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July 2, 2020

The Honorable Michael E. Horowitz
Inspector General
U.S. Department of Justice
Office of the Inspector General
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Inspector General Horowitz:

I write to you today in furtherance of our conversations about political interference at the Department of Justice. Specifically, I write to bring to your attention correspondence I have had with the Department about the Antitrust Division's investigation of agreements four automakers made with the State of California concerning greenhouse gas emissions by cars and light trucks. The Department's responses to my inquiries range from incomplete to misleading, and suggest an attempt to cover up misconduct from congressional oversight.

I have spent months trying to get answers from the Antitrust Division about this investigation. On September 17, 2019, Assistant Attorney General Makan Delrahim appeared for an oversight hearing before the Senate Judiciary Committee's Antitrust Subcommittee. I asked him questions about the Division's investigation, at that point just weeks old, and submitted written questions for the record (QFRs). I did not receive answers to those questions until May 29, 2020, nine months after they were submitted, four months after it was reported that the investigation had been closed, and only after I indicated that I would put a hold on legislation sought by the Antitrust Division.[1] On June 9, I advised the Department that Mr. Delrahim's responses were insufficient and that I would continue to place a hold on the legislation it sought.[2] On June 19, Assistant Attorney General Stephen Boyd responded in the place of Mr. Delrahim with a supplemental response.[3]

My suspicion that Mr. Delrahim's and Mr. Boyd's responses failed to tell the full story of this investigation was confirmed on June 24, when Antitrust Division attorney John Elias testified as a whistleblower before the House Judiciary Committee, in part about the events I raised in my questions.

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[1] See Exhibit A. Assistant Atty. Gen. Makan Delrahim Answers to Questions for the Record from Sen. Sheldon Whitehouse.
[2] See Exhibit B. Sen. Sheldon Whitehouse, Letter to Assistant Atty. Gen. Makan Delrahim on his insufficient responses to the Senator's QFRs (Jun. 9, 2020).
[3] See Exhibit C. Assistant Atty. Gen. Stephen Boyd, Letter to Sen. Sheldon Whitehouse supplementing answers to his QFRs (Jun. 19, 2020).

The Decision to Investigate the Automakers Was Motived by Politics

When I first asked why the Antitrust Division opened its investigation, circumstantial evidence strongly suggested the decision was driven by political considerations. California and the four automakers announced the new emissions standards in July 2019. The President tweeted about it on August 21, 2019. Letters from the Antitrust Division to the automakers were dated August 28.

Mr. Elias testified that political leadership of the Antitrust Division directed staff to open the investigation on August 22, 2019, the day after the President's tweet. At the House Judiciary Committee hearing, Rep. David Cicilline noted the investigation's coincidental timing and asked whether the investigation was opened to "cater to the President's political whims." Mr. Elias responded that "the coincidence in time between the President's tweets and the instruction the next day to open the investigation could lead to [such an] inference."[4]

In response to my QFR asking whether the Department considered White House preferences when launching an investigation, Mr. Delrahim claimed that Division decisions are always made without "improper political considerations or interference."[5] Mr. Boyd reiterated that external political concerns "never govern law enforcement efforts."[6] Mr. Delrahim stated that "the Division generally follows the procedures described in the Antitrust Division Manual in all matters it undertakes, including the investigation into the automaker agreement."[7] If Mr. Elias's testimony is correct, Mr. Delrahim's and Mr. Boyd's answers to me cannot be.

The Division Did Not Follow Its Own Procedures

The significant authority vested in the Antitrust Division means that even the opening of an investigation can have economic consequences on companies and industries. The Antitrust Division Manual sets out the procedures staff should follow to conduct a preliminary investigation to assess whether a formal investigation is warranted, effectively cabining that authority for cases in which a strong basis to suspect potential anticompetitive behavior has been established.[8]

When I asked Mr. Delrahim what facts the Division used to establish predication for the investigation it had opened several weeks earlier, Mr. Delrahim testified, "I have nothing. That's the purpose of an investigation."[9] Mr. Boyd was slightly more forthcoming, pointing to a one-page term sheet of the automakers' agreement with California that included the words "we all agree." When Mr. Delrahim replied to my QFR asking who decided to open the investigation,

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[4] Exhibit D. *Hearing on Oversight of the Department of Justice Before the H. Comm. on the Judiciary*, 116th Cong. at 26 (2020) (statements of Rep. Cicilline and John Elias),
[5] Exhibit A, at Question 30(a).
[6] Exhibit C, at 2 para. 2.
[7] Exhibit A, at Question 32.
[8] *Antitrust Division Manual* at III B-C.
[9] See Exhibit E. *Hearing on Antitrust Laws Oversight Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary*, 116th Cong. at 36 (2020) (statements of Assistant Atty. Gen. Delrahim).

Mr. Delrahim claimed that "career staff" evaluated and drafted the recommendation to investigate.[10]

An investigation premised on "nothing" or the words "we all agree" hardly follows the Antitrust Division Manual. So it came as little surprise that Mr. Elias testified that the decision to investigate the automakers was made by "political leadership" who directed career staff to open the investigation the day after the President's tweets. Mr. Elias continued that "the career staff who reviewed [the California automaker agreement] … had some grave concerns about opening it, especially the people who were then charged with actually conducting the investigation. They … documented their concerns with the legal underpinning … of the case."[11] Further, Mr. Elias testified that the Division did not bother to contact California officials, suggesting another departure from typical practice.[12] The effect of this rash and unjustified decision was to weaponize our nation's antitrust laws to cause economic harm to companies that took a position contrary to the President's wishes. This is exactly what the procedures in the Antitrust Division Manual are designed to prevent.

The Division Failed to Properly Consider Automakers' Defenses

The Division's investigation continued for months despite the existence of clear defenses it must consider before initiating and continuing an investigation according to the Antitrust Division Manual. In response to my QFR on the consideration of defenses, Mr. Delrahim claimed that "the Division considers the strength of likely defenses at every stage" of the investigation.[13] Mr. Boyd later suggested that two likely defenses—state action doctrine and Noerr-Pennington doctrine—did not necessarily apply to this case.[14]

Mr. Elias testified that "normally for significant, complicated matters, people put time and attention into assessing potential defenses" and that "the career staff who examined [the California automaker agreement] saw some very obvious defenses, things called state action or Noerr-Pennington, and … you really have to twist things" to not consider these defenses conclusive.[15] The Department's official answers and Mr. Elias's testimony cannot both be true.

