

# Agency Heads Anticipate Release of Antitrust Guidance, Talk of Priorities in September Speeches, Testimony

## AntitrustConnect Blog

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Traditionally, September has been a month in which the heads of the federal antitrust agencies speak at annual conferences, highlighting their agencies' accomplishments. This September was no exception.

Earlier this month, both Makan Delrahim, Assistant Attorney General in charge of the Antitrust Division, and FTC Chairman Joe Simons discussed their plans for releasing antitrust guidance to aid practitioners and the business community at the 46th annual Fordham Law School Conference on International Antitrust Law and Policy in New York City. In addition, the assistant attorney general delivered remarks on "whether antitrust legal outcomes would improve by improving the expertise of our decision-makers and how we could empower decision-makers with the necessary expertise."

The agency heads also testified at congressional hearings in September. There was an oversight hearing before the Senate antitrust subcommittee attended by both agency heads. The FTC chair also testified before a House appropriations subcommittee this month.

**Revisions, additions to guidance.** At Fordham, Delrahim told attendees of the

46th annual Fordham Law School Conference on International Antitrust Law and Policy that he has directed the Antitrust Division to undertake a review of the International Guidelines.

In addition to announcing review of the guidance, Delrahim's September 12 remarks, entitled "'With a Little Help from My Friends': Using Principles of Comity to Protect International Antitrust Achievements," provide an overview of the development of international antitrust cooperation since World War II and note the potential danger resulting from overreach by antitrust authorities that impose global remedies.

The Antitrust Guidelines for International Enforcement and Cooperation were last revised in January 2017. In the final days of the Obama Administration, the Antitrust Division and FTC released updates to the guidance that had been standing since the 1990s. The guidelines cover the agencies' international enforcement policy as well as the agencies' related investigative tools and cooperation with foreign authorities.

Delrahim said that an Antitrust Division review is intended to insure that the guidelines: (1) accurately reflect the latest guidance from our Supreme Court and lower courts; (2) adequately reflect the importance of comity to our relationships with international competition enforcers; and (3) adequately convey the symmetry that we expect from our international counterparts.

It was unclear whether the review would lead to the issuance of new guidelines or if additional guidance or commentary would be provided. New guidelines would be a significant, time-consuming effort and would likely involve the FTC. The 1995 and 2017 international enforcement guidelines were released jointly by the FTC and Justice Department. In 2006, the agencies jointly issued commentary on the Horizontal Merger Guidelines without completely revising the underlying document. The agencies have since issued new guidelines.

The next day at the Fordham program Simons detailed the guidance that he anticipates the Commission will release as a result of the FTC's Hearings on Competition and Consumer Protection in the 21st Century in his September 13 speech. With the series of 14 hearings now wrapped up, Simons said in his keynote address that the agency is turning its attention to producing output from those hearings.

The FTC is in the process of drafting a guidance document explaining how the antitrust laws might apply to conduct by technology platforms that is expected to be similar in format to the 2000 joint Competitor Collaboration Guidelines. Simons suggested that the guidelines would define technology platforms and consider the U.S. Supreme Court's 2018 decision in Ohio v. American Express Co., on two-sided markets. In addition to market power issues, he expects a discussion of conduct issues as well.

The FTC also is working on additional guidance on merger enforcement. Earlier this year at the American Bar Association Section of Antitrust Law Spring Meeting, both Simons and Makan Delrahim, Assistant Attorney General in charge of the Department of Justice Antitrust Division, said that both their agencies were looking into providing guidance to practitioners and business on vertical mergers. While Simons confirmed that discussions were under way with the Antitrust Division to develop joint vertical merger guidelines (and other planned guidance), he said that it was too early to say whether that effort would be successful. William Rinner, counsel to Assistant Attorney General Delrahim, said during a later panel at the Fordham conference that he remained hopeful that both agencies can embrace a single vertical merger guidelines document.

Some antitrust attorneys and members of the business community have called for guidance in this area. The Justice Department's non-horizontal merger guidelines date back to 1984, and interest in the area was rekindled by the government's unsuccessful challenge to AT&T, Inc.'s proposed \$108 billion acquisition of Time Warner, Inc.

In any event, the FTC chair said that the FTC could release a guidance document on vertical mergers in the near future. The document would be similar to the 2006 Commentary on the Horizontal Merger Guidelines, according to Simons, and it "will make clear that anticompetitive vertical mergers are not unicorns, and there should not be a presumption that all vertical mergers are benign."

