Preliminary Review of Allegations Concerning the Antitrust Division's Handling of the Automakers Investigation

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OVERSIGHT AND REVIEW DIVISION

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I. Introduction and Methodology

The Department of Justice (Department) Office of the Inspector General (OIG) received information from Members of Congress and at least one whistleblower alleging that senior officials in the Antitrust Division exercised improper political influence when they opened a preliminary investigation in August 2019 into four auto manufacturers that entered into an agreement with the State of California and the California Air Resources Board (CARB) to abide by vehicle emissions standards that were more stringent than proposed federal standards, but less stringent than existing state standards. The information received by the OIG alleged that circumstantial evidence, including a series of tweets by then President Trump the day before senior Antitrust Division officials decided to open the preliminary investigation, suggested that the Antitrust Division acted for political reasons; that the Antitrust Division did not follow its own internal procedures when opening the preliminary investigation; that the Antitrust Division did not consider antitrust defenses that might apply to the automakers' agreement, including the state action and *Noerr-Pennington* doctrines; and that senior officials in the Antitrust Division failed to answer questions about who made the decision to open the preliminary investigation or whether officials from other agencies were involved.

The OIG conducted a preliminary review of these allegations, which included examining thousands of documents, emails, text messages, phone records, paper archives, and meeting notes for officials in the Antitrust Division, the Office of the Deputy Attorney General (ODAG), and the Department's Environment and Natural Resources Division (ENRD). We also interviewed several officials involved in the decision to open a preliminary investigation, including the former Assistant Attorney General (AAG) for the Antitrust Division, Makan Delrahim; a Senior Official in the Antitrust Division's Front Office (Front Office Senior Official); the career Antitrust Division attorneys who researched, drafted, and edited the memorandum that formed the basis for opening the preliminary investigation; and select employees in the Antitrust Division who expressed concerns about that decision.

Our preliminary review did not identify evidence of improper political influence in the Antitrust Division's decision to initiate a preliminary investigation that was sufficient to warrant the OIG expanding its review of the allegations. We briefly summarize our findings and conclusion below.

II. Factual Background

A. Initial Discussions about the Automakers' Agreement in July 2019

Our preliminary review revealed that officials in ODAG and the Antitrust Division first discussed potential antitrust issues stemming from the automakers' agreement during a meeting on July 30, 2019, shortly after the agreement first was reported in the media and

several weeks before then President Trump's tweets. Among the attendees at this meeting were Delrahim and then Deputy Attorney General (DAG) Jeffrey Rosen. According to notes from that meeting, under the agreement the auto manufacturers "would voluntarily restrict output to hit a [California] target," raising questions about whether they were engaging in anticompetitive behavior by agreeing to restrict production. These notes indicate that the Antitrust Division would examine the potential antitrust implications of the automakers' agreement as a "close hold."

The notes do not indicate—nor could we establish definitively based on other documents or interviews—who initiated discussion of the automakers' agreement at the July 30 meeting: Delrahim, Rosen, or another Antitrust Division or ODAG official present at the meeting. While several documents created after this meeting referenced the "research that the DAG asked [the Antitrust Division] to conduct" or suggested that DAG Rosen had instructed the Antitrust Division to examine the agreement, witnesses told the OIG that they could not recall the exact sequence of the discussion at this meeting or who proposed what.

Delrahim testified at a Congressional hearing that he recalled personally raising the automakers' agreement at a meeting with Rosen and informing Rosen that he planned to have the Antitrust Division look at the issue. In his OIG interview, Delrahim stated that he had a particular interest in "standard setting" agreements among competitors to develop standardized technical requirements for product design, which could be pro-competitive or could be used to exclude competitors, restrict output, or harm innovation. He noted that while he was AAG the Antitrust Division pursued a number of anticompetitive standard setting agreements, including an agreement between elite private schools not to offer Advanced Placement courses; name, image, and likeness rules issued by the NCAA; and a requirement among cell phone manufacturers to use physical SIM cards rather than eSIM cards, which limited consumers' ability to change providers.

B. Drafting and Review of the Preliminary Research Memorandum

On August 1, 2019, two career attorneys in the Antitrust Division's Competition Policy and Advocacy (CPA) Section were assigned by senior Antitrust Division officials to draft a preliminary research memorandum examining the potential antitrust implications of the automakers' agreement. Witnesses told the OIG that CPA—rather than a litigating section—was asked to draft the memorandum for several reasons, including that assignments requiring complicated legal analysis frequently were handled by CPA or the Antitrust Division's Appellate Section, that CPA recently had been involved in another case involving anticompetitive standard setting, and that the litigating sections were extremely busy.

