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

[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.

our prosecutorial 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