Many Unanswered Questions about the Investigation Remain

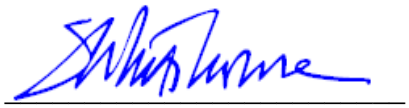
In addition to the Department's misrepresentations, there remain several questions that, if answered, could reveal the existence of additional improper interference in the Antitrust Division's investigation of the automakers. For example, neither Mr. Delrahim nor Mr. Boyd answered my questions about communications the Division had with the White House (Question 34) or with the EPA or DOT (Question 31). I have documented elsewhere the influence of the oil and gas industry throughout the Trump administration, and specifically on the

[10] Exhibit A, at Question 29.
[11] Exhibit D, at 29.
[12] *Id*. at 30.
[13] Exhibit A, at 38(b).
[14] Exhibit C, at 3.
[15] Exhibit D, at 28-29.

administration's decision to roll back emissions standards for cars and light trucks.[16] I strongly suspect this industry's influence extended to this antitrust investigation, as the attack on California's agreement with the four automakers was consistent with the Trump administration's decision, at the behest of the oil and gas industry, to weaken nationwide greenhouse gas emission standards for cars and light trucks.

To summarize, we have: (1) an industry willing to use every lever at its disposal to increase its profits by blocking an environmental regulation; (2) a Division with political leadership willing to disregard established policies to please the President, who himself wants to please that industry; and (3) a Department willing to countenance delayed, incomplete, and misleading answers to questions asked by a co-equal branch of government to stymie congressional oversight. Whether you view this as another instance of in the long and growing list of improper politicization of law enforcement across the Department or a breakdown of procedures in the Antitrust Division, these facts require your attention.

Sincerely,



Sheldon Whitehouse
United States Senator

Cc: The Honorable Lindsey Graham
The Honorable Dianne Feinstein
The Honorable Jerrold Nadler

[16] *See, e.g.*, Comment by Sheldon Whitehouse, *et al.*, *available at* https://www.regulations.gov/document?D=EPA-HQ-OAR-2018-0283-5483. The involvement of Marathon Petroleum Corporation in these efforts is the subject of an ongoing investigation by the House Oversight and Reform Committee. https://oversight.house.gov/news/press-releases/maloney-rouda-tlaib-and-whitehouse-probe-industry-influence-over-epa.

Exhibit A

Questions from Senator Whitehouse

28. When and how did the Department make the decision to investigate the agreement between the California Air Resources Board (CARB) and the four automakers in question?

Response:

The Division monitors markets and receives information from news reports, market participants, and third parties to learn of potential threats to competition. In appropriate cases, the Division opens investigations to determine the precise nature of the reported conduct, whether the conduct has harmed or would harm consumers, and whether enforcement would be appropriate.

29. At whose direction did the Antitrust Division make the decision to investigate the agreement between CARB and the four automakers in question? If the decision was first broached internally, which office or component of the Antitrust Division first raised the idea?

Response:

In this matter, as in any other, when allegations of a potential antitrust violation come to the Division's attention, career staff is asked to evaluate and draft a recommendation to open an investigation, and the request is reviewed and approved consistent with appropriate procedures.

30. To what extent does the Department consider White House preferences and/or policy priorities when making the decision to investigate a potential antitrust violation?

a. Does the Department consider President Trump's tweets when deciding whether to launch an antitrust investigation?

b. How does the Department distinguish a tweet from a directive?

Response:

The Division's decisions are based on the facts and the law without improper political considerations or interference.

31. You testified that you have not "had a communication with anybody outside of our building," including the White House, EPA, or DOT, about the Department's antitrust probe into Ford, Volkswagen, Honda, and BMW?

a. What communications, if any, has the Department of Justice had with the White House about this investigation? Please describe all such communications, identifying any individuals who participated.

b. What communications, if any, has the Department of Justice with EPA about this investigation? Please describe all such communications, identifying any individuals who participated.

c. What communications, if any, has the Department of Justice with DOT about this investigation? Please describe all such communications, identifying any individuals who participated.

Response:

The Department has specific policies and guidance, including a memo by then-Attorney General Holder dated May 11, 2009, that limit discussions between the White House and the Department regarding ongoing or contemplated cases or investigations. The Division has been and remains committed to following and enforcing applicable policies and procedures related to such contacts. I am not aware of any communications between the Department and the White House regarding the opening of any antitrust investigation regarding the reported emissions agreements.

32. On August 21, 2019, President Trump sent a series of tweets criticizing the July 2019 agreement between CARB and the four automakers. Just one week later, on August 28, 2019, you sent letters to the four automakers initiating the probe. Between August 21, 2019 and August 28, 2019, what materials did the Department consult in deciding to investigate the automakers?

a. Between August 21 and August 28, what communications, if any, did the Department have with the White House concerning the agreement between CARB and the four automakers?

b. Prior to August 21, had the Department decided to open an investigation into the agreement in question? If not, had the Department considered opening an investigation into the agreement in question prior to August 21, 2019? When was this idea first raised?

Response:

The policy of the Department limits my ability to comment on the status of an ongoing law enforcement investigation. The Division generally follows the procedures described in the Antitrust Division Manual in all matters it undertakes, including the investigation into the automaker agreement. The Department has specific policies and guidance, including a memo by then-Attorney General Holder dated May 11, 2009, that limit discussions between the White House and the Department regarding ongoing or contemplated cases or investigations. The Division has been and remains committed to following and enforcing applicable policies and procedures related to such contacts.

33. What communications, if any, has the Department had with the White House concerning the President's opinion on the July 2019 agreement between CARB and the four automakers?

a. Following the July 2019 agreement, a senior Trump advisor reportedly "summoned" Toyota, Fiat Chrysler, and General Motors to the White House,

and pressured them to abide by the Trump Administration's proposed lower standards rather than the CARB standards. To what extent does the Department consider such meetings when deciding whether to open an investigation?

Response:

The Division's decisions are based on the facts and the law without improper political considerations or interference.

b. Given the President's public opposition to the agreement between CARB and the four automakers, what steps has the Department taken to maintain independence from the White House in this particular investigation?