Emails and other documents indicate that the attorneys relied on publicly available information when beginning to research the agreement, including news articles and other public sources that appeared to characterize it as a single, horizontal agreement between

the four automakers and the State of California. The career attorney who supervised, edited, and partially drafted the preliminary research memorandum testified that even though he knew that there was strong interest in the agreement and concern over its legal implications on the part of senior Antitrust Division officials, no one told him to take a particular position or reach a particular conclusion when giving him this assignment. In his OIG interview, he explained that there is a "debate going on in antitrust law whether you have to prove…price effects and output effects or whether…concerted agreement on product design is enough for a violation." He stated that he thought that the relevant "cases allow for a broader interpretation of the antitrust laws and antitrust liability," such that if there was an agreement between the automakers concerning emissions design and relevant antitrust defenses did not apply, there could be potential liability. He said that, in his view, an agreement between competitors that eliminates competition is impermissible even where there is a potential social benefit, such as a reduction in environmental pollution.

Career CPA attorneys completed a draft of the preliminary research memorandum on August 6, 2019—more than 2 weeks before then President Trump's tweets—and sent it to senior Antitrust Division officials. The draft concluded that the automakers' agreement may have gone "too far" to constitute a legitimate standard setting agreement and potentially was unlawful. The draft also examined three potential antitrust defenses, tentatively concluding that none were likely to apply.[1]

A revised draft of the preliminary research memorandum circulated on August 8 characterized the automakers' agreement as "limit[ing] the companies' output of higher-emissions cars so as to meet the emissions-reduction goals of the agreement" and expanded the analysis of potential antitrust defenses. It also included a caveat in the conclusion, noting that because there was no "directly on-point, binding precedent" a judge could view the agreement as promoting a "laudable goal" and interpret the antitrust laws such that the agreement would be permitted.

It is unclear when Delrahim first reviewed the preliminary research memorandum, as he was out of the country on personal leave from August 1 to 11, 2019. In his OIG

[1] The three antitrust defenses examined were the state action doctrine, which immunizes anticompetitive policies that are the intentional or foreseeable result of state or local regulation; the *Noerr-Pennington* doctrine, which shields from liability private efforts to influence or attempt to influence the legislative process or administrative rulemaking; and an exemption for political expression, which provides immunity where firms engage in joint noncommercial or politically motivated activity, such as a boycott, that is designed to effect a social, moral, or political outcome, and the firms initiating the boycott are neither competing with the target of the boycott nor profiting from their actions.

interview, Delrahim said that he did not remember if he read the memorandum while he was on vacation or after he returned.[2]

Delrahim said that he recalled wanting to ask the automakers to come in on a voluntary basis to answer questions about the agreement, but that he was told by Antitrust staff that the Antitrust Division needed an open investigation to obtain information from the parties. Other witnesses similarly recalled that Delrahim wanted to ask the automakers to provide information voluntarily in an effort to avoid a longer, more rigorous investigation, but that the consensus was that it was "safer" to ask the automakers for information in the context of an open investigation. One witness explained that this was at least in part because a process in place between the Department and Federal Trade Commission (FTC), known as the clearance process, determines which agency has the industry expertise and resources to handle a particular antitrust matter and dictates what actions may be taken before clearance is granted.

C. ENRD Involvement and Communications

In 2018, the Environmental Protection Agency (EPA) and the Department of Transportation's (DOT) National Highway Traffic Safety Administration (NHTSA) began a joint rulemaking known as the Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule. The rulemaking, which would have rescinded California's authority to establish more stringent vehicle emissions and mileage requirements and instead sought to implement a uniform national standard, was ongoing in July and August 2019 and formed the backdrop for the automakers' agreement with California. ENRD represented the EPA and NHTSA in various environmental litigation involving California and participated in meetings concerning the SAFE Vehicles rulemaking. At the time, ENRD was led by then AAG Jeffrey Clark.

