

November 22, 2021

The Honorable Jonathan Kanter
Assistant Attorney General – Antitrust Division
Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Assistant Attorney General Kanter:

I am writing regarding increasing prices paid by consumers for chicken, turkey, and other poultry products as a result of excessive consolidation, price fixing, vertical integration, and plain-old corporate greed. As poultry companies report record profits, hand out executive pay raises, and spend billions on stock buybacks and dividends, I am requesting that the Antitrust Division of the Department of Justice (DOJ) examine how poultry companies' anticompetitive practices raise costs for American families and lower wages for American farmers – all while enriching poultry executives and shareholders.

The heavily concentrated poultry industry, in which the top four companies (Tyson Foods, Inc. (Tyson), Pilgrim's Pride, Perdue, and Sanderson Farms) control over half of the market,¹ has seen disproportionate price increases this year. In May 2021, processed-poultry prices jumped to an all-time high,² with consumer prices continuing to increase through October.³ And with the holidays approaching, American families are feeling these price increases at the grocery counter. The American Farm Bureau reported that the price of turkey increased by 24% over the past year, far outpacing other Thanksgiving foods.⁴

¹ White House, "Addressing Concentration in the Meat-Processing Industry to Lower Food Prices for American Families," Brian Deese, Sameera Fazili, and Bharat Ramamurti, September 8, 2021, <https://www.whitehouse.gov/briefing-room/blog/2021/09/08/addressing-concentration-in-the-meat-processing-industry-to-lower-food-prices-for-american-families/>.

² Bloomberg, "Poultry Prices Soar to Record Amid U.S. Chicken-Sandwich Wars," Michael Hirtzer and Dominic Carey, June 15, 2021, <https://www.bloomberg.com/news/articles/2021-06-15/poultry-prices-soar-to-record-amid-u-s-chicken-sandwich-wars>.

³ U.S. Bureau of Labor Statistics, "Consumer Price Index – October 2021," Nov. 10, 2021, <https://www.bls.gov/news.release/cpi.nr0.htm>.

⁴ CNN, "Thanksgiving dinner will cost Americans 14% more this year, survey finds," Vanessa Yurkevich, November 18, 2021, https://www.cnn.com/2021/11/18/economy/thanksgiving-dinner-cost/index.html?utm_medium=social&utm_source=twCNN&utm_term=link&utm_content=2021-11-18T14%3A45%3A05.

While consumers are suffering, major poultry companies have enjoyed record profits and handed out massive shareholder payouts this year. Tyson raised the prices of chicken 19% during its fiscal fourth quarter and announced its intention to continue increasing prices in 2022 to offset “inflationary costs.”⁵ But between September 2020 and July 2021, the company raised dividends by 6% and implemented a \$200-million stock-buyback program.⁶ In 2020, Tyson Chairman of the Board John Tyson and CEO Noel White received pay raises that brought their salaries to over \$1.2 million, marking an increase in every year since 2018 and bringing their total compensation to approximately \$11 million each.⁷ JBS Foods, which owns the second-largest chicken company in the U.S., Pilgrim’s Pride,⁸ “had ample cash to buy back shares and reduce net debt by 17%” – and proposed a 74% increase in dividends, a record payout for shareholders.⁹ In 2021, Pilgrim’s Pride saw an annual net sales increase of 24% with a nearly 14% increase in marginal profits.¹⁰

In addition to passing on higher costs to consumers through high prices so that they can increase CEO pay, increase profits, and pay more in dividends and buybacks, there is a history of widespread price fixing by the “Big Four” poultry companies. A 2017 lawsuit against the Big Four found that from 2008 to 2017, the price of wholesale chicken for consumers rose nearly 50%, even as the cost of feed for chickens decreased by 20%.¹¹ In 2020, a DOJ investigation into allegations of price fixing resulted in criminal indictments after the DOJ found that the companies engaged in “collusion that inflates prices American shoppers and diners pay for food.”¹²

Price-fixing allegations that are particularly relevant to this month’s festivities include Tyson’s recent agreement to pay \$4.6 million to resolve claims that it was involved in a “turkey cartel”

⁵ Fox Business, “Tyson Foods plans further price hikes to offset inflation pressures,” Jonathan Garber, November 15, 2021, <https://www.foxbusiness.com/markets/tyson-foods-plans-further-price-hikes-offset-inflation-pressures>.