Response:

The Department has specific policies and guidance, including a memo by then-Attorney General Holder dated May 11, 2009, that limit discussions between the White House and the Department regarding ongoing or contemplated cases or investigations. The Division has been and remains committed to following and enforcing applicable policies and procedures related to such contacts.

The Division is working to correct the unfortunate misunderstandings reflected in the public discourse about the reported investigation. To that end, I recently wrote an op-ed, published in USA Today and reprinted above, in an effort to correct the public record on well-settled antitrust law principles.

34. What communications, if any, has the Department had with the White House regarding the President's decision to revoke California's ability to set more stringent emissions standards than those set by the federal government?

a. What communications, if any, has the Department had with the White House regarding the President's contentious relationship with the state of California?

b. What communications, if any, has the Department had with the White House regarding ongoing litigation between the White House and the state of California?

Response:

I am unaware of any communications between the Department and the White House regarding the President's decision to revoke California's ability to set more stringent emissions standards than those set by the federal government, or regarding the President's relationship with California or the ongoing litigation between the White House and the state of California.

The Department has specific policies and guidance, including a memo by then-Attorney General Holder dated May 11, 2009, that limit discussions between the White House and the Department regarding ongoing or contemplated cases or investigations. The Division has been and remains committed to following and enforcing applicable policies and procedures related to such contacts.

35. The Antitrust Division Manual sets forth standards for approving a preliminary investigation. The manual provides that although an investigation does not formally become "civil" or "criminal" until compulsory process is issued, "a preliminary judgment is usually made when the preliminary investigation memo is submitted as to whether the investigation will be pursued as a civil or criminal matter."

a. Has that preliminary judgment been made?

b. If so, is the Division's investigation into the California automakers' agreement being considered a civil or criminal investigation, and why?

Response:

The policy of the Department limits my ability to comment on the status of any specific law enforcement investigation. The Division generally follows the procedures described in the Antitrust Division Manual in all matters it undertakes, including the investigation into the automaker agreement.

36. If the Division's investigation into the California automakers' agreement is considered a criminal investigation:

a. Was a decision made, pursuant to the Antitrust Division Manual, that the allegations or suspicions were "sufficiently credible or plausible to call for a criminal investigation"? If so, who made that determination, and when?

b. Was a decision made, pursuant to the Antitrust Division Manual, that the matter was "significant"? If so, who made that determination, and when?

Response:

The policy of the Department limits my ability to comment on the status of any specific law enforcement investigation. The Division generally follows the procedures described in the Antitrust Division Manual in all matters it undertakes, including the investigation into the automaker agreement.

37. Pursuant to the Antitrust Division Manual, in opening an investigation into the California automakers' agreement, did a Division attorney prepare a preliminary investigation memo describing the nature and scope of the activity? Please produce it.

a. If this is a civil matter, did the Division attorney consult with an economist in the Economic Analysis Group (EAG)? If so, did EAG provide an opinion that the agreement presents any anticompetitive harm?

Response:

The policy of the Department limits my ability to comment on the status of any specific law enforcement investigation. The Division generally follows the procedures described in the Antitrust Division Manual in all matters it undertakes, including the investigation into the automaker agreement.

38. In your hearing testimony, when I asked why you were pursuing the California automakers' investigation in light of likely defenses, such as the state action doctrine or the *Noerr-Pennington* doctrine, you replied that "the conduct needs to be examined first. Then the immunity to that type of conduct." But that statement – about the order in which likely defenses are to be considered – appears at odds with the Antitrust Division Manual, which provides that in considering a preliminary investigation, "attention should be given to the legal theory, relevant economic learning, the strength of likely defenses, any policy implications, the potential significance of the matter, and the availability of an effective and administrable remedy" (emphasis added).

a. How do you reconcile your statement with this guidance?

b. In considering whether to open an investigation, did the Division give attention to the strength of likely defenses? Specifically, did it assess the state action doctrine and *Noerr-Pennington*? What was its assessment of those defenses?

Response:

The policy of the Department limits my ability to comment on the status of any specific law enforcement investigation. The Division generally follows the procedures described in the Antitrust Division Manual in all matters it undertakes, including the investigation into the automaker agreement. The Division considers the strength of likely defenses at every stage as appropriate in light of the facts then available.

I attach several cases relevant to that assessment. *See, e.g., N.C. State Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494 (2015)*; FTC v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986); *Arizona v. Maricopa Cty. Med. Soc.*, 457 U.S. 332 (1982); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *In re Detroit Auto Dealers Ass'n, Inc.*, 955 F.2d 457 (6th Cir. 1992); *Nat'l Macaroni Mfrs. Ass'n v. FTC*, 345 F.2d 421 (7th Cir. 1965); *Manaka v. Monterey Sardine Indus.*, 41 F. Supp. 531 (N. D. Cal. 1941); Bennett H. Goldstein & Howell H. Howard, *Antitrust Law and the Control of Auto Pollution: Rethinking the Alliance Between Competition and Technical Progress*, 10 Environ. L. 517 (1980).

39. Pursuant to the Antitrust Division Manual, was a completed preliminary investigation memo forwarded to a section or field office chief for review? Which section or field office chief completed this review?

a. Did the section or field office chief approve the memo?

b. Was the memo emailed to the ATR-Premerger-PI Requests mailbox and the appropriate special assistant?

c. Did the Premerger and Division Statistics Unit request clearance from the FTC and email a copy of the memo to all chiefs and assistant chiefs? When did that clearance request take place?

d. Did FTC provide the requested clearance? When?

Response:

The policy of the Department limits my ability to comment on the status of any specific law enforcement investigation. The Division generally follows the procedures described in the Antitrust Division Manual in all matters it undertakes, including the investigation into the automaker agreement.

40. "When final preliminary investigation authority has been granted on any investigation," the Antitrust Division Manual requires the internal circulation of the preliminary investigation memo, "marked with the clearance result, date of resolution, the name of the individual authorizing the preliminary investigation, the date of the authorization, and the file number for the investigation." Please provide that document.

Response:

The policy of the Department limits my ability to comment on the status of any specific law enforcement investigation. The Division generally follows the procedures described in the Antitrust Division Manual in all matters it undertakes, including the investigation into the automakers' agreement.