Emails and other contemporaneous documents indicate that ENRD officials were aware of and had an interest in the Antitrust Division's research concerning the automakers' agreement. On Friday, August 2, 2019, Clark's Principal Deputy Assistant Attorney General (ENRD PDAAG) and an ODAG official met to discuss the proposed SAFE Vehicles rules. Notes from this meeting indicate that they discussed the Trump administration's argument that federal law preempts California's ability to adopt separate standards, but that California was continuing to position itself to be the "de facto regulator nationwide" by settling with four automakers that agreed "to meet C[alifornia]'s higher standard." The notes from the August 2 meeting further stated that DAG Rosen met with Clark and gave three instructions concerning ENRD's litigation strategy, including "Do we have opportunities to…allege autos are making agreements in restraint of trade[?]" The

[2] After reviewing a draft of this report, Delrahim stated that he likely read the draft memorandum while he was on vacation. He said that although he did not have a specific recollection of doing so, his usual practice was to review emails and memoranda when he was out of the office so that he did not return to a high volume of unread emails.

notes concluded, "What is the status of the [Antitrust Division research]? Wednesday next week. [Antitrust Division] needs to talk to [General Counsel] of NHTSA."

The August 2 meeting appears to have prompted ODAG to ask the Antitrust Division about the status of the preliminary research memorandum. Emails indicate that ODAG contacted the Front Office Senior Official on August 2 about the memorandum, without copying Delrahim, then sent an email to the ENRD PDAAG informing him that a policy attorney had begun researching the issue. The ODAG official recommended that the ENRD PDAAG "connect directly" with Antitrust Division officials to discuss relevant background information. In subsequent emails, the ENRD PDAAG provided information to the Antitrust Division about federal fuel economy standards, which measure fuel efficiency based on a manufacturer's fleet of vehicles.

Rosen and his staff again met with ENRD on Thursday, August 15, 2019. The proposed SAFE rule was the first item on the agenda, and notes indicate that they discussed the Antitrust Division's research into the legality of the automakers' agreement in connection with the SAFE rulemaking. The notes stated, "Get DAG the ATR [Antitrust] memo. (1) [Freedom of Information Act] C[alifornia] (2) some affirmative suit." Asked about these notes, witnesses told the OIG that they did not recall the discussion at this meeting.

Emails sent by the ENRD PDAAG following the August 2 and August 15 ODAG meetings suggested that at least some Department officials viewed the Antitrust Division's research into the automakers' agreement as part of a broader legal or political effort against California. On Monday, August 5, 2019, the ENRD PDAAG sent an email to several ODAG and Antitrust Division officials asking if anyone wanted to "chat" about the automakers' agreement and stating,

> This relates to a major rulemaking that we, DOT, and EPA have been working on since the early days of the administration. The President expressed displeasure in a [White House] m[ee]t[in]g a little over a week ago that it still isn't done—so all hands are on deck at the agencies pushing to finish, while we're thinking creatively about what [we] can do to counter some late-breaking machinations by certain states and car companies that benefit from the implicit subsidization and regulatory preference the prior administration's rule gave electric car makers.

Similarly, following the August 15 meeting, the ENRD PDAAG sent an email to several Antitrust Division officials referencing the meeting and attaching an article that described efforts by Democratic Members of the House of Representatives to encourage more auto manufacturers to join the agreement with California. In his email, the ENRD PDAAG stated,

> I also want to note for you the following news article. You will see, notwithstanding the potentially anticompetitive and illegal nature of the agreements, it appears that there are opposition folks who want to encourage more of this conduct to stick a finger in the eye of the President and his policy judgments. Finally, short of launching a full complaint at this time, is there anything that might be considered in the very near-term to move this matter ahead if your analysis continues on the same path, such as [Civil Investigative Demands] or subpoenas, as appropriate, to existing subjects?[3]

The ENRD PDAAG declined our request for an interview, and thus we were unable to ask him about the meetings with ODAG concerning the rulemaking, his suggestion to "think creatively," or the substance of his August 5 and August 15 emails.[4]

We did not find evidence that the ENRD PDAAG's views affected the Antitrust Division's decision to open an investigation into the automakers' agreement, or that Antitrust Division officials shared them. To the contrary, the Antitrust Division officials we interviewed said that they disavowed these emails. The Front Office Senior Official told the OIG that he was so offended by the statements in the ENRD PDAAG's August 15 email that he contacted an ODAG official that day to voice his objections. He stated, "This is not how DOJ operates…. We're not here to…be part of your fight…on behalf of the President. This is just not how we operate."

