

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?

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