United States Senate

WASHINGTON, DC 20510

November 14, 2022

The Honorable Thomas J. Vilsack
Secretary
Department of Agriculture
1400 Independence Avenue, S.W.
Washington, DC 20250

Dear Secretary Vilsack:

We write to you today with serious concerns regarding the role of the Department of Agriculture's (USDA), and individual USDA employees, in an antitrust lawsuit brought by the Department of Justice (DOJ) to stop United States Sugar Corporation (U.S. Sugar) from acquiring Imperial Sugar Company (Imperial).[1] It appears that a senior USDA employee, testifying as an expert on behalf of the sugar industry, may have persuaded a judge to greenlight a corporate merger that is likely to increase sugar prices. This activity raises numerous ethics concerns and is particularly troubling at a time when major grocery chains have already been leveraging their market power to raise prices and increase their own profits at the expense of American families.[2] This contradicts President Biden's recent executive order on competition[3] and calls into question whether USDA's employees are working to serve the American people or wealthy corporate interests.

On July 9, 2021, President Biden released his Executive Order on Promoting Competition in the American Economy, a powerful set of directives and recommendations designed to reinvigorate antitrust enforcement in the United States and coordinate his administration's efforts to create fairer markets. This Executive Order called on USDA to "cooperat[e] with any concurrent Department of Justice…oversight activities under the Clayton Act" and "giv[e] significant consideration to the views of the [Department of Justice]" when USDA and DOJ share jurisdiction in the review of major transactions.[4]

In July 2022, DOJ secured a landmark settlement with a group of Big Ag processors to end a "long-running conspiracy to suppress" pay for poultry growers and "address deceptive abuses against poultry growers."[5] In a similar fashion, DOJ filed a lawsuit to enjoin U.S. Sugar's

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[1] U.S. v. United States Sugar Corporation, et al., 2022 WL 4544025 (D. Del., 2022).
[2] CNN, "Grocery stores are excited to charge you higher prices," Nathaniel Meyersohn, June 18, 2021, https://www.cnn.com/2021/06/18/business/grocery-store-inflation-kroger-albertsons/index.html.
[3] White House, "Executive Order on Promoting Competition in the American Economy," July 9, 2021, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.
[4] Id.
[5] Department of Justice, "Justice Department Files Lawsuit and Proposed Consent Decrees to End Long-Running Conspiracy to Suppress Worker Pay at Poultry Processing Plants and Address Deceptive Abuses Against Poultry Growers," July 25, 2022, https://www.justice.gov/opa/pr/justice-department-files-lawsuit-and-proposed-consent-decrees-end-long-running-conspiracy.

proposed acquisition of Imperial in November 2021 on the grounds that the purchase would violate the Clayton Act.[6] In its complaint, DOJ alleged that the deal "would leave an overwhelming majority of refined sugar sales across the Southeast in the hands of only two producers" and that "American businesses and consumers would pay more for refined sugar."[7]

But even as one part of the Biden administration fought to enforce the nation's antitrust laws and prevent a sugar duopoly from attaining nearly 75% of a regional market,[8] another part of the administration appeared to undermine antitrust enforcement. Dr. Barbara Fecso, USDA's chief economist, served as a key witness in her "personal capacity" during this sugar merger trial, even though USDA officially took no position as to whether the deal would produce any anticompetitive effects.[9] Although she indicated that she was appearing in her personal capacity and not on behalf of USDA, Dr. Fecso nevertheless testified *against* DOJ, alleging that U.S. Sugar's "acquisition of Imperial Sugar would ultimately benefit consumers."[10] This opinion was apparently not based on any actual evidence; "when asked if she had seen any data that supported her belief that the merger wouldn't lead to higher sugar prices,"[11] Dr. Fecso admitted that she had not. At least a part of Dr. Fecso's conclusion rested on her longstanding relationships with corporate executives at U.S. Sugar and Imperial, "who had assured her they had no plans to raise prices": "'Knowing these people as long as I have,' she said, according to a transcript of her testimony, 'I had high faith that [the deal] was good.'"