Although AAG Delrahim said he did not receive the August 15 email and was not aware of it until his OIG interview, Delrahim said that it was "not what we do" and "not the way we should be thinking about it." Delrahim distinguished between agencies working together because they shared jurisdiction over an issue or industry and agencies working together for political purposes, stating that it would be "inappropriate" to open an investigation to punish companies that were opposing the President. Delrahim stated,

> [T]he Antitrust Division [should not] be used because the President has a concern or politically, these are favored or disfavored parties against him. I don't think I should go after car companies in a Democratic administration, because they're polluters and I'm going to squeeze them [with] antitrust law, nor should I be squeezing them [in a Republican administration] because they're not agreeing with a different policy of the President. So, I mean, I would stand 100 percent against the [ENRD PDAAG] email.

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[3] A Civil Investigative Demand is an administrative subpoena that requires the recipient to produce documents, answer written interrogatories, or give oral testimony. *See* 15 U.S.C. § 1312.

[4] The OIG does not have the authority to compel or subpoena testimony from former Department employees.

D. References to a Potential Meeting with DOT and EPA (That Ultimately Did Not Happen)

The Antitrust Division held its weekly update meeting with ODAG on August 16, 2019. Delrahim was traveling between August 13 and 20 and did not attend this meeting. Notes taken by an ODAG official at this meeting indicate that they discussed the automakers' agreement and a potential meeting with EPA and DOT "to determine if an investigation would be an obstruction…. Talk to ENRD to set up." In his OIG interview, the ODAG official said that he did not recall the substance of the discussion at this meeting or any meeting between Antitrust Division officials and DOT or EPA concerning the automakers' agreement.

Contemporaneous emails indicate that, after the August 15 and 16 meetings, the ODAG official and others within ODAG and ENRD were confused about whether to schedule a meeting with DOT and EPA, what the meeting was intended to address, and who should be invited. While some emails characterized the proposed meeting as involving ENRD, EPA, and DOT, others stated that Delrahim and other Antitrust Division officials planned to attend a meeting with the DOT and EPA General Counsels to discuss the "CAFE [fuel economy] standards/California automakers issue."

We determined that Antitrust Division officials did not meet with the DOT or EPA General Counsels, or any other officials from EPA or DOT, concerning the automakers' agreement. According to a series of emails on August 21, 2019, DAG Rosen spoke to the DOT General Counsel by phone and determined that a meeting involving Antitrust Division officials was not necessary. That afternoon, the ODAG official sent an email to Antitrust Division administrative staff notifying them that the proposed meeting with Rosen and the DOT and EPA General Counsels was "now moot, so please disregard." In a separate email, the ODAG official was asked to arrange for "[the ENRD PDAAG]/ENRD to get together with [the DOT and EPA General Counsels]."

We have no information about the substance of Rosen's discussion with the DOT General Counsel on August 21 or any subsequent meetings involving ENRD, the DOT or EPA General Counsels, or other personnel from these agencies. While emails reveal subsequent communications between Rosen and the DOT General Counsel to set up a White House meeting to discuss the rulemaking, these emails do not reflect the substance of their discussions, and Antitrust Division officials were not copied on those emails. Relevant phone records, text messages, and notes also do not include anything about the August 21 phone conversation.

Consistent with these emails, Delrahim and other Antitrust Division officials told the OIG that they did not recall a meeting with the DOT and EPA General Counsels about the automakers' agreement. In his OIG interview, Delrahim stated, "I don't recall ever being in a meeting with Rosen [and the DOT and EPA General Counsels]." In testimony before the Senate Judiciary Committee on September 17, 2019, Delrahim stated that he was not aware

of any "contacts between officials at the EPA and DOT and [Antitrust Division] officials" and that he had not "had a communication with anyone outside our building" concerning the automakers investigation.

E. President Trump Tweets About the Automakers' Agreement

On Wednesday, August 21, 2019, then President Trump tweeted several times about the proposed rule and the automakers' agreement. That morning, Trump posted, "My proposal to the politically correct Automobile Companies would lower the average price of a car to consumers by more than $3000 while at the same time making the cars substantially safer. Engines would run smoother. Very little impact on the environment!!" Later that day, President Trump posted a series of three tweets criticizing the automakers' agreement. In one of the tweets, he stated that "Henry Ford would be very disappointed if he saw his modern-day descendants wanting to build a much more expensive car that is far less safe and doesn't work as well because execs don't want to fight California regulators."

