



October 11, 2023

Hon. Michael E. Horowitz
U.S. Department of Justice
Office of the Inspector General
Investigations Division
950 Pennsylvania Ave., NW
Washington, DC 20530

Dear General Horowitz,

The U.S. Chamber requests that the Office of Inspector General (OIG) investigate whether the Antitrust Division is in compliance with Executive Order 12988 – Civil Justice Reform (EO or Order). Based on public filings and media reports, there is reason to believe that the Division is failing to comply with the Order’s directives that, prior to filing a civil complaint and throughout any litigation, federal agencies should “attempt to achieve a settlement” and “identify any type of bias on the part of the decision-makers.” These concerns constitute the type of “fraud, waste, abuse, and misconduct” that OIG is charged with investigating¹: the Division’s apparent failure to comply with EO 12988 may cost taxpayers millions of dollars in litigation expenses and attorney time that could have been avoided via reasonable attempts at settlement, while its failure to resolve bias concerns undermines the agency’s law enforcement mission.

A. The Antitrust Division is Failing to Make Reasonable Efforts to Settle Litigation

Executive Order 12988 is designed to improve the operation of the justice system by giving private parties an opportunity to settle lawsuits without having to endure the costs of litigation. Specifically, the EO provides that federal agencies shall not file a complaint initiating civil litigation “without first making a reasonable effort to notify all disputants about the nature of the dispute and to attempt to achieve a settlement.” Even after filing a complaint, and throughout the litigation, an agency “shall evaluate settlement possibilities and make reasonable efforts to settle the litigation.” The Order facilitates the just and efficient resolution of civil claims, encourages the filing of only meritorious suits, and promotes fair and prompt adjudication.

Unfortunately, it appears that the Division has violated the letter and spirit of this Executive Order. In at least one high-profile case, the Division filed suit without presenting a settlement offer itself, and even worse, ignoring or affirmatively rejecting a settlement overtures from the company. Specifically, prior to the Division filing its ad tech case, Google offered to split the part of its

¹ See generally DOJ OIG, Strategic Plan, at https://oig.justice.gov/sites/default/files/2020-04/2020-Strategic-Plan_0.pdf.



business that auctions and places ads on websites and apps into a separate company, yet the Division preferred to go to court in an attempt to force “deep structural changes.”²

This behavior appears to directly contravene the mandates set forth in Executive Order 12988. The EO directs agencies to engage in good-faith settlement talks, yet the Division refused to do so. This refusal represents a misuse of taxpayer resources. Antitrust cases can take years to resolve. Direct costs, in terms of expert fees and attorney time, can easily run into the tens of millions of dollars. Prior to embarking on a years-long quest to reshape antitrust law, spending tens of millions of taxpayer dollars in the process, the Division should try to resolve concerns through good-faith negotiations. Such an approach perhaps could have resolved the Division’s concerns much more quickly, effectively, and cheaply than litigation.

B. The Antitrust Division is Failing to Identify and Resolve Concerns about Bias

The Executive Order is also designed to improve the public’s confidence in the justice system by resolving concerns about bias. The EO directs all federal agencies to “review their administrative adjudicatory processes to *identify any type of bias* on the part of the decision-makers that results in an injustice to persons who appear before administrative adjudicatory tribunals; regularly train all fact-finders, administrative law judges, and other decision-makers to eliminate such bias; and establish appropriate mechanisms to receive and resolve complaints of such bias from persons who appear before administrative adjudicatory tribunals” (emphasis added). Although directed at administrative adjudication, rather than civil litigation, this portion of the Order reinforces the importance of impartiality, and the appearance of impartiality, throughout the justice system.

In the Google case, the court itself expressed concerns about the participation of Assistant Attorney General Kanter.³ Google requested that Mr. Kanter recuse himself based on his past work for Google’s competitors. Although the court declined to order recusal, the court worried about the perception of bias:

I am concerned about whether it would be appropriate for Mr. Kanter to stay out of this case. I really -- you know, as a judge -- you never want the judge to become an issue in a piece of litigation. ... I think the Department of Justice needs to think very carefully and use some wisdom and continue, as I understand it, the current recusal of Mr. Kanter. I'm not ordering it, but I think it's something that wise counsel should think about.

² Miles Kruppa, Sam Schechner, Brent Kendal, *Google Offers Concessions to Fend Off U.S. Antitrust Lawsuit*, WSJ, July 8, 2022, at <https://www.wsj.com/articles/google-offers-concessions-to-fend-off-u-s-antitrust-lawsuit-11657296591>.

³ See generally David Shepherdson, *US Judge will not order Justice Dept. official to exit Google advertising case*, REUTERS, Sept. 15, 2023, at <https://www.reuters.com/legal/us-judge-will-not-order-doj-official-exit-google-advertising-case-2023-09-15/#:~:text=In%20November%202021%2C%20Google%20asked,sell%20its%20ad%20manager%20suite>.



Given these objectively legitimate concerns, the Division's leadership appears to be disregarding the spirit of the Executive Order's mandate to eliminate bias. This failure raises questions about the validity of the lawsuit, the refusals to engage in settlement talks, and the use of taxpayer dollars.

We thank you for your attention to this matter.

Sincerely,

Sean Heather
Senior Vice President
International Regulatory Affairs & Antitrust
U.S. Chamber of Commerce

cc: House Judiciary Committee
Senate Judiciary Committee
Office of Attorney General
White House Counsel