



U.S. Department of Justice
Office of Professional Responsibility

950 Pennsylvania Avenue, N.W., Suite 3266
Washington, D.C. 20530

MEMORANDUM

TO: Bradley Weinsheimer
Associate Deputy Attorney General

Date: June 11, 2020

FROM: Jeffrey R. Ragsdale
Director and Chief Counsel

SUBJECT: OSC File Nos. DI-20-000194 and DI-20-000232

Handwritten signature of Jeffrey R. Ragsdale in black ink.

This is in response to your request for the Department of Justice (DOJ) Office of Professional Responsibility (OPR) to review allegations submitted by the Office of Special Counsel (OSC) on December 12, 2019, to the Office of the Deputy Attorney General for informal review and resolution. Specifically, two anonymous whistleblowers made allegations that the Antitrust Division (ATR) violated the Clayton Act §7A(e) and the Hart-Scott-Rodino Antitrust Improvements Act (HSR Act) by conducting pretextual investigations of, and placing onerous demands on, merging companies in the cannabis industry through the issuance of Second Requests, even though such mergers presented no competitive concerns.

On December 13, 2019, your Office referred these allegations to OPR, which conducted an investigation. OPR contacted OSC and requested additional information from the whistleblowers. On January 30, 2020, OSC provided OPR two submissions from the whistleblowers' counsel. In addition to identifying the transactions at issue, these submissions provided additional detail regarding the original allegations. The submissions added an allegation that ATR, at the direction of the Attorney General's Office, placed these demands on merging cannabis companies in order to slow the growth of the cannabis industry due to DOJ leadership's animosity towards the industry. They further alleged that ATR designed the demands so that they would be as burdensome as possible, and ATR leadership rejected any attempts to narrow their scope by the merging companies or ATR staff. Finally, the submissions added an allegation that the stated reason for these demands, to understand the industry better, was pretextual, as ATR staff conducted limited reviews of the submissions and otherwise omitted several steps in their investigations.

On February 13, 2020, OPR asked ATR to respond to these allegations, and submitted thirteen requests for information and ten requests for documents. On March 13, 2020, ATR provided a 21-page written response to the allegations and made an initial production of

documents, with a second production of documents following on April 3, 2020, providing a total of 2,593 pages of documents.¹ ATR responded with a categorical denial of the allegations, and argued that even if those allegations were true, there would be no violation of any laws, regulations, rules, policies, or guidelines.² ATR's response also explained how the cannabis industry exploded overnight, with multiple mergers taking place in a matter of months. These mergers provided unique challenges for ATR because ATR lacked experience with the cannabis industry, that industry was rapidly expanding and consolidating, many cannabis companies are unsophisticated, and ATR was limited in its ability to collect information from the merging companies and third parties because cannabis is illegal under federal law. In contrast to the allegation that the mergers provided no competitive concerns, ATR stated that these challenges made it impossible for ATR to reach that conclusion within the statutory thirty-day period in which it can issue Second Requests. Furthermore, ATR refuted the allegations that ATR staff did not appropriately conduct its reviews and that ATR leadership rejected attempts to narrow the scope of the Second Requests. Finally, ATR also flagged how other regulators, including the Federal Trade Commission (FTC) and state regulators, took an interest in these mergers, with the FTC deferring to ATR.

OPR reviewed the submissions from the whistleblowers' counsel and ATR, conducted its own review of the relevant laws, regulations, rules, policies, and guidelines governing the issuance of Second Requests, and reviewed publicly available information concerning the cannabis industry. OPR's review found support for ATR's response. The cannabis industry provided a unique challenge to federal and state regulators alike, and it was reasonable for ATR to seek additional information from the industry through its Second Request process. In addition, contrary to the whistleblowers' allegations, the documents provided by ATR reflect significant, and successful, negotiations among ATR and the cannabis companies concerning narrowing the scope of the Second Requests. Furthermore, the internal memoranda recommending the closure of the investigations reflect that ATR staff conducted a significant amount of analysis regarding the competitive impact of the proposed mergers, and often explained how the actions of state regulators offset any competitive concerns.

Finally, based on its review of the law and applicable DOJ rules, policies, and guidelines, OPR agrees with ATR's interpretation of the latitude it has in issuing Second Requests. Accordingly, even if the whistleblowers' allegations were true, OPR finds that ATR's Second Requests would not have violated any relevant laws, regulations, rules, policies, or guidelines. Because OPR concludes that ATR acted consistent with all applicable laws, regulations, and DOJ guidelines in its review of the proposed cannabis mergers, OPR is closing its investigation.

¹ The documents consisted of, among other things, internal and external communications regarding the merger investigations, the Second Requests submitted to the merging cannabis companies, negotiations with merger company counsel surrounding those requests, and the memoranda and analysis closing out ATR's investigations into those mergers.

² For example, ATR explained that the Clayton Act does not govern the issuance of Second Requests, and the only limitation on Second Requests in the HSR Act is that the requests seek information "relevant to the proposed acquisition."