F. Conversion of the Research Memorandum into a Preliminary Investigation (PI) Memorandum

On Thursday, August 22, 2019—the day after President Trump's tweets, and the day after Delrahim returned from several weeks of personal and work travel—the Antitrust Division converted the preliminary research memorandum and used it as the basis to open a preliminary investigation (PI) into the automakers' agreement.

That afternoon, the Front Office Senior Official requested a copy of the draft memorandum from the career CPA attorney who had edited and supervised it. The CPA attorney, the Front Office Senior Official, and another Antitrust Division manager then met briefly to discuss it. Witnesses told the OIG that, during this meeting, the Front Office Senior Official stated that there was sufficient evidence to open an investigation and asked the CPA attorney to convert the existing memorandum into a PI memorandum for Delrahim to sign by 5:30 p.m. The CPA attorney said that no one explained what the basis for this urgency was, and that he was concerned that he had less than 2 hours to convert the research memorandum into a PI memorandum because he had drafted it as "sort of a preliminary…sketch" of the relevant issues rather as than a completed piece.

The CPA attorney said that it was "highly unusual" that CPA was asked to produce a PI memorandum instead of a litigating section, and that he could not recall another time when that had occurred. He said that his understanding was that Delrahim did not "think any more work needed to be done" on the memorandum and "just wanted to get it done." He said that, in retrospect, the speed with which Delrahim wanted the memorandum converted and the "highly, highly compressed timeline" made him suspicious and, in his view, "gives rise to at least a potential question" about what motivated it. Despite this, he told the OIG that he stood by the substance of his legal analysis and stated, "I think the

prep for an investigation was inappropriately abbreviated but…there was some basis for inquiry though the run up to it should have been done longer."

The other Antitrust Division manager told the OIG that she was concerned that the investigation would not "yield an enforcement action" and was not a "good faith exercise that would…explore potential enforcement." She said that not only were there "some very real defenses…that would ultimately preclude enforcement" and "policy considerations that weighed against investigating this," the Antitrust Division also was "very resource-constrained" at the time. In addition, she described the decision to convert a research memorandum into a PI memorandum without "significant engagement" with a litigating section as "definitely odd" and "very unusual," but said she suspected that the sudden urgency to open an investigation may have been because Delrahim was "impatient."

The other Antitrust Division manager said that, after the August 22 meeting with the Front Office Senior Official, she advised the CPA attorney to "temper" some of the statements in the preliminary research memorandum and to "think hard" about whether the PI memorandum should reflect that he was personally recommending an investigation, or that the division had decided to take the action. A draft of the PI memorandum circulated later that afternoon reflected this advice, concluding that the state action defense "present[ed] the closest question" and required further research, and attributing the decision to open the investigation to the Antitrust Division (rather than the result of a staff recommendation). In a section describing the proposed investigative approach, the PI memorandum stated that the first step would be to contact the automakers and California regulators to learn more about the emissions agreement.

The final memorandum was circulated by email within the Antitrust Division that evening with a note that they had requested FTC clearance.

G. Testimony Concerning the Basis for the Decision to Open a PI

Asked about the decision to open an investigation, both Delrahim and the Front Office Senior Official said that that they wanted to ask the automakers to provide information voluntarily about the agreement before deciding whether further investigation was warranted but, as described above, were told that it would be "safer" to do so in connection with an open investigation. Delrahim stated,

> At some point, and I don't know when, but it was certainly after that [draft] memo, I was told that you can't ask the party a question [without an open investigation], which was a surprise to me…. And by this time, I had been in the job a year and a half. You have to have a PI opened. I said, okay, open up a PI. And you know, there's not much for a PI, other than, I believe, a good faith belief that there could be an antitrust violation, and I said, all right. Let's open it.

The Front Office Senior Official similarly told the OIG that "if we need to have a PI memo signed in order to have a conversation with car companies, then that's what we'll do." He told the OIG that they relied on CPA's analysis in deciding whether to open a PI, and that if CPA had concluded that "there [wa]s no circumstance in which there could be an antitrust violation, it would have ended right there."

Concerning the timing, the Front Office Senior Official stated that his "best recollection" was that Delrahim "checked in on something he had asked for days ago" and "might have been annoyed" that the PI memorandum was not done yet. He said that it was "not at all unusual" for Delrahim to say, "[Y]ou've been working on this for a while[,] it should be very easy to do the following, I would like to be able to sign this by so-and-so time."