41. In your hearing testimony, you rejected the assertion that the California automakers' agreement was one that you had singled out. You stated that "it is not the one I have picked out," and pointed to other cases – "the college admissions counselors," and "APs in elite high schools" – that your division had "looked at."

a. During your tenure, how many investigations has the Antitrust Division launched involving agreements between companies that directly involve the participation and consent of a sovereign government? Please list them.

b. How many letters has the Antitrust Division sent to other industries regarding agreements that involve the participation and consent of a government? Please list them.

Response:

During my testimony before this subcommittee, I referred to other investigations into potential violations of Section 1 of the Sherman Act. If cases with fact patterns similar to the automakers' agreement emerge, the Division will devote resources as appropriate to such matters in a manner consistent with those we devote to the automakers investigation.

Although Department policy prevents me from disclosing the names of nonpublic investigations, I can disclose that the Division has launched eight civil Section 1 investigations during fiscal years 2018 and 2019, and we have filed lawsuits in five instances during those fiscal years.

42. How many attorneys and attorney hours have been devoted to the investigation into the California automakers' agreement?

Response:

The policy of the Department limits my ability to comment on the status of any specific law enforcement investigation. The Division generally follows the procedures described in the Antitrust Division Manual in all matters it undertakes, including the investigation into the automakers' agreement.

43. The Antitrust Division Manual states that one factor for determining whether to initiate an investigation is "whether allocating resources fits within the needs and priorities of the Division." In EPA and NHTSA's August 24, 2018, Notice of Proposed Rulemaking for the "Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks" (83 FR 42986), those agencies concluded: (1) "Consumer preferences have shifted markedly away from higher-fuel-economy smaller and midsize passenger vehicles toward crossovers and truck-based utility vehicles." (Id. at 42993); and "Consumers tend to avoid purchasing things that they neither want or need" (Id.).

a. Before opening its investigation into the California automakers' agreement, did the Division consider the Administration's position that '[c]onsumer preferences have shifted markedly away from higher-fuel-economy smaller and midsize passenger vehicles"?

b. If not, did the Division conduct its own analysis into consumer preferences for higher-fuel-economy smaller and midsize passenger vehicles?

c. Under what circumstances would it be an appropriate allocation of the Division's scarce resources to open an investigation into a product that the federal government has concluded increasingly "neither want or need"?

Response:

Consistent with Chapter 3 of the Antitrust Division Manual, the Division considers appropriate available information, including from public sources and other investigations, to determine whether the particular conduct poses a threat to competition.

44. At your hearing, you referenced the letter that you sent to the automakers regarding the Antitrust Division's investigation into their agreement with California. Please produce a copy of that letter.

Response:

The letter is attached to these responses.

45. It was reported that the Justice Department is set to meet this week with representatives of the automakers that are the subject of your antitrust investigation. Who attended that meeting, and what transpired?

Response:

The policy of the Department limits my ability to comment on the status of any specific law enforcement investigation.

46. When will the Antitrust Division make a decision about whether to pursue a challenge to the automakers' agreement with California?

Response:

The Division's decision-making about whether to pursue a challenge to the automakers' agreement among each other, whether to close its investigation, or whether other action is appropriate as it "develops evidence" adheres to Chapter 3, section G, of the Antitrust Division Manual.

Exhibit B

SHELDON WHITEHOUSE
RHODE ISLAND

COMMITTEES:
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June 9, 2020

Mr. Makan Delrahim
Assistant Attorney General
Antitrust Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Mr. Delrahim:

Thank you for your recent responses to questions for the record from your appearance before the Senate Judiciary Committee's Antitrust Subcommittee on September 17, 2019. Those answers were insufficient and I request that you supplement them.

My questions concerned the Antitrust Division's investigation of agreements four automakers made with the State of California to follow vehicle greenhouse gas emissions standards set by the state. As we discussed at that hearing, the timing and circumstances of the Division's investigation—including statements made at the time by President Trump and the availability of obvious legal defenses to any antitrust liability—raises concerns of political interference and improper use of the Department's legal authority to intimidate businesses that made decisions contrary to the interests of the President. My questions sought information about how that investigation was initiated and whether internal procedures in the Antitrust Division Manual were followed.

You justified many of your incomplete or cursory answers as a "policy" of not commenting on ongoing investigations. See, e.g., Response to Question 32 ("The policy of the Department limits my ability to comment on the status of an ongoing law enforcement investigation"); see also Responses to Questions 35-40, 42. It has been widely reported that this investigation was closed on or about February 1, 2020.[1] Any member of this Committee, which has oversight responsibilities over your Division, should receive answers that are correct and complete at the time they are submitted. These were not. You should revise your answers to account for the current status of the Division's investigation.

[1] Brent Kendall and Timothy Puko, *Justice Department Drops Antitrust Probe of Automakers Involved in California Emissions Deal*, Wall Street J., Feb. 7, 2020, https://www.wsj.com/articles/justice-department-drops-antitrust-probe-of-auto-makers-involved-in-california-emissions-deal-11581114207#:~:text=Timothy%20Puko,-Biography&text=WASHINGTON%E2%80%94The%20Justice%20Department%20closed,of%20collusion%20among%20the%20companies.&text=In%20a%20statement%2C%20Democratic%20California%20Gov.

You should also conduct these revisions consistent with the Antitrust Division's "Issuance of Public Statements Upon Closing Investigations" policy.[2] That policy states that the Antitrust Division "may issue a public statement describing the reasons for closing an antitrust investigation." It further advises that the Division may issue such a statement when an investigation "had previously been publicly confirmed by the Department" and when the matter "has received substantial publicity." Under the circumstances, where an investigation appears to have been hastily opened, civil investigative demands were issued,[3] and the investigation then quickly closed, all bringing unjustified negative attention upon a state and four automakers, there is significant "value to the public in receiving information regarding the reasons for nonenforcement (including public trust in the Department's enforcement, and the value of the analysis for other enforcers, businesses and consumers)."[4]

To ensure your next set of responses is complete, I note the following specific deficiencies in your first answers:

> Question 29: You did not respond to my request that you identify "which office or component of the Antitrust Division first raised the idea" of an antitrust investigation. This is a simple question which does not require you to divulge any deliberative materials. If this investigation was first raised by career staff who are experts on potential anti-competitive activity in the auto industry and who typically author opening memos for investigations, you should say so. If not, you should explain how the investigation was initiated and by whom.

