

Testimony of John W. Elias
U.S. House Committee on the Judiciary
June 24, 2020

Chairman Nadler, Ranking Member Jordan, and Members of the Committee, thank you for the opportunity to testify today.

I am a career employee at the Department of Justice. Based on what I have seen, and what my colleagues saw and described to me, I was concerned enough to report certain antitrust investigations launched under Attorney General Barr to the Department of Justice Inspector General. I asked him to investigate whether these matters constituted an abuse of authority, a gross waste of funds, and gross mismanagement. I am appearing here today under subpoena to describe these matters to the Committee. Although I am a current DOJ attorney, my testimony is personal and does not represent the views of the Department.

Introduction

I joined the Department in 2006, and over the past 14 years I have served under six Attorneys General and three Presidents. I held leadership positions both in the Trump Administration, where I acted as Chief of Staff in the Antitrust Division from January 2017 to October 2018, and in the Obama Administration, where I served as a Deputy Associate Attorney General and Chief of Staff in the Office of the Associate Attorney General. Currently, as an Antitrust Division prosecutor, my casework includes prosecuting price-fixing conspiracies in the pharmaceutical industry.

Today, I will describe two forms of investigations undertaken over the objections of the career staff. First, at the direction of Attorney General Barr, the Antitrust Division launched ten full-scale reviews of merger activity taking place in the marijuana, or cannabis, industry. These mergers involve companies with low market shares in a fragmented industry; they do not meet established criteria for antitrust investigations. Second, I will detail an investigation – initiated the day after tweets by President Trump – of an arrangement between the State of California and four automakers on fuel emissions.

I have undertaken whistleblower activity, and am here today, because I recognize the imperative for law enforcers to operate even-handedly and in good faith. During my career at DOJ, I have been taught to do the right thing, for the right reasons, in the right way.

Cannabis Merger Investigations

Since March 2019, the Antitrust Division has conducted ten investigations of mergers in the cannabis industry. While these were nominally antitrust investigations, and used antitrust investigative authorities, they were not bona fide antitrust investigations. Nonetheless, they accounted for 29 percent of the Antitrust Division's full-review merger investigations in Fiscal Year 2019.

Regardless of whether these companies are complying with the Controlled Substances Act, the investigations I will describe are not investigations of potential violations of federal drug law. An appropriations rider restricts the Justice Department from prosecuting medical marijuana usage in states that have legalized it.

The Standard Merger Review Process

The mission of the Justice Department's Antitrust Division is to protect competitive marketplaces across our entire economy. The Division reviews for potential harm to competition every large-dollar merger taking place in the United States. The Division enforces the Clayton Act, which bars mergers that may substantially lessen competition or tend to create a monopoly.

After companies report their proposed mergers,¹ staff undertakes an individualized examination to identify those most likely to violate the antitrust laws. Staff assesses whether to perform no investigation, a brief investigation, or a full investigation. The Antitrust Division's Manual identifies as the first factor for staff to consider in determining whether to open an investigation "whether there is reason to believe that an antitrust violation may have been committed." Our Horizontal Merger Guidelines treat market shares as a key indicator of whether to give routine clearance or to perform the full and most searching examination of the merger by issuing what is called a "Second Request" subpoena. It usually takes high market shares – typically double-digit market shares – to trigger the extended review process. "Unconcentrated markets" require the least review.

Across the entire American economy, the Antitrust Division performs the full Second Request investigation on around 1-2% of the thousands of mergers filed each year – ordinarily, only the most concerning deals. The Division conducted 19 Second Request investigations in Fiscal Year 2018 and 31 in Fiscal Year 2019 from over 2000 transactions filed in each of those years.

¹ Under the Hart-Scott-Rodino Antitrust Improvements Act (HSR), mergers are reported to both the Antitrust Division and the Federal Trade Commission, which shares the Division's mandate to enforce the antitrust laws and which engages in similar merger reviews. The criteria for when a merger must be reported under HSR are described on the FTC website.

These figures illustrate the number of Second Request reviews as a share of total pre-merger notifications:



Second Request investigations are infrequent because they require companies to respond to burdensome administrative subpoenas – often 15 pages or longer – and produce hundreds of thousands or millions of documents. Pursuant to the Antitrust Division’s Manual, “Since a second request may have substantial consequences for the parties to the transaction, staff should carefully assess both the need for and the scope of the request; if a second request is necessary, staff should tailor it to the transaction and its possible anticompetitive consequences.” Merging companies have essentially no recourse to challenge a Second Request subpoena, and they cannot complete their proposed mergers until they have complied. Second Request investigations also consume DOJ staff resources.