⁶ White House, “Addressing Concentration in the Meat-Processing Industry to Lower Food Prices for American Families,” Brian Deese, Sameera Fazili, and Bharat Ramamurti, September 8, 2021, <https://www.whitehouse.gov/briefing-room/blog/2021/09/08/addressing-concentration-in-the-meat-processing-industry-to-lower-food-prices-for-american-families/>.

⁷ Securities and Exchange Commission, Tyson Foods, Inc., Proxy Statement Pursuant to Section 14(a) of the Securities Exchange Act of 1934, February 11, 2021, <https://www.sec.gov/Archives/edgar/data/100493/000010049320000207/proxystatement-2020.htm>.

⁸ Wall Street Journal, “Brazil’s JBS Proposes to Buy Rest of Pilgrim’s Pride as Chicken Industry Booms,” Dave Sebastian and Jacob Bunge, August 13, 2021, <https://www.wsj.com/articles/brazils-jbs-proposes-to-buy-rest-of-pilgrims-pride-11628866397#>.

⁹ Bloomberg News, Fabiana Batista, “JBS Says It’s Flush With Cash for Acquisitions and Dividends,” March 25, 2021, <https://www.bloomberg.com/news/articles/2021-03-24/jbs-says-it-s-flush-with-cash-for-acquisitions-and-dividends>.

¹⁰ Pilgrim’s Pride, “Pilgrim’s Pride Reports Third Quarter 2021 Results with Strong Growth in Sales and Adjusted EBITDA,” press release, October 27, 2021, <https://ir.pilgrims.com/news-releases/news-release-details/pilgrims-pride-reports-third-quarter-2021-results-strong-growth>.

¹¹ NBC News, “You’re Getting Skinned on Chicken Prices, Suit Says,” Ben Popken, February 17, 2017, <https://www.nbcnews.com/business/consumer/you-re-getting-skinned-chicken-prices-suit-says-n721821>.

¹² Department of Justice, “Six Additional Individuals Indicted On Antitrust Charges In Ongoing Broiler Chicken Investigation,” press release, October 7, 2020, <https://www.justice.gov/opa/pr/six-additional-individuals-indicted-antitrust-charges-ongoing-broiler-chicken-investigation>.

that also implicated Cargill, Perdue Farms, and Butterball LLC.¹³ Similarly, Tyson agreed to pay \$221.5 million in January 2021 to settle allegations over broiler-chicken price fixing¹⁴ while the Big Four faced similar allegations from food-distribution companies including U.S. Foods Inc. and Sysco¹⁵ and retailers Walmart, Kroger, Albertsons, and Winn-Dixie Stores.¹⁶

The costs of price fixing in the poultry industry have hit squarely in customers' wallets. A suit filed in 2018 against major poultry corporations including Tyson, Perdue Farms, and Koch Foods alleged that since 2008, coordinated production cuts resulted in a "roughly 50% increase in the price of broiler chickens," cheating American families out of approximately \$330 each year.¹⁷ A 2017 suit alleged that the "wrongful conduct" of chicken companies including Tyson, Pilgrim's Pride Corp., and Sanderson Farms Inc. "not only materially reduced or eliminated the historical boom and bust cycle of the chicken industry, they propped up chicken prices during periods of rapidly falling input costs."¹⁸

And while consumers are paying more for poultry, American farmers are being paid less in wages – an equation that is resulting in record profits for poultry companies. The National Chicken Farmers reported that chicken-farmer pay fell more than 6% between 1988 and 2015.¹⁹ Poultry farmers filed a class-action suit in 2017 alleging that the major poultry companies were a "cartel" engaging in "anticompetitive, collusive, predatory, unfair, and bad faith conduct."²⁰ In 2021, Perdue Farms and Tyson agreed to a \$35-million settlement with chicken farmers over allegations that the companies used long-term contracts to lock farmers into "unprofitably low" compensation ranging between \$12,000 and \$40,000 a year.²¹

¹³ Food Business News, "Tyson to pay \$4.6 million to settle turkey price-fixing case," Erica Shaffer, May 26, 2021, <https://www.foodbusinessnews.net/articles/18704-tyson-to-pay-46-million-to-settle-turkey-price-fixing-case>; Bloomberg Law, "Tyson, Cargill, Hormel, Butterball to Face Turkey Cartel Claims," Mike Leonard, October 27, 2020, <https://news.bloomberglaw.com/antitrust/tyson-cargill-hormel-butterball-to-face-turkey-cartel-claims>.

