

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
OFFICE OF THE ATTORNEY GENERAL



ATTORNEY GENERAL  
KARL A. RACINE

Vivek Sankaran  
Chief Executive Officer  
Albertsons Companies, Inc.  
250 Parkcenter Blvd.  
Boise, ID 83706

W. Rodney McMullen  
Chief Executive Officer  
The Kroger Co.  
1014 Vine St.  
Cincinnati, OH 45202

October 26, 2022

Dear Messrs. Sankaran and McMullen:

As the Chief Legal Officers of our States, the undersigned Attorneys General of the District of Columbia, Arizona, California, Idaho, Illinois, and Washington State write to request that Albertson Companies, Inc. (“Albertsons”) delay payment of its recently announced “special dividend” of \$6.85 per share until the undersigned States have completed their review of Albertsons’ proposed merger with the grocery store chain The Kroger Co. and Kettle Merger Sub, Inc. (collectively, “Kroger”), and the merger has closed.

Grocery stores supply daily necessities to millions of people throughout the United States and employ hundreds of thousands of workers in communities across the country. That is why we are dedicated to ensuring that the proposed merger of Kroger and Albertsons (the “Parties”), announced on October 14, 2022,<sup>1</sup> does not result in higher prices for consumers, suppressed wages for workers, or other anticompetitive effects. In this period of historically above-average inflation, purchasers of groceries have been particularly hard hit: grocery prices rose 12.2% from last summer to this summer, which is the biggest jump in over 40 years.<sup>2</sup> The proposed merger’s implications do not end with the consumer: the Parties’ merger announcement noted that together, Kroger and Albertsons have more than 710,000 employees in 4,996 stores across 48 states and the District of Columbia.<sup>3</sup> Thus, if the proposed merger has anticompetitive effects, nearly every corner of this country will feel them.

Federal and state competition laws forbid parties from entering agreements that substantially lessen competition or unreasonably restrain trade. The Companies’ merger announcement noted that “[a]s part of the transaction,” Albertsons would pay its stockholders of record as of October 24 a “special cash dividend of up to \$4 billion” on November 7.<sup>4</sup> The payment of this special dividend is included in Albertsons’ merger agreement with Kroger, a competitor.<sup>5</sup> The sum

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<sup>1</sup> Kroger and Albertsons Companies Announce Definitive Merger Agreement (Oct. 14, 2022), *available at* <https://ir.kroger.com/CorporateProfile/press-releases/press-release/2022/Kroger-and-Albertsons-Companies-Announce-Definitive-Merger-Agreement/default.aspx> (“Merger Announcement”).

<sup>2</sup> Hamza Shaban, “Food prices are still rising. Here’s how Americans are coping,” *The Washington Post* (Aug. 10, 2022), *available at* <https://www.washingtonpost.com/business/2022/08/10/food-prices-rising/>.

<sup>3</sup> See Merger Announcement.

<sup>4</sup> See Merger Announcement.

<sup>5</sup> See Agreement and Plan of Merger by and Among Albertsons Companies, Inc., The Kroger Co. and Kettle Merger Sub, Inc., at 16 (Oct. 13, 2022), <https://assets.website->

involved represents approximately one third of Albertsons' market capitalization of approximately \$11.19 billion,<sup>6</sup> and is comparable to the total of cash and cash equivalents (\$3.392 billion) and net receivables (\$652 million) that Albertsons reported in its most recent 10-Q filing with the U.S. Securities and Exchange Commission.<sup>7</sup> An agreement with Kroger that deprives Albertsons of the cash it needs to operate competitively is economically no different than other pre-merger agreements or actions that have limited the output or other business operations of a merging party, leading the federal agencies to act.<sup>8</sup> Even if Albertsons plans to adhere to the legal requirement—and the merger agreement's commitment—that it continue to compete with Kroger during the pendency of the merger's review,<sup>9</sup> paying a dividend of this size will hamper its ability to meaningfully compete with Kroger.

Moreover, regulatory approval of the merger is far from assured. The States must undertake their review and assure themselves that competition in all relevant antitrust markets at issue is preserved. Should any regulatory challenge to the merger succeed, or should the parties abandon the transaction, Albertsons would have to continue to compete with other grocery stores, a goal that its decision to enrich its shareholders to the tune of \$4 billion will have made significantly more difficult to accomplish, if not unattainable altogether.

Accordingly, the undersigned request that Albertsons cancel issuance of the special dividend and postpone payment of any such dividend until regulatory review of the merger is complete and the merger closes. Please advise by 5:00 pm on October 28, 2022, whether you will do so.

Sincerely,

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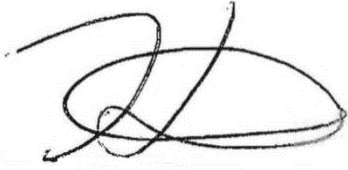
files.com/6313a39c3c13ed1541dc24e1/634951168ca2950849801654\_Kroger-Albertsons-Companies-Merger-Agreement.pdf ("Merger Agreement").

<sup>6</sup> See Yahoo! Finance, Albertsons Companies, Inc. (ACI), available at <https://finance.yahoo.com/quote/ACI/> (last visited Oct. 25, 2022).

<sup>7</sup> Albertsons Companies, Inc., Form 10-Q for the quarterly period ended September 10, 2022, at 3, <https://www.albertsonscorporation.com/investors/financial-reports/sec-filings/sec-filings-details/default.aspx?FilingId=16140596>.

<sup>8</sup> For instance, the Department of Justice sued several companies under Section 7A of the Clayton Act and Section 1 of the Sherman Act because they partly "prematurely transferred operational control" between them before obtaining clearance, the consequences of which persisted after the parties had abandoned their deal in the face of regulatory opposition. Compl., *United States v. Flakeboard Am. Ltd. et al.*, No. 3:14-cv-4949 (N.D. Cal. Nov. 7, 2014), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/11/07/flakeboard\\_complaint.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/11/07/flakeboard_complaint.pdf); see also Compl., *United States v. Smithfield Foods, Inc.*, No. 1:10-cv-00120 (D.D.C. Jan. 21, 2010) (alleging target company "stopped exercising independent business judgment" with respect to certain aspects of its operations), <https://www.justice.gov/atr/case-document/file/511646/download>.

<sup>9</sup> See Merger Agreement, Sec. 6.1.



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