

February 7, 2022

The Honorable Merrick Garland
Attorney General
Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

The Honorable Lisa Monaco
Deputy Attorney General
Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Attorney General Garland and Deputy Attorney General Monaco:

I am writing to urge the Department of Justice (DOJ) to more aggressively address price fixing, which is a violation of antitrust law. The nation is dealing with inflation at its highest level in decades, much of it driven by corporate greed and anticompetitive behavior, and the federal government must use every tool available to prevent price gouging and reduce prices for Americans. Antitrust policy plays a vital role in protecting consumers from anticompetitive practices that lead to higher prices, and no practice has a more direct effect on prices than price fixing. It is imperative that corporate executives who engage in criminal antitrust activity like price fixing be prosecuted to the fullest extent of the law rather than receive a slap on the wrist. Ineffectual settlements are no substitute for bringing criminal cases that seek corporate fines, individual fines, restitution for victims, and prison sentences, as appropriate under the Sherman Act.¹

Section 1 of the Sherman Act states that “[e]very person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony.”² This includes forms of collusion like price fixing, “agreement[s] among competitors to raise, fix, or otherwise maintain the price at which their goods or services are sold.”³ As the DOJ has observed, “[c]ollusion is more likely to occur if there are few sellers. The fewer the number

¹ 15 U.S.C. § 1.

² *Id.*

³ Department of Justice, “PRICE FIXING, BID RIGGING, AND MARKET ALLOCATION SCHEMES: WHAT THEY ARE AND WHAT TO LOOK FOR,” February 2021, <https://www.justice.gov/atr/file/810261/download>.

of sellers, the easier it is for them to get together and agree on prices.”⁴ And the American economy is plagued by increasing concentration across sectors: 75% of all industries underwent consolidation between 1997 and 2012.⁵ These conditions have the unfortunate effect of facilitating price fixing.

In a November 2021 letter I sent to the DOJ, I highlighted alarming instances of price fixing in the poultry industry.⁶ In private litigation, Tyson recently agreed to pay \$4.6 million to resolve claims that it was involved in a “turkey cartel” that also implicated Cargill, Perdue Farms, and Butterball LLC.⁷ Similarly, Tyson agreed to pay \$221.5 million in January 2021 to settle allegations over broiler-chicken price fixing⁸ while other major poultry firms faced similar allegations from food-distribution companies.⁹ The DOJ’s own ongoing investigation into price fixing in the broiler-chicken industry is investigating a group of executives and Koch Foods for their involvement in the collusive scheme, as announced on July 29, 2021.¹⁰ As an FBI director noted in this case, “[p]rice fixing is not a victimless crime, and the illegal actions taken by these companies and individuals in the broiler chicken industry have had a direct and negative impact on the American consumer.”¹¹ The costs of price fixing in the poultry industry have hit customers square in their wallets, resulting in a “roughly 50% increase in the price of broiler chickens,” cheating American families out of approximately \$330 each year, according to one lawsuit.¹² I applaud the DOJ’s efforts to address these issues in this industry: prosecution of poultry-industry price fixing will have the direct effect of lowering prices for American consumers.

But price fixing occurs in multiple industries, and all too often, the DOJ fails to prosecute using the full force of the law. For instance, last year the DOJ charged Argos USA, a producer of

⁴ *Id.*

⁵ Roosevelt Institute, “The United States Has a Market Concentration Problem,” September 2018, https://www.ftc.gov/system/files/documents/public_comments/2018/09/ftc-2018-0074-d-0042-155544.pdf.

⁶ Letter from Senator Elizabeth Warren to the Department of Justice, November 22, 2021, <https://www.warren.senate.gov/imo/media/doc/2021.11.22%20Letter%20to%20DOJ%20re%20Rising%20Poultry%20Prices%20.pdf>.

⁷ 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>.

⁸ 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>.

⁹ 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>.

¹⁰ Department of Justice, “Four Executives and Company Charged with Price Fixing in Ongoing Investigation into Broiler Chicken Industry,” July 29, 2021, <https://www.justice.gov/opa/pr/four-executives-and-company-charged-price-fixing-ongoing-investigation-broiler-chicken>.

