future boss. On the campaign trail, President Trump took on the populist message of opposing the [AT&T-Time Warner](#) merger. However, while Delrahim recognized that the deal will get a lot of attention because of "the sheer size of it, and the fact that it's media," he stated it's not a significant antitrust problem because the deal does not involve direct competitors. While we want strong enforcers heading the Antitrust Division, we also don't want leaders who squander the division's resources and winning records on fights supported by opinions but not facts or the law.

It is important to have tough but moderate enforcers like Delrahim who know how to pick and choose battles, especially with the amount of important enforcement actions on the Antitrust Division's plate. The division is currently in the midst of a merger wave, and is litigating tough battles in the health insurance, financial services and music industries. In each of these markets there are critical cases on appeal in which the division has staked out vital positions to protect consumers and competition. These battles will take tremendous resources and we need a leader like Delrahim that can direct the division's priorities as appropriate.

It is important that the Senate turn its attentions to an efficient nomination process to preserve the significant achievements of the Antitrust Division and ensure that the division stays on an effective course. Senate oversight of presidential nominations is critical, but it's also critical to have a strong and capable leader of an Antitrust Division that is overseeing an economy with many concentration problems and one of the largest merger waves in history. This is why Delrahim's upcoming confirmation hearing is so critical. I hope that the Senate maintains its bipartisan traditions when it comes to antitrust by having a judicious hearing that conducts the necessary diligence, asks the tough and thoughtful questions,

and then confirms.

Delrahim has the sophistication, experience and practical savvy to be a strong leader of the division. The challenges of leading the division and protecting consumers are great; but we will have the right captain at the helm. I urge the Senate to confirm Delrahim's nomination.

—By David Balto, Law Offices of David A. Balto PLLC

*David Balto is a former policy director of the Federal Trade Commission Bureau of Competition and a former antitrust lawyer at the U.S. Department of Justice.*

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