> Question 30: The timing of the President's statements on social media about the automakers agreements with California coincided with the Division's investigation. I asked you whether the President's tweets were considered by the Division. You did not answer.

> Question 31: I asked whether you spoke with officials at the White House, EPA, or DOT about the investigation. You did not answer with respect to the EPA or DOT.

> Question 32: I asked what investigatory steps, if any, the Antitrust Division had taken before the President's first tweet criticizing the four automakers on August 21, 2019. I do not want to know the substance of any of these conversation, but simply when the Division first identified a basis for reviewing this conduct. Presumably this information is documented in memos and communications. I also asked what materials the Department consulted in deciding to investigate the automakers. In response to question 28, you stated that the "Division monitors markets and receives information from new reports, market participants, and third parties…." What specific types of information were reviewed in this case?

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[2] U.S. Dep't of Justice, Antitrust Div., Issuance of Public Statements Upon Closing Investigations (2006), https://www.justice.gov/sites/default/files/atr/legacy/2006/04/27/201888.pdf.

[3] Brent Kendall and Ben Foldy, *Justice Department Issues Civil Subpoenas to Auto Makers in California Emissions Pact Probe*, Wall Street J.,Nov. 7. 2019, https://www.wsj.com/articles/justice-department-issues-civil-subpoenas-to-auto-makers-in-california-emissions-pact-probe-11573161496#:~:text=Ben%20Foldy,-Biography&text=The%20Justice%20Department%20has%20issued,that%20has%20generated%20political%20controversy.

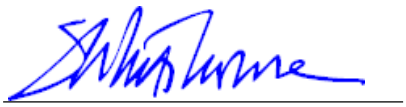
[4] Issuance of Public Statements, *supra* note 2.

Questions 37-40: I asked you to confirm that specific procedures for opening an investigation, as laid out in the Antitrust Division Manual, were followed in this case. You responded: the "Division generally follows the procedures described in the Antitrust Division Manual in all matters it undertakes, including the investigation into the automaker agreement." To be responsive to these questions, please provide documentation that the Division followed each of the required steps in the Manual, with whatever redactions are necessary to protect deliberative or otherwise privileged materials.

I observe that those of us who asked questions of you following this hearing did not receive answers until I indicated to Judiciary Committee staff that I would not agree to any consent request to expedite consideration of the Antitrust Criminal Penalty Enhancement and Reform Permanent Extension Act, S. 3377. That appears to be part of a consistent pattern of the Department failing to answer post-hearing questions for the record, which is an impediment to this Committee's ability to conduct proper oversight over the Department's activities. By my count, Department of Justice witnesses testified at 28 hearings between May 2017-November 2019. As of February 2020, the Department has not responded to any QFRs from any Senator following 19 of those hearings. This includes your responses to QFRs following a hearing on October 3, 2018. I am copying Department of Justice Inspector General Michael Horowitz on this letter so he is aware of these concerns.

I will continue to withhold my consent to any request to expedite consideration of this bill until I receive satisfactory answers to my questions.

Sincerely,



Sheldon Whitehouse

United States Senator

Cc: The Honorable Lindsey Graham
The Honorable Dianne Feinstein

Exhibit C

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

June 19, 2020

The Honorable Sheldon Whitehouse
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senator Whitehouse:

This responds to your letter to the Assistant Attorney General for the Antitrust Division (Division) dated June 9, 2020. Your letter explains that you are withholding consent from expediting consideration of the Antitrust Criminal Penalty Enhancement and Reform Permanent Extension Act, S. 3377 (the "Act") pending our response to your letter. The Department supports the Act because it will allow the original ACPERA to continue to strengthen criminal antitrust enforcement, which has long been a bipartisan priority. In enacting ACPERA, Congress recognized that, "[c]ooperation obtained through the leniency program has led to the detection and prosecution of massive international cartels that cost businesses and consumers billions of dollars."[1] The Act has received bipartisan support from antitrust subcommittee leadership in both chambers of Congress,[2] but needs to be enacted before June 22, 2020, to prevent the sunset of the legislation.

Your letter asks in particular for supplemental information about an investigation by the Division into "agreements four automakers made with the State of California" regarding automobile emissions.[3] To be clear, the Division did not seek to investigate bilateral agreements

[1] 150 Cong. Rec. S3614 (Apr. 2, 2004) (statement of Sen. Hatch).

[2] *See* Cosponsors, Antitrust Criminal Penalty Enhancement and Reform Permanent Extension Act, S.3377, 116th Cong. (2020) (Senator Lindsay Graham, sponsor, with Senators Dianne Feinstein, Mike Lee, and Amy Klobuchar cosponsors), https://www.congress.gov/bill/116th-congress/senate-bill/3377/cosponsors; Cosponsors, H.R.7036, 116th Cong. (2020) (Representative Joe Neguse sponsor, with Representatives Jerrold Nadler, David Cicilline, Jim Jordan, James Sensenbrenner, and Jamie Raskin cosponsors), https://www.congress.gov/bill/116th-congress/house- bill/7036/cosponsors.

[3] You have asked for additional information about the automaker investigation to supplement the responses provided to the questions for the record from Assistant Attorney General Delrahim's appearance before the Senate Judiciary Committee's Antitrust Subcommittee on September 17, 2019. As you note, although the Department's responses referenced an ongoing investigation, the investigation was reportedly closed prior to their transmission, as confirmed to members of the press by a Ford spokesperson. *See., e.g.*, Coral Davenport, Justice Department Drops Antitrust Probe Against Automakers That Sided With California on Emissions, NEW YORK TIMES, Feb. 7, 2020, https://www.nytimes.com/2020/02/07/climate/trump-california-automakers-antitrust.html. I should underscore that the Division's responses to your questions were prepared prior to the investigation's close, although a final document was not transmitted to your office until afterwards. We are now in a better position to provide additional details about the investigation

between individual automakers and the State of California. Rather, it undertook an investigation of whether competing automakers had entered an agreement with each other—a key distinction for antitrust purposes, even if the State of California were a participant. The Division closed the investigation after finding that, contrary to initial reports, the automakers had not entered into an agreement with each other.