With respect to horizontal mergers, Simons anticipates an addendum to the 2006 Horizontal Merger Commentary. The addendum will explain how staff analyzes acquisitions of nascent competitors and how staff accounts for non-price factors in horizontal merger analysis. Acquisitions of nascent competitors, sometimes called "killer acquisitions," have been the subject of criticism, particularly in the tech sector, in recent years.

Simons said that the FTC is in discussion with the Antitrust Division regarding the planned guidance and reports. Delrahim announced at the Fordham conference that he has directed the Antitrust Division to undertake a review of the International Guidelines.

On the consumer protection front, Simons mentioned the agency's efforts to reauthorize the US SAFE WEB Act, which is currently subject to a "sunset" provision that will terminate it on September 30, 2020. The SAFE WEB Act gives the FTC critical powers to enhance cross-border cooperation on consumer protection investigations and fraud actions, as well as to support cross-border data transfer mechanisms, Simons explained. According to the FTC chair, the hearings confirmed the Act's value and success. He is hopeful that Congress will eliminate the sunset provision so that the Act's provisions can become a permanent part of the FTC Act. Simons noted that the agency also was considering output on privacy and data security issues.

**Expert decision-makers.** Delrahim spoke on September 9 at George Washington University Law School in Washington, D.C., about "whether antitrust legal outcomes would improve by improving the expertise of our decision-makers and how we could empower decision-makers with the necessary expertise."

In his remarks, entitled "'Special, So Special': Specialist Decision-Makers in, and the Efficient Disposition of, Antitrust Cases," Delrahim identified the "importance of ensuring that the decision-maker in antitrust cases fully grasps the evidence and underlying concepts." The speech came just days after the Antitrust Division filed a brief with the U.S. Court of Appeals in San Francisco in the FTC's antitrust action over Qualcomm Inc.'s licensing practices, stating that "the district court committed fundamental errors of antitrust law that permeate its decision and require vacatur." The Antitrust Division contended that the court's "analyses of two practices reflect basic misunderstandings of antitrust law."

Delrahim also noted the Antitrust Division's first use of a novel form of dispute resolution for federal antitrust enforcement in the challenge to Novelis Inc.'s proposed acquisition of Aleris Corporation. The new process "could prove to be a model for future enforcement actions, where appropriate, to bring greater certainty for merging parties and to preserve taxpayer resources while staying true to our enforcement mission." The arbitration would resolve the sole issue of product market definition.

Delrahim concluded by noting that “the Antitrust Division welcomes innovation in legal and economic thinking—not only in how we understand the contours of substantive antitrust law, but also in processes for resolving antitrust claims themselves.”

**Testimony.** Simons and Delrahim testified before the Senate Judiciary Committee’s antitrust, competition policy, and consumer rights subcommittee at a hearing on “Oversight of the Enforcement of the Antitrust Laws” this month. Simons noted at the September 17 hearing that the FTC has been active in combatting anticompetitive conduct in pharmaceutical markets, including a settlement with Reckitt Benckiser to resolve allegations related to that firm’s efforts to thwart generic competition to the company’s opioid addiction treatment drug.

Delrahim noted that the Antitrust Division criminal program has been very active with 91 pending grand jury investigations at the close of Fiscal Year (FY) 2018, the highest total since 2010. “Criminal enforcement can be resource intensive, but it is one of our most powerful deterrents against serious violations such as price fixing, bid rigging, and market allocation that unambiguously disrupt the integrity of the competitive process, harm consumers, and reduce faith in the free-market system,” said Delrahim. Over the past year, the Antitrust Division has obtained settlement agreements, guilty pleas, and prison sentences in suits related to rigging bids on U.S. government fuel supply contracts, collusion in online markets, price fixing for the sale of international ocean shipments, stock trading, bid rigging and fraud relating to real estate foreclosure auctions, and unlawful conduct in the generic pharmaceuticals industry.

In a September 25 prepared statement for a hearing of the House Appropriations Committee’s Subcommittee on Financial Services and General Government, the FTC chair noted that the FTC’s primary antitrust concerns are currently focused on Big Pharma and Big Tech. At the hearing, Simons reiterated the agency’s call for greater enforcement powers, particularly in the areas of privacy and data security legislation.

The prepared remarks for these speeches and testimony, which have been released by the agencies, provide some insights into the agencies’ priorities and merit a read.