The First Cannabis Investigation: The Merger of MedMen and PharmaCann

Last year, the Antitrust Division reviewed the proposed combination of MedMen and PharmaCann, two companies that supply cannabis. When career staff examined the transaction, they determined that the cannabis industry appeared to be fragmented with many market participants in the states that had legalized the product. As a result, they viewed the transaction as unlikely to raise any significant competitive concerns.

However, on March 5, 2019, Attorney General Barr called the Antitrust Division leadership to his office for a meeting entitled “Marijuana Industry Merger Review.” As a Microsoft Outlook delegate of one of the attendees, I was copied on the calendar appointment but did not attend the meeting. The Antitrust Division political leadership asked staff to prepare a short briefing memo for Attorney General Barr before the meeting. In that memo, staff emphasized in underlined text that in its preliminary view, the transaction was unlikely to raise any significant competitive concerns that would justify issuance of Second Requests.

Rejecting the analysis of career staff, Attorney General Barr ordered the Antitrust Division to issue Second Request subpoenas. The rationale for doing so centered not on an antitrust analysis, but because he did not like the nature of their underlying business.

After the meeting, Division political leadership turned to the career staff to implement Attorney General Barr’s directive. In assembling the paperwork to issue the Second Request, which is normally styled as the career staff’s “recommendation,” career staff declined to recommend either opening an investigation or issuing the Second Request subpoenas. Instead, the staff reiterated its view that the transaction was “unlikely to raise any significant competitive concerns” and that the industry appeared to be fragmented, with many participants. The staff went on to say that, nonetheless, “[t]he Division has decided to open an investigation and issue Second Requests,” for the purported reason that it had “not closely evaluated this industry before.” This rationale – standing alone, without reference to a competition problem – is not described in the Merger Guidelines as a basis for investigating a transaction.

The Division’s Front Office negotiated subpoena compliance with the companies, obtaining 1.3 million documents from the files of 40 employees. The investigation confirmed that the markets at issue were “unconcentrated” and closed in September 2019 without any enforcement action. The merger collapsed nonetheless, with MedMen citing unexpected delays in obtaining regulatory approval. During the course of the Division’s investigation, MedMen’s stock price declined by about one-third.

Nine More Cannabis Investigations and 29% of All Second Requests

The Division went on to conduct similar antitrust investigations of nine other mergers in the cannabis industry.² Staff continued to document at the outset of the investigations that the transaction appeared unlikely to raise significant competitive concerns but that the Division (meaning the political leadership) nonetheless had decided to proceed, purportedly because it had not closely evaluated this industry before. This remained the rationale through the tenth investigation.

However, in order to draw less attention to the investigations, the career staff was not permitted to take customary fact-finding steps. For example, staff was instructed not to conduct interviews of customers or competitors – a necessary step in any bona fide antitrust investigation both to assess marketplace conditions and to identify potential witnesses in any enforcement action.³

In many of these investigations, staff calculated market shares far smaller than the double-digit shares that ordinarily trigger a full antitrust review. Instead, it calculated, for example, a combined post-merger market share of 0.35 percent.

² In total, nine of the Division’s ten cannabis investigations were conducted via Hart-Scott-Rodino Second Request authority. The tenth used only Civil Investigative Demand authority.

³ Recognizing the need for information from third-parties, the Division Manual instructs that “when preliminary investigation authority is obtained, staff should outline its provisional theory of anticompetitive harm and should begin contacting customers, trade associations, competitors, and other relevant parties to determine whether there are likely competitive concerns in any relevant markets.”

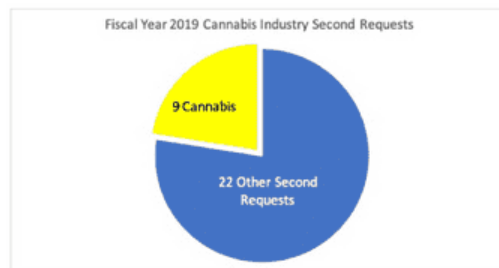
In two instances, staff determined at the outset that the merging companies operated in different geographies and *did not compete at all*. In one of these, the parties reevaluated their transaction after the Second Request subpoenas had issued and determined that their deal’s value fell below the HSR threshold. In other words, they were able to close their deal without complying with the Second Request subpoena. In closing the investigation, staff noted that they evaluated whether to proceed with the investigation anyway, using the more customary civil investigative demand (CID) subpoena power, “but recommend[ed] against that action because of the likelihood that the parties would successfully challenge the CIDs on the basis that there is no current or future geographic overlap, and thus no threat to actual or potential competition.”