¹¹ *Id.*

¹² 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>.

ready-mix concrete, for a price-fixing scheme carried out by Argos employees and other competing concrete firms from 2010 to 2016.¹³ As a result of Argos' collusion with other manufacturers, the price of concrete increased for "a large number of victims."¹⁴ While the DOJ did secure a \$20-million criminal penalty for the antitrust violation, it nevertheless entered into a deferred prosecution agreement with Argos,¹⁵ meaning that the criminal charges will likely be dismissed as long as Argos complies with certain corporate protocols. This deferred prosecution agreement is unusual particularly because the concrete industry has been rife with criminal-antitrust issues for decades.¹⁶

As another example, between 2013 and 2015, Taro Pharmaceuticals, Sandoz, and Apotex conspired to fix the prices of a number of generic drugs,¹⁷ leading to "higher drug prices for federal health care programs and beneficiaries," increasing the financial burdens of patients who needed drugs to treat hypertension, high cholesterol, and arthritis, among other conditions.¹⁸ But in October 2021, the DOJ Antitrust Division confirmed it had entered deferred prosecution agreements with these three pharmaceutical companies under which the companies agreed to pay only \$447.2 million,¹⁹ even though Taro "admitted its role in the conspiracy" and that the "scheme boosted sales by more than \$500 million."²⁰ None of the criminal executives will see any time in prison in spite of confessed illegal practices scamming the government and patients in need of drugs, thanks to the deferred prosecution agreements in place.

In October 2021, Deputy Attorney General Lisa Monaco outlined the DOJ's priorities regarding white-collar crime going forward.²¹ In particular, she noted "that cases against corporate executives are among some of the most difficult that the department brings, and that means the

¹³ Department of Justice, "Ready-Mix Concrete Company Admits to Fixing Prices and Rigging Bids in Violation of Antitrust Laws," January 4, 2021, <https://www.justice.gov/opa/pr/ready-mix-concrete-company-admits-fixing-prices-and-rigging-bids-violation-antitrust-laws>.

¹⁴ Atlanta Business Chronicle, "Feds charge Atlanta concrete giant Argos USA with price fixing," David Allison, January 5, 2021, <https://www.bizjournals.com/atlanta/news/2021/01/05/feds-charge-argos-usa-price-fixing-savannah.html>.

¹⁵ Department of Justice, "Ready-Mix Concrete Company Admits to Fixing Prices and Rigging Bids in Violation of Antitrust Laws," January 4, 2021, <https://www.justice.gov/opa/pr/ready-mix-concrete-company-admits-fixing-prices-and-rigging-bids-violation-antitrust-laws>.

¹⁶ JD Supra, "DOJ Announces Concrete Company's Deferred Prosecution Agreement: Are Effective Antitrust Compliance Programs Really Less Important Now? Unlikely," Vinson & Elkins LLP, January 26, 2021, <https://www.jdsupra.com/legalnews/doj-announces-concrete-company-s-4598471/>.

¹⁷ Department of Justice, "Pharmaceutical Companies Pay Over \$400 Million to Resolve Alleged False Claims Act Liability for Price-Fixing of Generic Drugs," Oct. 1, 2021, <https://www.justice.gov/opa/pr/pharmaceutical-companies-pay-over-400-million-resolve-alleged-false-claims-act-liability>.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Fierce Pharma, "With Taro's \$419M deal, feds' price-fixing net snares another big settlement," July 24, 2020, <https://www.fiercepharma.com/pharma/taro-pharma-will-pay-419m-to-settle-claims-it-engaged-generics-price-fixing-scheme>.