Both denied that President Trump's tweets about the automakers' agreement had any impact on the decision, asserting that they had been looking into potential antitrust issues for several weeks by that time and had already reviewed a draft of the preliminary research memorandum. Delrahim told the OIG that he did not become aware of President Trump's tweets until later and was grateful the tweets were about California's emissions regulations rather than potential antitrust issues. He acknowledged that the timing "look[ed] bad," but stated, "it was definitely not something that was in my mind or decision to do this."

Both also denied being aware of any communications between the Antitrust Division and the White House, DOT, or EPA concerning the automakers' agreement. We did not find evidence to contradict this testimony. As described above, we determined that Delrahim did not meet with the DOT or EPA General Counsels or other DOT or EPA officials concerning the automakers' agreement.

While several emails initially appeared to suggest meetings between Antitrust Division staff and White House officials in August 2019, we found no evidence that these were related to the automakers' agreement. For example, a Deputy Assistant Attorney General in the Antitrust Division had a meeting at the White House on the morning of August 21, 2019. While this initially raised concerns given the timing, contemporaneous emails indicate that White House officials were interviewing the Deputy Assistant Attorney General as the replacement for another official who was leaving the Department to return to private practice. We found nothing to indicate any relationship to or discussion of the automakers' agreement.

Similarly, a calendar invitation appeared to indicate that Delrahim and the Front Office Senior Official were scheduled to attend a meeting at the Eisenhower Executive Office Building (EEOB), which houses the Executive Office of the President and the Office of the Vice President, on August 22. Again, the timing of this meeting—between President Trump's tweets on August 21 and the decision to convert the PI memorandum on the afternoon of August 22—raised concerns. However, an Antitrust Division administrative

assistant sent this calendar invitation on August 6, while Delrahim was still on vacation, and there is no indication in it or in other contemporaneous communications that the meeting had any relevance to the automakers' agreement. Asked about the calendar invitation, Delrahim said that he had been to meetings at EEOB "many times on different things," including data privacy issues and the Open Skies agreement, but that he had "zero" recollection of any meeting at EEOB where the automakers' agreement was discussed.[5]

H. Career Antitrust Division Staff Express Concerns about the Decision

As described above, the PI memorandum was circulated within the Antitrust Division on the evening of Thursday, August 22, 2019. Some staff, particularly within the Defense, Industrials, and Aerospace Section (DIA), to which the automakers investigation was assigned, objected to the decision to recommend opening a PI and drafted an alternate memorandum outlining the arguments against investigating the auto manufacturers.

On August 23, several DIA attorneys met with the career CPA attorney and informed him that "they were quite unhappy" with being assigned a "political hot potato," and were skeptical that the automakers' agreement even "could be conceived of as a violation." Following this meeting, the CPA attorney sent an email to Delrahim and the Front Office Senior Official, as well as several Antitrust Division managers, describing his "follow up thoughts" about the decision to open an investigation, including that doing so might be "highly controversial," "lessen public confidence" in the Antitrust Division, and result in "Congressional ire" that would "backfire." Asked about this email, the CPA attorney said that he wanted to advise Delrahim and the Front Office Senior Official to "think seriously" before putting resources into an investigation because there was the potential for it to be seen as political, which would "garner negative blowback both from [the] public and from Congress."

After the August 23 meeting, the DIA attorneys began conducting additional research into California's emissions regulations and drafting a separate memorandum analyzing the automakers' conduct, focusing on relevant antitrust defenses. In one email exchange, one DIA attorney stated that there were "significant problems with the initial basis of the investigation" and criticized the legal analysis in the original PI memorandum.

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[5] Delrahim attempted to address these issues in response to questions from Members of Congress. In a July 1, 2020 letter to Representatives Jerry Nadler and Jim Jordan, Delrahim stated that he was the one who requested a "legal analysis of the antitrust issues associated with the [California Air Resources Board] agreement" within days of its public announcement. As described above, although we found some evidence suggesting that Rosen requested the legal analysis, that evidence was not definitive, nor did it necessarily contradict Delrahim's account. Additionally, on September 17, 2019, Delrahim testified before the Senate Judiciary Committee that he was not aware of any "contacts between officials at the EPA or the DOT and [Antitrust Division] officials," and that he had not "had a communication with anybody outside of our building" concerning the automakers investigation. In his OIG interview, Delrahim stated that his testimony was accurate and that Antitrust Division officials did not meet with DOT or EPA.