Your letter emphasizes concerns that the Division's investigation could appear to be the result of political interference and improper use of the Department of Justice's legal authority. We share the view that political interference from outside the Department must never govern law enforcement efforts. As such, we investigate and pursue only matters with a legitimate legal basis for the belief that an antitrust violation may have occurred, as we did in the automakers matter.

The evaluation of a potential horizontal automaker agreement began in early August, 2019, consistent with section III.A. of the Division Manual, with an evaluation of press reports and other publicly available materials. This initial evaluation suggested that competing automakers may have entered into a horizontal agreement between and among themselves.

Therefore, the Division's opening of an investigation was consistent with section III.B.'s requirement that there be "reason to believe that an antitrust violation may have been committed." The investigation continued with the issuance of a preliminary investigation memorandum, a request to the FTC for clearance to investigate, and other steps consistent with conducting a preliminary investigation.

The Division's inquiry was premised on examining whether competing automakers entered into a horizontal agreement with each other. This inquiry was, based on the information known to it at the time, entirely reasonable. The announcement of the agreement contained only a single signature block signed by four competing automobile manufacturers.[4] Moreover, it explicitly stated that "we all agree" to the framework, to which "the undersigned companies have agreed."[5] In the course of the investigation, the Division learned, and confirmed using appropriate investigative steps, that each automaker had merely bilaterally agreed with California to the framework. Accordingly, the investigation fruitfully, and expeditiously, resolved a critical factual element, as our investigations often do.

If the automakers had in fact entered into a horizontal agreement, it would have given rise to a potential antitrust violation. This is the case irrespective of whether the subject matter of an agreement involved a current political topic like emissions—such considerations are irrelevant to our prosecutorial

[4] "Terms for Light-Duty Greenhouse Gas Emissions Standards," https://ww2.arb.ca.gov/sites/default/files/2019-07/Auto%20Terms%20Signed.pdf
[5] Id.

judgment. As Assistant Attorney General Makan Delrahim has made clear, declining to investigate potentially collusive conduct because the collusive objectives might be politically popular would itself reflect inappropriate political consideration in antitrust enforcement.[6] The Department values public trust in law enforcement, which is reflected in time-tested policies to guard against political interference from outside the Department, whether from other Executive Branch offices, from Capitol Hill, or elsewhere. Maintaining public trust, and more fundamentally enforcing the rule of law, also requires that the Department review possible anticompetitive conduct even if it would be politically unpopular to do so. Indeed, declining to investigate potentially anticompetitive collusive conduct purely out of support for certain policy goals would reflect inappropriate political consideration.

During the September 17, 2019 hearing, you questioned whether the involvement of the State of California in negotiating the terms of an agreement among automakers would exempt it from the antitrust laws. Under well-settled precedent, however, state or federal government involvement in a collusive agreement does not, in and of itself, provide a defense to anticompetitive behavior. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226-27 (1940) ("Though employees of the government may have known of those programs and winked at them or tacitly approved them, no immunity would have thereby been obtained. For Congress had specified the precise manner and method of securing immunity. None other would suffice. Otherwise national policy on such grave and important issues as this would be determined not by Congress nor by those to whom Congress had delegated authority but by virtual volunteers.").

Rather, a state's involvement would only resolve any otherwise anticompetitive conduct if either the state-action doctrine or the *Noerr-Pennington* doctrine applies.

Both the state-action doctrine and the *Noerr-Pennington* doctrine have limits, and their application will necessarily depend on the particular facts. As the Supreme Court has recognized, the state-action doctrine is not boundless, and does not allow states merely to "cast[] a 'gauzy cloak of state involvement' over what is essentially private anticompetitive conduct."

S. Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 57 (1985). Indeed, "given the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, state-action immunity is disfavored." *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 225 (2013) (internal quotation mark omitted). Meanwhile, while the *Noerr-Pennington* doctrine protects First Amendment lobbying activities, as the Supreme Court has explained, it does not immunize "private commercial activity, no element of which involved seeking to procure the passage or enforcement of laws." *Cont'l Ore Co. v. Union Carbide & Carbon Corp*., 370 U.S. 690, 707 (1962).

[6] Makan Delrahim: Popular ends should not justify anti-competitive collusion, USA Today, Sept. 12, 2019, https://www.usatoday.com/story/opinion/2019/09/12/doj-antitrust-division-popular-ends-dont-justify-collusion-editorials-debates/2306078001/

As you know, antitrust matters raise fact-specific and nuanced questions. That is precisely what investigations are intended to accomplish—answer questions in order to determine whether the antitrust laws have been violated. Through its investigation of the automakers matter, the Division concluded that the facts did not demonstrate a violation of the antitrust laws and accordingly, it closed the matter.

We hope this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter.

Sincerely,

Stephen E. Boyd

Assistant Attorney General

cc: The Honorable Lindsey Graham
The Honorable Dianne Feinstein

Exhibit D

House Judiciary Committee Holds Hearing on Department of Justice Oversight

List of Panel Members and Witnesses

NADLER:

The committee on the Judiciary will come to order. Without objection the chair is authorized to declare recesses of the committee at any time.

We welcome everyone to this afternoon's hearing on oversight of the Department of Justice, political interference, and threats to prosecutorial independence. Before we begin I would like to remind members that we have established an email address and distribution list dedicated to circulating the exhibits, motions, or other written materials that members might want to offer as part of our hearing today. If you would like to submit materials please send them to the email address that has been previously distributed to your offices and we will circulate the materials to members of staff as quickly as we can.

I would also remind all members that guidance from the office of attending physicians states that face coverings are required for all meetings in enclosed spaces such as committee hearings. Everybody attending this hearing is required to follow this on guidance. This is for the health and safety of all of us in this room, including our staff, and for the loved ones, we will return to at the end of the day. I expect all members on both sides of the aisle to wear a mask except when you are speaking. I will now recognize myself for an opening statement.

MIKE JOHNSON:

Mr. Chairman point of parliamentary inquiry.