²¹ Department of Justice, "Deputy Attorney General Lisa O. Monaco Gives Keynote Address at ABA's 36th National Institute on White Collar Crime," October 28, 2021, <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute>.

government may lose some of those cases. But...the fear of losing should not deter them.”²² She also posed a question of fundamental importance in today’s climate of rampant corporate malfeasance: “Does the opportunity to receive multiple [nonprosecution agreements] and [deferred prosecution agreements] instill a sense among corporations that these resolutions and the attendant fines are just the cost of doing business?”²³

For corporations and their billionaire executives, all too often, crime pays.²⁴ It is unconscionable that we appear to have two tracks of criminal justice in this country: one for the wealthy and powerful, and one for everyone else. Failure to enforce price-fixing and antitrust laws has a grave economic cost: as demand has increased and supply chains have buckled during the economic recovery, it has allowed companies that have obtained market power using illicit means to raise prices for consumers who are faced with corporate monopolies.²⁵ I share Deputy Attorney General Monaco’s concern that absent tough and effective enforcement of antitrust laws, our current system perpetuates a belief among corporations that fines and settlements are just the cost of doing business.

You are now in position at the DOJ to enforce this nation’s antitrust laws in order to protect consumers, small businesses, and the public, and an important part of that mission means seeking stronger penalties, full restitution, and prison sentences when criminals break the law. Corrupt corporations must not be allowed to conclude that the benefits of colluding to jack up consumer prices far outweigh any potential sanctions. To better understand the DOJ’s enforcement efforts against price fixing, I request answers to the following questions by February 21, 2022:

1. Does the DOJ maintain statistics on its price-fixing enforcement efforts, including charges brought, affected industries and geographies, damages resulting from price fixing, instances of non-prosecution agreements (NPAs) or deferred prosecution agreements (DPAs), penalties and restitution obtained, completed trials, trial success rate, and prison sentences? Please include any such data in your response.
2. How does the DOJ decide whether to enter NPAs or deferred prosecution agreements DPAs instead of fully prosecuting criminal violations like price fixing?

²² *Id.*

²³ *Id.*

²⁴ Report prepared by Senator Elizabeth Warren and Representative Pramila Jayapal, “Rigged Justice 2.0: Government of, by, and for Billionaires,” May 14, 2019.

<https://www.warren.senate.gov/imo/media/doc/Rigged%20Justice%20Report.pdf>.

²⁵ See Letter from Senator Elizabeth Warren to Secretary Raimondo, December 16, 2021, [https://www.warren.senate.gov/imo/media/doc/2021.12.16%20Letter%20to%20Sec.%20Raimondo%20re.%20semi-conductor%20shortage%20\(1\).pdf](https://www.warren.senate.gov/imo/media/doc/2021.12.16%20Letter%20to%20Sec.%20Raimondo%20re.%20semi-conductor%20shortage%20(1).pdf); see also Senator Elizabeth Warren, “Warren Calls Out Private Equity-Backed Firms for Increasing Rents, Driving Up Housing Costs, and Raking in Profits Amid Housing Shortage,” press release, January 13, 2022, <https://www.warren.senate.gov/newsroom/press-releases/warren-calls-out-private-equity-backed-firms-for-increasing-rents-driving-up-housing-costs-and-raking-in-profits-amid-housing-shortage>; see also Senator Elizabeth Warren, “Warren Calls Out Big Grocery Chains for Putting Company Profits Over Customers,” press release, December 20, 2021, <https://www.warren.senate.gov/newsroom/press-releases/warren-calls-out-big-grocery-chains-for-putting-company-profits-over-customers>.

3. In which industries has the DOJ observed multiple instances of price fixing in the last 10 years? How has the DOJ shifted its enforcement practices in these industries?
4. How has the DOJ responded to any instances of recidivism from particular firms? Has the DOJ reduced the number of NPAs and DPAs it enters with these firms? Will the DOJ continue to enter NPAs or DPAs with repeat offenders in this industry?
5. In markets in which price fixing occurs, how much of an impact does price fixing have on final consumer prices? Please use examples where possible.
6. 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?
7. What resources from Congress, if any, does the DOJ need in order to vigorously prosecute criminal violations of antitrust law such as price fixing and bidding rigging?

Thank you for your attention to this matter.

Sincerely,



Elizabeth Warren
United States Senator

cc:

The Honorable Jonathan Kanter, Assistant Attorney General, Department of Justice