The DIA memorandum, which was completed on September 12, argued that the automakers had a "powerful" *Noerr-Pennington* defense. The DIA memorandum recommended that the Antitrust Division conduct a "more careful analysis of the facts and law" before taking additional investigative steps and, after receiving information from the automakers, "carefully reevaluate whether there is a basis for proceeding with any further investigation."

At Delrahim's request, the DIA attorneys also prepared an annotated version of the PI memorandum highlighting their concerns with the legal analysis. Asked about DIA's objections, Delrahim characterized DIA's memorandum as "quite irregular" and "a little bit unusual, because you don't [typically] have the [Antitrust] [D]ivision writing defense counsel memos about this. Should we even ask a question?" Delrahim said that he subsequently met with the DIA attorneys in an effort to understand their concerns, including why they should not even ask for information about the agreement, and that they ultimately "got on the same page."

I. Antitrust Staff Meets with Automakers, Issues a Civil Investigative Demand (CID), and Subsequently Closes Its PI

On August 28, 2019, Delrahim sent letters to the automakers informing them that news reports had raised concerns that an agreement "may violate federal antitrust laws" and inviting them to meet with Antitrust Division staff and provide information about the background and context for the agreement and the substance of their communications with the other companies. In these meetings, counsel represented that each company entered into separate unilateral agreements with CARB, not a single agreement between all of the companies. Counsel also characterized the agreements as a CARB-driven effort. In a written submission, counsel for one automaker stated that CARB had approached the company and proposed a non-negotiable emissions framework that would function as a deferred enforcement settlement agreement resolving future claims that each company had failed to meet more stringent California emissions standards.

After these meetings, the Antitrust Division issued a CID to each of the auto manufacturers that included a single specification asking if there had been an agreement among them. Each responded that there had not been and, based on these representations, the Antitrust Division formally closed the investigation in January 2020.

Asked about these investigative steps, Delrahim told the OIG that his goal was to understand the context of the companies' discussions with each other. He stated, "I did not want this to even be public.... It was just, hey, I'm doing my job to make sure you guys did not collude here." According to Delrahim, he thought there was more that the Antitrust Division could have done because some of the information provided by the automakers was inconsistent and "their stories did not match," but they represented under penalty of perjury that they did not collude. To illustrate that his concerns about the potential antitrust implications of the automakers' agreement were not unwarranted, Delrahim

pointed to a similar case in which his counterpart in the European Union obtained an €875 million settlement from some of the same companies where cooperation on technical standards amounted to an illegal agreement not to compete to develop emissions technology.[6]

J. The EPA-DOT September 6, 2019 Letter to California

On September 6, 2019—the same day the media publicly reported the antitrust investigation—EPA and DOT sent a joint letter to California warning that the agreement with the automakers appeared to violate federal environmental law, arguing that federal law vested the authority to set fuel economy standards and regulate vehicle emissions with the federal government, not with any state. News articles drew a connection between the antitrust investigation and the letter, raising questions about whether the letter showed that the Antitrust Division's decision to open an investigation was part of a coordinated effort involving EPA and DOT.

We found no evidence that anyone in the Antitrust Division was aware of the EPA-DOT letter before it was sent. Based on contemporaneous documents and emails, we determined that the Department did not learn about the proposed letter until September 5, 2019, when several non-Antitrust Division officials were told about it.

Specifically, documents indicate that the ENRD PDAAG learned during a September 5, 2019 phone call with the General Counsels of DOT and EPA that DOT was "pressing to send a joint letter with EPA tomorrow to California regarding the 4 automaker deal and California's noncompliance with current federal standards." The ENRD PDAAG then sent an email to Clark, an ODAG official, and a member of the Department's Office of the Associate Attorney General informing them about the proposed EPA-DOT letter. That night, the ENRD PDAAG and Clark reviewed a draft. The ENRD PDAAG provided feedback to the DOT General Counsel the following day, including "agree[ing] with [the EPA General Counsel] that the letter should be softened."

We found no evidence that Delrahim or anyone else in the Antitrust Division reviewed the draft letter or were notified or included in discussions about it. Both Delrahim and the Front Office Senior Official denied knowing about the letter until after it had been sent. Delrahim told the OIG that the letter was "annoying, because it created

[6] According to a press statement, five European car manufacturers cooperated in the development of clean diesel technology but impermissibly agreed to limit the capacity and range of the system that injected urea into the exhaust stream, reducing the ability of the cars to remove pollutants. The European Commission determined that this agreement amounted to cartel behavior. *See* European Commission, *Statement by Executive Vice-President Vestager*, https://ec.europa.eu/commission/presscorner/detail/en/statement_21_3583 (Jul. 8, 2021) (accessed Mar. 26, 2024).

broader noise that…affected [the Antitrust Division's] ability to look into" potential antitrust issues raised by the automakers' agreement.