NADLER:

Last Friday without explanation Attorney General William Barr announced that Jeffrey Berman, the United States attorney for the Southern District of New York, was quote stepping down unquote. This was, of course, untrue. Mr. Berman had not resigned. In his statement, Mr. Berman made clear that he had no intention of resigning and every intention of moving forward with his work without delay or interruption. He emphasized that point. He wanted to stay on the job to ensure that his work would continue unimpeded.

……..……..……

CICILLINE:

And was there any evidence that this investigation would in any way help the American people?

ELIAS:

I am not aware of any, no.

CICILLINE:

There is evidence in your mind that this investigation was opened in bad faith to cater to the president's political whims, isn't that correct?

ELIAS:

I think the coincidence in time between the presidents tweets and the instruction the next day to open the investigation could lead to the inference that you are describing.

CICILLINE:

And I am correct in saying that the investigation was ultimately closed without any evidence of wrongdoing found, correct?

ELIAS:

And what is worse the Attorney General used taxpayer money to do this. Mr. Elias, you have described an entire division writing a memo and all staff meeting, weeks, and weeks of work. Given this investigation was clearly not about protecting the interest of the American people am I correct that it still required the expenditure of significant resources?

ELIAS:

It--it did require some staff time, some attorney time and was a use of funds that did not ultimately yield a real violation.

CICILLINE:

So rather than pursuing meritless investigations in support of the president's personal vendetta the resources could have been used in better spent elsewhere. Do you agree?

ELIAS:

I--I certainly agree, yes.

CICILLINE:

And finally, Mr. Elias, what has been the effect on morale in your division given that the Attorney General is pursuing investigations based on the presidents tweets and not on what is for the American people?

ELIAS:

Well, I do know that in the thorough employee viewpoint survey which surveys employees every year the antitrust division is now ranked 404 out of 420.

……..……..……

HANK JOHNSON:

Thank you, Mr. Chairman. Mr. Zelinsky and Mr. Elias, you put duty over country and you have come to testify today, putting your job at risk, and--and I think the nation owes you both a debt of gratitude for coming forward as whistleblowers.

Now, Mr. Elias, last summer the state of California announced that it had reached an agreement with four automakers on air quality standards that would be stricter than the rules the Trump administration was preparing to adopt for the country, correct?

ELIAS:

Yes, that's correct.

HANK JOHNSON:

And when California announced that agreement, President Trump made clear that he did not like it, didn't he?

ELIAS:

He did criticize the agreement on Twitter, yes.

HANK JOHNSON:

And on August 20th, 2019, the New York Times reported that he was "enraged by California's deal." Trump even apparently called a White House meeting to plot ways to retaliate, all because

he resented the fact that California and the four automakers would dare to undermine his loosening of air-quality emissions standards. So, the next day, August 21st, Trump went public and he threatened the four automakers, saying that these countries--these companies "will be out of business" if they don't get in line.

Then the day after those tweets, August 22nd, President Trump's Justice Department follow through on that threat. That's what Attorney General--assistant Attorney General Dahlrahine (PH) gave an instruction to your division to start an antitrust investigation immediately into those four automakers. Is that correct?

ELIAS:

It--that is when the instruction to open the investigation happened, on August 22nd, yes.

HANK JOHNSON:

And so, the president tweets out threats and then the next day the automatic--the automakers get hit with an antitrust investigation. That's what happened, didn't it?

ELIAS:

And--and a point I would like to underscore is normally for significant, complicated matters, people put time and attention into assessing potential defenses.

HANK JOHNSON:

But you didn't have any time to do that because the president made the order on August 22nd--on August 21st, and the investigation began on August 22nd.

ELIAS:

There--there was very little time between those two events, yes.

HANK JOHNSON:

Do you believe that the department commenced that investigation based on good faith belief that they had committed a violation of the antitrust laws or not?

ELIAS:

So, the--the career staff who examined it saw some very obvious defenses, things called state action, Noerr-Pennington, and you--you really have to twist things to get around those. So, it--it did not appear to be in good faith, no.

HANK JOHNSON:

An investigation didn't have anything to do with protecting the American people from anti-competitive behavior, did it?

ELIAS:

So, the--the career staff of unit had some grave concerns about opening it, especially the people who were then charged with actually conducting the investigation. They wrote--they documented their concerns with the legal underpinning of the--of the case. And if you are immune from eventual prosecution for something, because you have a legal defense, you should be immune from investigation for having committed the offense.

HANK JOHNSON:

And the law was clear that the state of California was immune?

ELIAS:

So, the--the--what I describe in my complaint is how staff was not given enough time to go through and--and properly understand the--

HANK JOHNSON:

--And--and I wish I could give you a chance to explain more, but bottom line, it wasn't a legitimate antitrust investigation, was it?

ELIAS:

That's what my complaint alleges, yes.

HANK JOHNSON:

And--and if it had been, the first step would have been for the department to get with California officials and get the facts from those officials, but it never did even establish contact with California, did it, before it instituted the investigation?

ELIAS:

That step is permitted even before an investigation. You could have resolved things even before opening the investigation. But it's correct, yeah, to my knowledge, they--they were never contacted.

HANK JOHNSON:

So, what we have here is a clear-cut case of the antitrust division being made to respond to a president's tweet the day before to begin an investigation that had no basis in law or in fact.

ELIAS:

I'd like--

HANK JOHNSON:

Would you describe that as an abuse of authority of the upper echelons of the Justice Department?

ELIAS:

Well, I--I did submit my complaint to the IG on the grounds that it--the events here constituted an abuse of authority.

HANK JOHNSON:

All right. With that, I will yield back. Thank you.

Exhibit E

Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights Holds Hearing on Antitrust Laws Oversight

List of Panel Members and Witnesses

LEE:

Welcome to this hearing on the Subcommittee on Antitrust Competition, Policy and Consumer Rights. Today, we're pleased to have with us the Chairman of the Federal Trade Commission Joseph Simons and the Assistant Attorney General for the Antitrust Division of the Department of Justice Makan Delrahim. Welcome to both of you.

As an initial matter, as a matter of housekeeping, we've been informed that we may have a block of four votes starting about an hour from now as a practical matter. We may well be able to push to an hour and 15, hour and a half from now before we have to recess at some point. We likely will have to go recess to cast a few votes. We will have to play some of that by ear. I apologize in advance for that.