¹⁴ Reuters, "Tyson Foods to pay \$221.5 million to settle some chicken price-fixing claims," Jonathan Stempel, January 19, 2021, <https://www.reuters.com/article/us-tyson-foods-chicken-settlement/tyson-foods-to-pay-221-5-million-to-settle-some-chicken-price-fixing-claims-idUSKBN29O2IK>.

¹⁵ The Fern, "Is the U.S. chicken industry cheating its farmers?" Leah Douglas and Christopher Leonard, August 2, 2019, <https://thefern.org/2019/08/is-the-u-s-chicken-industry-cheating-its-farmers/>.

¹⁶ Chicago Tribune, "Second lawsuit against poultry giants alleges chicken price-fixing conspiracy," Ally Marotti, January 15, 2018, <https://www.chicagotribune.com/business/ct-biz-winn-dixie-tyson-chicken-prices-20180115-story.html>.

¹⁷ Chicago Tribune, "Second lawsuit against poultry giants alleges chicken price-fixing conspiracy," Ally Marotti, January 15, 2018, <https://www.chicagotribune.com/business/ct-biz-winn-dixie-tyson-chicken-prices-20180115-story.html>; NBC News, "You're Getting Skinned on Chicken Prices, Suit Says," Feb. 17, 2017, <https://www.nbcnews.com/business/consumer/you-re-getting-skinned-chicken-prices-suit-says-n721821>.

¹⁸ Bloomberg, "Top U.S. Chicken Producers Sued on Price-Fixing Claims by Buyers," Michael Hirtzer, September 4, 2020, <https://www.bloomberg.com/news/articles/2020-09-04/bob-evans-farms-alleges-tyson-others-inflated-chicken-prices?sref=ZvMMMOkz>.

¹⁹ *Id.*

²⁰ Case No. 6:17-cv-00033-SPS, Class Action Complaint, January 27, 2017, <https://static1.squarespace.com/static/55e8e9ece4b09a2da6c9b923/t/5899e07cf5e23192dad8d45e/1486479485000/Oklahoma+Poultry+Data+Case.pdf>.

²¹ Associated Press, "Tyson, Perdue to pay \$35M to settle with chicken farmers," Josh Funk, September 2, 2021, <https://apnews.com/article/business-fa91f3a79e4eb9aa5e3d0046e4f16d85>.

Consolidation and vertical integration appear to be other key factors leading to rapidly increasing poultry prices for consumers. The Big Four poultry companies have a combined 54% market share, and given the strong evidence of price fixing, this consolidation threatens to snuff out new competition and keep prices artificially high.²² Ongoing litigation highlights the danger of a highly concentrated industry, as ten executives and employees of top U.S. poultry companies, including former Pilgrim’s Pride Corp. CEOs Jayson Penn and William Lovette, face trial for criminal antitrust violations and a wide-ranging price-fixing scheme.²³ And even as consumers continue to see massive increases in poultry prices, this trend of excessive merger and acquisitions activity has not slowed. In August 2021, Cargill Inc. and Continental Grain Co. announced that they would buy Sanderson Farms, currently the third-biggest chicken producer in the U.S., with Wayne Farms, the sixth-biggest producer and owned by Continental Grain.²⁴ Cargill Inc. buys and trades key commodities for chicken feed,²⁵ while Wayne Farms is a self-described “vertically integrated U.S. poultry producer,”²⁶ sparking concerns about the impact of vertical integration on farmers and consumers.²⁷

Lack of competition in the poultry industry is allowing these massive companies to squeeze both American consumers and farmers to fuel record corporate profits and payouts to shareholders. When companies have monopoly power as massive suppliers, they can jack up prices of the goods they sell. And when those same companies have complete or substantial market power as large employers or buyers of inputs, also known as monopsony power, they can suppress their own costs for those inputs, including workers’ wages. This is the worst of all worlds: wages are held back while prices are jacked up.

I urge the DOJ to consider the extensive history of price fixing in the poultry industry when reviewing prospective deals like the Sanderson-Wayne transaction. Section 7.2 of the *Horizontal Merger Guidelines* states that a history of collusion or coordinated interaction in a market will be given “substantial weight” when the DOJ and the Federal Trade Commission assess the likelihood that an acquisition or merger will lead to anticompetitive harms.²⁸ In light of the

²² White House, “Addressing Concentration in the Meat-Processing Industry to Lower Food Prices for American Families,” Brian Deese, Sameera Fazili, and Bharat Ramamurti, September 8, 2021, <https://www.whitehouse.gov/briefing-room/blog/2021/09/08/addressing-concentration-in-the-meat-processing-industry-to-lower-food-prices-for-american-families/>.