III. Conclusion

The substantial documentary and testimonial evidence that the OIG obtained and reviewed during our preliminary review led us to conclude that there was insufficient evidence of improper political influence in the Antitrust Division's decision to initiate a preliminary investigation to warrant the OIG expanding its review of the allegations. In particular, the evidence demonstrated that the Antitrust Division began its internal preliminary assessment of the automakers' agreement and whether it potentially violated federal antitrust law in July 2019, weeks before then President Trump's tweets. Additionally, we did not find evidence of any interactions between Antitrust Division officials and the White House concerning the automakers matter.

Further, upon initiating its assessment of the matter, the Division's leadership assigned responsibility for drafting a preliminary research memorandum to career Antitrust Division lawyers. The career attorneys concluded in their draft preliminary research memorandum, which was completed prior to President Trump's tweets, that the automakers' agreement was potentially unlawful and that potential antitrust defenses were not likely to apply. While some career staff disagreed with the memorandum's legal analysis, the CPA attorney who drafted the memorandum explained that there is a difference of opinion in the antitrust bar about whether concerted agreement on product design among competitors is enough for a violation, or whether the government must prove an impact on price or output. The CPA attorney told the OIG that, in his view, relevant "cases allow for a broader interpretation of the antitrust laws and antitrust liability," and he stood by that analysis.

Delrahim and other Antitrust Division officials explained the events leading up to the decision to open a preliminary investigation, including that Delrahim wanted to contact the automakers—without an investigation being open—to ask them about the agreement but was told an open investigation was needed to do so. Delrahim and the Front Office Senior Official stated that they then relied on CPA's legal analysis in determining whether opening a preliminary investigation was warranted. We found these explanations credible and did not find any documentary evidence, including in Delrahim's emails, that contradicted these explanations or suggested that political considerations motivated Delrahim's decision. Under these circumstances, we could not conclude that Delrahim lacked a good faith basis for his decision.

Although the timing and seemingly rushed process to convert the preliminary research memorandum into a PI memorandum on August 22 gave us pause given it occurred 1 day after then President Trump's tweets, we did not identify information in the materials that we reviewed to suggest it reflected impropriety. The initial draft

memorandum was produced on August 6, and witnesses testified that Delrahim decided shortly after reading it (and prior to August 22) that he wanted to ask the automakers to provide information about the agreement. While we did not obtain a complete explanation for the push on August 22 to initiate a preliminary investigation, we note that Delrahim returned from several weeks of travel on the afternoon of August 21, and we obtained witness testimony attributing the timing to Delrahim's impatience that the memorandum had not yet been completed despite his prior decision to move forward with a preliminary investigation.

As for then President Trump's tweets, Delrahim acknowledged that the timing "looked bad" but told us that they played no role in his decision to open an investigation. Moreover, as described above, the decision to review the automakers' agreement predated the President's tweets by several weeks and the draft memorandum that led to the opening of the preliminary investigation was completed more than 2 weeks earlier. We found no evidence that Delrahim opened the investigation in response to the tweets, nor other information suggesting White House influence or involvement.

We also did not find evidence that the decision to open an investigation was part of a broader effort by the Department or the Antitrust Division against California. While we were troubled by emails sent to Antitrust officials by the ENRD PDAAG in which the ENRD PDAAG raised potential political considerations, Delrahim and other Antitrust Division officials denied that those considerations played any role in their decision to investigate the automakers' agreement and, as noted above, we did not find evidence of such political motivations in the materials we reviewed. Moreover, based on emails and witness testimony, we determined that Delrahim and the Front Office Senior Official did not meet with DOT or EPA officials to discuss the automakers' agreement in August 2019 and had no role in the letter sent to California by EPA and DOT on September 6, 2019.

Finally, we note that the investigative steps taken by the Antitrust Division—meetings with each of the companies and a single-question CID asking them to attest that there had been no collusion—were limited and quickly resolved. After receiving this information, the Antitrust Division closed the preliminary investigation in January 2020. The Antitrust Division did not impose burdensome document requests on the automakers, and we saw no evidence that they sought to misuse the enforcement process based on political considerations.