No way to predict these things in advance--it does seem, however, to be an uncanny event with antitrust subcommittee hearings--seems to be a good predictor, albeit an unintentional predictor of when votes are going to occur.

As both of you know, I've been critical of the fact that we have two federal agencies responsible for civil antitrust enforcement. And this, of course, is not your choice. This is a choice made by congress in years past, and so the fact that the law is the way it is has a lot to do with this branch of government and not to do with your respective offices.

……..……..……

WHITEHOUSE:

If you don't mind, I'll follow up on Senator Blumenthal's questions because Mr. Delrahim every single example you just gave, it was collusive conduct by the group without the participation of a government, right?

DELRAHIM:

Ah, I--

WHITEHOUSE:

What was your first example?

DELRAHIM:

To be honest--

WHITEHOUSE:

The lawyers getting together.

DELRAHIM:

The lawyers got together probably did not include the bar system but there have been many examples of this, including the North Carolina Dental Board, where the parties have done that.

So, it's not so much that just the government being involved in collusive conduct does not immunize that. The Supreme Court has been quite clear. You need to meet two prongs. There has to be a clearly articulated policy by the state, there also has to be--

WHITEHOUSE:

--That's (INAUDIBLE) state action, that's different. This is like Noerr-Pennington getting together to address grievances.

DELRAHIM:

They--

WHITEHOUSE:

--How on earth is it possible that these four companies which have a very small share of the overall car market sitting down with California in these circumstances and negotiating their fuel standard with California is a violation and what the American Petroleum Institute does in this building every day, plotting and planning to try to defeat renewable energy, clean energy, electric vehicles.

All of those groups, the entire fossil fuel industry out to try to damage its competitor. All day long they do this here.

The Koch Industries people defending their ability to refine and pollute with fossil fuel, Marathon Oil has fingerprints all over the whole auto cafe standards debacle.

It's just bizarre that of all the different political schemes that are going on right now to harm competition, the one you pick out, the one that you pick out is the one in which the White House has gotten itself enraged because its scheme on behalf of the oil industry to bust up the cafe

standards got disrupted by the auto industry going to a different government and agreeing to a different rule.

DELRAHIM:

If I may answer you. Two points that you've raised.

First, it's not the one I've picked out. We have looked at the college admission counselors, we have looked at AP's in elite high schools, we have looked at--

WHITEHOUSE:

--college admission counselors were going to a state and asking for permission to do a certain thing or asking for a certain regulation and you went after that as an antitrust violation?

DELRAHIM:

No Senator, the college--

WHITEHOUSE:

--well you're--you're, quite throwing apples when we're talking about oranges.

DELRAHIM:

Well the conduct needs to be examined first. Then the immunity to that type of conduct--

WHITEHOUSE:

--were you looking at the American Petroleum Institute? Have you looked at the fossil fuel industry's effort to combine and collude to manipulate Congress to squelch competition? That's perhaps the most obvious fact of our existence in this building.

DELRAHIM:

I hear your point Senator. Let me just tell you we have not concluded there's a violation. All I have done so far is ask them for--to come in and explain to us if there was communication between them, the context of which and why they need to do that collusively.

WHITEHOUSE:

You don't think that the members of the American Petroleum Institute discuss with each other what they're going to ask their lobbying organization to do?

DELRAHIM:

If they discussed--

WHITEHOUSE:

You (INAUDIBLE) the American Chemistry Council does that?

DELRAHIM:

If they discussed prices and output, you would be sure I would go down on them and send them a letter, do you have any evidence?

There's been no reports that they have done that senator.

WHITEHOUSE:

Fuel standards or prices?

DELRAHIM:

Nor have I got--

WHITEHOUSE:

Fuel standards or prices?

DELRAHIM:

They have come to Congress as far as I know and just like you said that is protected under the First Amendment and I'm not defending them and I would defend their rights, these four car companies if that is what they did but that is not what has happened.

So, if you're telling me I can't even investigate four companies that might have colluded. We don't even know if they have agreed on prices.

We don't know if they have said, look any--

WHITEHOUSE:

--you don't know if they agreed on price? Do you have any information that they've agreed on prices?

DELRAHIM:

I have nothing. That's the purpose of an investigation. Doesn't mean I'm bringing a lawsuit tomorrow--

WHITEHOUSE:

--ever heard of predication? You just fire off letters at random without any evidence that the misconduct is underway?

DELRAHIM:

You fire off letters to ask them for information to see what the next step is. I don't know if you read the letter that I sent. I brought it hear, apparently some in the media have it but I'm going to read it for you because I think it should alleviate a lot of your concern.

WHITEHOUSE:

I doubt it but go ahead.

DELRAHIM:

I'm somebody who's owned two Priuses and one of the first owners of Tesla. I'm not out there and I've lived in California.

Believe me I'm not out there to try to increase pollution into the air, but I have a duty to do and I'm not going to shirk that for political heat.

WHITEHOUSE:

The opposite is my suggestion to you. That you're doing this for political reasons, you're doing this because the administration is fed up and cross that they got their little scheme to bust up the cafe standards interrupted by California.

DELRAHIM:

With respect senator I think once you hear the exact letter--

WHITEHOUSE:

Put it into the record. Put it in the record, my time is up. What I would like to ask you to do though, was a question for the record is to ask for let's say a years' worth of such letters you've sent to other industries.

Again, this seems really unique. I mean I've been the Attorney General of my state. I've done antitrust work. It was always the gold standard that when a group of companies got together with a government to negotiate what the government standard would be and their adherence to it, that was protected.

So, to me, this rings all sorts of really strange bells. It's really bizarre and in the context of the long saga from the voluntary agreement with the Obama administration to the discomfort with some of the technical terms, to reopening the conversation to suddenly Marathon Oil and other companies barging in and running off with the conversation, forcing the auto industries to find a fair forum someplace to try to work this out.

The fair forum being the State of California, a government and now suddenly with the president evidently furious about having this little scheme disrupted, suddenly this very peculiar letter that doesn't seem to have either basis in Noerr-Pennington or a rationale in predication from you.

It looks an awful lot like scores are being settled here and God forbid that the Department of Justice should ever become the tool for political scores to be settled.

DELRAHIM:

I agree with you on that senator and it's not what's going on here.

WHITEHOUSE:

We'll see.