²³ Bloomberg, “Chicken Executives Face Prison in Denver Price-Fixing Trial,” Bob Van Voris and Michael Hirtzer, October 26, 2021, <https://www.bloomberg.com/news/articles/2021-10-26/big-chicken-executives-face-prison-in-denver-price-fixing-trial>.

²⁴ Bloomberg, “Cargill, Continental to Buy Sanderson Farms for \$4.5 Billion,” Crystal Tse and Kim Chipman, August 9, 2021, <https://www.bloomberg.com/news/articles/2021-08-09/cargill-continental-to-buy-sanderson-farms-for-4-53-billion>.

²⁵ Washington Monthly, “More Trouble with Big Chicken,” Claire Kelloway, August 25, 2021, <https://washingtonmonthly.com/2021/08/25/more-trouble-with-big-chicken/>.

²⁶ Cargill, “Cargill and Continental Grain Company to Acquire Sanderson Farms for \$203 per Share in Cash and Create a Leading U.S. Poultry Company,” press release, August 9, 2021, <https://www.cargill.com/2021/cargill-and-continental-grain-company-to-acquire-sanderson-farms>.

²⁷ U.S. Senator Chuck Grassley, Letter, August 9, 2021, https://www.grassley.senate.gov/imo/media/doc/continental_grain_company_merger.pdf.

²⁸ Department of Justice and Federal Trade Commission, “Horizontal Merger Guidelines,” August 19, 2010, <https://www.justice.gov/atr/horizontal-merger-guidelines-08192010>.

multiple lawsuits and settlements involving the major poultry producers, it is clear that any additional mega mergers in this sector should be reviewed with suspicion.

Given the apparent connection between rising poultry prices for consumers and the history of anticompetitive practices in the poultry industry, I ask that you open a broad investigation into the impact of price fixing, wage fixing, and consolidation in the poultry industry on consumers and farmers. Specifically, I request answers to the following questions by December 20, 2021:

1. The price of poultry has risen significantly in the last year: chicken prices increased by 7.5% from October 2020 to October 2021²⁹ and turkey prices increased 24%.³⁰ How have (i) price fixing and (ii) increased consolidation in the industry contributed to these rising prices?
2. Many of the major poultry companies, including Tyson Farms, Inc., Sanderson Farms, Perdue Farms, and Pilgrim's Pride, have agreed to pay settlements over allegations of illegal price fixing in 2021.
 - a. How does the DOJ decide whether to enter non-prosecution agreements (NPAs) or deferred prosecution agreements (DPAs) instead of fully prosecuting criminal violations like price fixing?
 - b. Will the DOJ continue to enter NPAs or DPAs with repeat offenders in this industry?
 - c. Through more vigorous criminal prosecution, would the DOJ be able to ensure that criminal offenders disgorge ill-gained profits or provide restitution to injured parties?
3. In what ways will the DOJ consider the history of collusion in the poultry industry and others when assessing prospective transactions such as the Sanderson-Wayne deal (in accordance with Section 7.2 of the *Horizontal Merger Guidelines*)?
4. How does the DOJ determine that a company has wielded monopsony power in violation of the Sherman Act? Are the factors considered, including relevant market shares, when determining illegal monopsony power different than those considered when determining illegal monopoly power?
5. Under what circumstances does the DOJ decide to commence a retrospective review of a consummated transaction? Under what circumstances would the DOJ decide that a consummated transaction should be unwound?

²⁹ CBS News, "Meat prices are soaring as inflation bites U.S. consumers, Kate Gibson, November 16, 2021, <https://www.cbsnews.com/news/consumers-paying-higher-meat-costs/>.

³⁰ NPR, "Expect to pay more this year to stage your Thanksgiving feast," Deepa Shivaram, November 18, 2021, <https://www.npr.org/2021/11/18/1056809650/thanksgiving-turkey-prices-inflation-farm-bureau>.

6. How often has the DOJ completed retrospective reviews of consummated transactions in the poultry industry? Has such a deal ever been unwound?
7. What resources from Congress, if any, does the DOJ need in order to (i) vigorously prosecute criminal violations of antitrust law such as price fixing, (ii) successfully block or unwind anticompetitive mergers and acquisitions, and (iii) protect workers and farmers from monopsony power?

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Elizabeth Warren", written over a horizontal line.

Elizabeth Warren
United States Senator

cc:

The Honorable Lina Khan, Chair of the Federal Trade Commission
The Honorable Tom Vilsack, Secretary of Agriculture