Judge Maryellen Noreika ruled against DOJ on September 23, 2022, and her memorandum opinion makes clear that she "found Dr. Fecso to be an exceptionally knowledgeable and particularly credible witness."[12] The judge noted that "[t]here is no one at USDA with a longer tenure working on the Federal Sugar Program" than Dr. Fecso, and she went on to remark that "Dr. Fecso testified credibly that she anticipates the Proposed Transaction is not likely to lead to higher prices but, in fact, may lower prices for U.S. purchasers and consumers of refined sugar by creating certain efficiencies and cost savings."[13]

This testimony by a USDA employee against DOJ represented a grave conflict of interest, and raises a number of ethics questions about Dr. Fecso's behavior. Specifically, federal ethics rules require that federal employees "shall not use public office for private gain," and "shall not engage in outside employment or activities, including seeking or negotiating for employment, that conflict with official Government duties and responsibilities," and "shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards."[14] It is not clear that Dr. Fecso's appearance before the court in an effort to undermine DOJ antitrust

[6] Department of Justice, "Justice Department Sues to Block U.S. Sugar's Proposed Acquisition of Imperial Sugar," November 23, 2021, https://www.justice.gov/opa/pr/justice-department-sues-block-us-sugar-s-proposed-acquisition-imperial-sugar.
[7] Id.
[8] Time, "How a USDA Analyst Helped Stymie the Biden Administration's Bid to Block a Sugar Merger," Eric Cortellessa, September 28, 2022, https://time.com/6218111/biden-sugar-merger-usda-analyst/.
[9] U.S. v. United States Sugar Corporation, et al., 2022 WL 4544025 (D. Del., 2022).
[10] Id.
[11] Id.
[12] U.S. v. United States Sugar Corporation, et al., 2022 WL 4544025 (D. Del., 2022).
[13] Id.
[14] 5 C.F.R. 2635.101.

actions meets those tests. It is also unclear that Dr. Fecso's claims that she acted in her personal capacity are at all meaningful. She is a senior employee at USDA and was identified as such during her testimony

Moreover, having engaged in such activity, it is not clear how Dr. Fecso can continue in her role at USDA without recusing herself from any and all USDA activities related to the sugar industry: federal conflict of interest laws requires barring "an officer or employee of the executive branch of the United States Government, …[from] participat[ing] personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which… he… has a financial interest"[15] and may apply here due to Dr. Fecso's role as an expert witness for the sugar industry – particularly given her testimony to facts based on her personal knowledge of key industry officials.

In light of the concerns raised by Dr. Fecso's actions, we ask that you respond to the following questions by no later than November 28, 2022, so that we can better understand USDA's role in allowing this conflict to transpire:

1. What protocols, if any, does USDA have in place to check for conflicts of interest before USDA employees serve as witnesses in judicial or administrative proceedings?
2. Was Dr. Fecso required to disclose and obtain any form of approval from the Designated Agency Ethics Official or any other USDA employee before testifying against DOJ in this matter?
    a. If yes, who authorized her to testify?
    b. If yes, why would USDA allow her to testify against DOJ?
    c. If yes, how did DOJ's assessment that this transaction would violate the Clayton Act and result in higher sugar prices factor into USDA's decision?
3. What compensation did Dr. Fecso receive in exchange for her testimony in this case?
4. Has Dr. Fecso participated in her "personal capacity" in any other cases related to the sugar or other agriculture industries? If so, please provide a list of all such instances.
5. Given Dr. Fecso's legal and financial arrangement with the sugar industry, will she be required to recuse from any and all USDA matters related to the industry, consistent with 18 U.S.C. 208?
6. Given that USDA represented that it had no position on whether the acquisition would produce any anticompetitive effects, why was USDA's chief economist permitted to testify in this matter related to the acquisition at all?
7. Since 2010, how many USDA employees have testified against DOJ or the Federal Trade Commission in any antitrust matters? Please list any such matters and identify any such employees.

[15] 18 U.S.C. 208.

8. Will you commit to prohibiting USDA employees from testifying against DOJ or the Federal Trade Commission in all antitrust matters going forward?

Sincerely,

Elizabeth Warren
United States Senator

Cory A. Booker
United States Senator