In several instances, staff sought to make the investigation less burdensome on the parties by narrowing the subpoenas. Political leadership refused such requests, resulting in the document productions described below.⁴

DOJ Investigation Control Number	Documents Produced (Approximate)
60-453998-0003	1,300,000
60-453998-0004	900,000
60-453998-0009	959,000
60-453998-0010	759,000
60-453998-0011	1,100,000
60-453998-0012	947,000

Few of these documents were viewed by Division staff. In one case, Division records show that the investigation closing process began before the documents had been uploaded and made available for viewing by Division staff.

Across all sectors of the American economy, the cannabis industry accounted for a full 29 percent of the Division’s Second Request investigations in Fiscal Year 2019:



⁴ This table displays six of the ten investigations. The remaining four investigations either did not yield documents due to HSR withdrawal or I do not have the data.

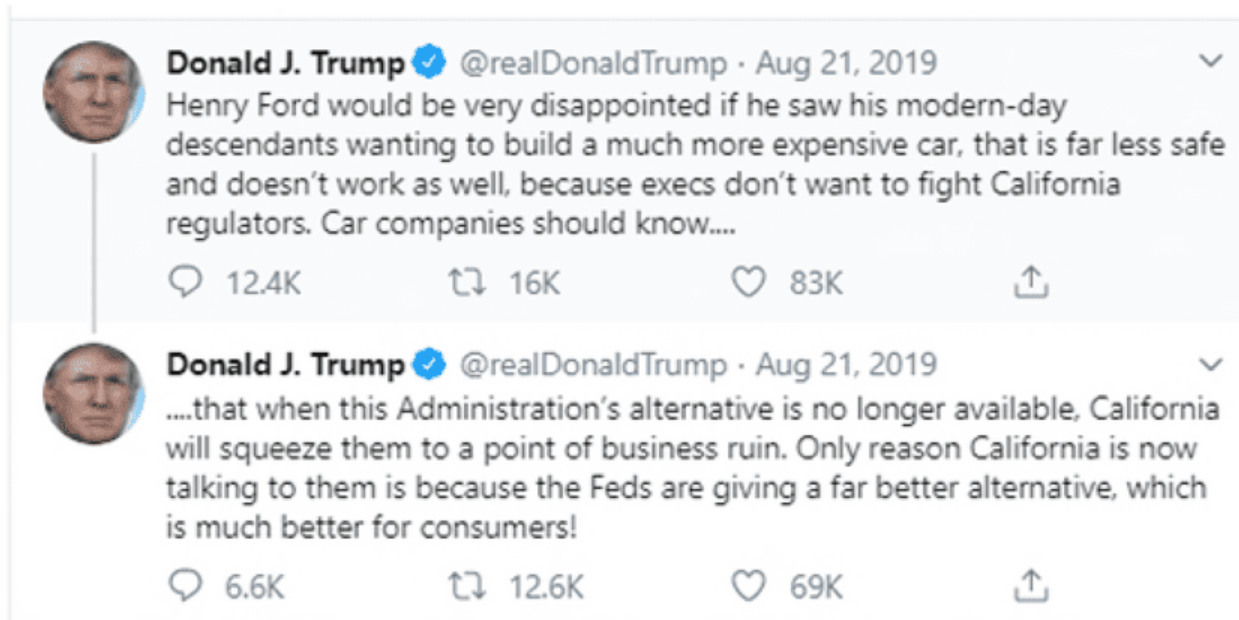
At one point, cannabis investigations accounted for five of the eight active merger investigations in the office that is responsible for the transportation, energy, and agriculture sectors of the American economy. The investigations were so numerous that staff from other offices were pulled in to assist, including from the telecommunications, technology, and media offices.

