

PUBLICATION

FTC and DOJ Antitrust Division Still Waiting for New Leaders

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While the Senate confirmed more than five dozen individuals chosen by President Trump for senior administration positions in August (shortly before departing for their summer recess), the head leaderships positions at the DOJ Antitrust Division and the Federal Trade Commission still remain vacant, now almost nine months into the new administration.

At the Antitrust Division, Makan Delrahim was nominated by President Trump to serve as the Assistant Attorney General for Antitrust (the highest position in the DOJ Antitrust Division) back in March. The Senate Judiciary Committee endorsed Delrahim in June by a vote of 19 to 1 and it was presumed that he would be confirmed by the Senate and assume his position in the summer. However, that has not happened. Reportedly, this delay has occurred because Senator Elizabeth Warren has placed a "hold" on his confirmation vote. Senator Warren previously expressed reservations about Delrahim's appointment when he was nominated in the spring. As a result, Delrahim was not included in the group of nominees that were approved by the Senate by voice vote before the Senate adjourned in August and a vote on his confirmation has still yet to be scheduled.

However, in the last few weeks, it has been reported that Senator Warren has agreed to meet with Delrahim and that this meeting might lead to a release of her "hold" on the nomination. This would be significant because – unlike the confirmation, which requires only a majority for approval – 60 votes are required to override a "hold," and given the current Senate composition, it is not clear whether 60 votes to override Senate Warren's hold could be obtained. Therefore, obtaining Senator Warren's agreement to release the hold is clearly the easiest (and likely fastest) path to confirmation for Delrahim. In the interim, however, other senior level positions in the Antitrust Division that do not require Senate confirmation have been filled, with Barry Nigro and Roger Alford recently being named as new Deputy Assistant Attorneys General, joining Andrew Finch (the current acting head of the Division and future Principal Deputy), Donald Kempf, Luke Froeb and Bryson Bachman.

Meanwhile, the process at the Federal Trade Commission has been even slower, although August brought some news on that front as well. Since January, the Commission has been operating with only two commissioners (rather than five), with Commissioner Maureen Ohlhausen serving as Acting FTC Chairwoman since President Trump's inauguration. However, President Trump is reportedly expected to nominate Joseph Simons for that role on a permanent basis. Simons, who is currently in private practice, was previously the Chief of the FTC's Bureau of Competition during the Bush Administration. If Simons is confirmed, Acting Commissioner Ohlhausen would presumably resume her role as a Commissioner, which would still leave two additional positions to be filled. In addition, Commissioner Terrell McSweeney's term ends in September and, while she is expected to remain in the position until replaced, it appears likely that we will have both a new FTC Chairman, and several new commissioners, in the coming months. Stay tuned.