The head of the Antitrust Division, Assistant Attorney General Delrahim, responded to internal concerns about these investigations at an all-staff meeting on September 17, 2019. There, he acknowledged that the investigations were motivated by the fact that the cannabis industry is unpopular “on the fifth floor,” a reference to Attorney General Barr’s offices in the DOJ headquarters building. Personal dislike of the industry is not a proper basis upon which to ground an antitrust investigation.

Automobile Emissions Standards Investigation

In July 2019, California, together with four major automakers, announced an arrangement on air quality emissions standards that would be stricter than the rules the EPA was preparing to adopt. Under well-established antitrust precedent, states have wide latitude to regulate. In addition, under a doctrine called *Noerr-Pennington*, which is grounded in the First Amendment, companies are free to collectively lobby the government for regulation.

On August 20, 2019, the New York Times reported that President Trump was “enraged” by the deal and wanted to retaliate. The next day, August 21, the President tweeted about it. As reprinted below, he said, “Henry Ford would be very disappointed ... because [Ford] execs don’t want to fight California regulators.”



The day after the tweets, Antitrust Division political leadership instructed staff to initiate an investigation that day. Accordingly, the investigation opening memorandum is dated August 22, and the August 22 opening date is reflected in internal tracking records.

The investigation's initiating paperwork, like the cannabis opening memorandums, does not include a staff "recommendation" but instead states that "[t]he Antitrust Division would like to open an investigation." It was generated by the Division's policy staff, which does not conduct enforcement investigations of this type.⁵ Later, in an all-staff email of September 11, AAG Delrahim explained that he had had the policy staff convert an earlier analytical piece into an investigation opening memorandum "due to our current resource constraints."

Ordinarily, decisions of import – here, an investigation of a \$630 billion automobile market – take time and care to evaluate, especially when the action would face defenses. Here, in its opening memorandum, staff acknowledged that it had not fully examined the public record. For example, it made some assessment of the strength of a potential "state action" defense (immunity conferred by the active involvement of California) but left for a future step to research more about California law to determine whether state law authorized the agreement. Although consulting with state officials is a permissible pre-investigation step, and the Division could have contacted California to obtain information, it had not done so.

Once opened, the matter was transferred from the policy staff to an enforcement section. Upon receiving the matter, the enforcement staff expressed concerns about the legal and factual basis for the investigation. The enforcement staff asked for time to perform their own analysis and requested a delay in going overt with the investigation. The investigation proceeded anyway, with AAG Delrahim personally writing the automakers to inform them that the Division had decided to examine the arrangement with California.

When news of the investigation became public and spread within the Antitrust Division, many of my colleagues, who are familiar with the "state action" defense as well as the *Noerr-Pennington* doctrine, questioned why the Division was investigating conduct that appeared to be prompted by a state regulator. In response to criticism of the investigation, on September 11, AAG Delrahim circulated an all-Division email in which he stated that he "strongly believe[s] that the Division has a basis to investigate and that the standards for opening a preliminary investigation were more than satisfied based on the available facts." AAG Delrahim simultaneously announced an all-staff town hall meeting for September 17. There, he stated that staff was not rushed into initiating the investigation. That representation conflicted with the recollection of a staff member who had assisted with the opening memorandum.

⁵ In addition, the investigation concerned a commodity (automobile manufacturing) that would normally be handled by the Federal Trade Commission rather than the Antitrust Division. The FTC is an independent agency, and its Commissioners cannot be removed by the President over mere political differences. Here, because the FTC did not clear the matter to DOJ until August 27, the Division did not conduct investigative steps before that date.

In October, the four automakers indicated that each company had independently entered into an agreement with California; there was no group agreement. The Division issued a subpoena to each automaker and on November 8 obtained a sworn affirmation of the earlier oral statements. The potential antitrust violation under investigation was premised on a group (competitor-to-competitor) agreement. With that undercut, the Division no longer needed to reach questions of state action immunity. At that point, a colleague with a key role in the investigation expressed optimism to me that the investigation would close by Thanksgiving.

Instead, the political leadership instructed staff to examine an announcement by California that it would purchase state vehicles only from automakers that comply with the stricter fuel efficiency standards. When operating as a market participant, states have wide latitude to determine their own purchases. Moreover, California's annual purchase of fewer than 2,700 vehicles in a state of nearly 40 million people did not confer it with the market power that could lead to antitrust liability. Accordingly, in February of this year, the Division notified the automakers that its investigation was closed.

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Members of the Committee, thank you again, and I will be happy to answer your questions.