

October 5, 2023

The Honorable Merrick Garland  
Attorney General  
United States Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, D.C. 20530

The Honorable Lisa Monaco  
Deputy Attorney General  
United States Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, D.C. 20530

Dear Attorney General Garland and Deputy Attorney General Monaco:

I write regarding reports that the Department of Justice (DOJ, or the Department) is unveiling a new “safe harbor” that would provide a get-out-of-jail-free card for mergers involving corporate white-collar criminals.<sup>1</sup> If the reports are accurate, this new policy represents a betrayal of the Department’s mission “to uphold the rule of law,”<sup>2</sup> and a massive step backwards in the Biden administration’s approach to preventing anticompetitive mergers. This policy would reduce competition and encourage corporate crime – and you should act quickly to reverse it.

The reports indicate that “under the policy, the DoJ will not bring charges against an acquirer that voluntarily reports misconduct committed by a company it buys within six months of the deal closing, whether the illegal activity was identified before or after the purchase.”<sup>3</sup>

I have – for the majority of my time in the United States Senate – fought hard to ensure that corporate wrongdoers are held accountable.<sup>4</sup> I pushed the Obama administration, the Trump administration, and now the Biden administration to punish white-collar criminals and recidivist corporations. Yesterday’s policy announcement represents a sharp reversal of hard-fought progress made since January 2021.

---

<sup>1</sup> U.S. Department of Justice, “Deputy Attorney General Lisa O. Monaco Announces New Safe Harbor Policy for Voluntary Self-Disclosures Made in Connection with Mergers and Acquisitions,” press release, October 4, 2023, <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-announces-new-safe-harbor-policy-voluntary-self>.

<sup>2</sup> U.S. Department of Justice, “A Message from the Attorney General,” <https://www.justice.gov/doj/doj-strategic-plan/message-attorney-general>.

<sup>3</sup> Financial Times, “US to Incentivise Companies to report misdeeds of businesses they buy,” Stefania Palma, October 4, 2023, <https://www.ft.com/content/debf32f3-b33e-469a-8c69-6ee4ba8794d1>.

<sup>4</sup> See, e.g., Office of U.S. Senator Elizabeth Warren, “Rigged Justice: 2016, How Weak Enforcement Lets Corporate Offenders Off Easy,” January 2016, [https://www.warren.senate.gov/files/documents/Rigged\\_Justice\\_2016.pdf](https://www.warren.senate.gov/files/documents/Rigged_Justice_2016.pdf).

The new policy is reportedly “aimed at giving the DoJ an opportunity to spot misconduct during the due diligence and integration processes typical in mergers and acquisitions.”<sup>5</sup> But it is not clear what benefit the Department would gain from these opportunities – or why corporate wrongdoers deserve the opportunity to be absolved of responsibility for them. Put simply, corporations should be punished if they commit wrongdoing or cover it up, not rewarded for revealing illegal behavior.

Deputy Attorney General Monaco told the Financial Times that “We want to incentivise good companies, companies with good, strong compliance records . . . to acquire companies that may have . . . a less robust compliance program, that may actually have a history of misconduct.”<sup>6</sup> But there is no rationale for the Department putting its thumb on the scale in favor of these mergers, and legitimate questions about whether they would do anything to reduce corporate misconduct.<sup>7</sup> Indeed, this approach would incentivize corporations to engage in illegal activity of all kinds – knowing that they could simply wipe the slate clean during a merger. It is not clear how the corporations would meet the criteria for “timely and appropriate remediation, restitution, and disgorgement”<sup>8</sup> of the illegal activity, as the policy appears to require, or when, given prosecutors would have discretion as to the timeline.

The new DOJ policy, as well as Deputy Attorney General Monaco’s troubling comments in favor of incentivizing mergers,<sup>9</sup> also appears to directly conflict with President Biden’s 2021 Executive Order on Promoting Competition in the American Economy, a government-wide directive that instructs agencies to promote competition in all sectors of the economy.<sup>10</sup> The order specifically calls on DOJ and the Federal Trade Commission (FTC) to vigorously enforce our antitrust laws.<sup>11</sup> The DOJ policy announced yesterday is entirely inconsistent with these administration actions: it encourages more mergers and makes it easier for companies that have engaged in illegal activity to get bought up – reducing competition, and eliminating penalties for bad behavior.

There is no need for this policy, and no justification for it. It is a mistake for DOJ to eliminate accountability for corporate wrongdoers, and to adopt a policy that reduces competition by incentivizing mergers of corporate criminals. I ask that you quickly move to reverse the policy before engaging in any activity to approve any merger or provide amnesty for any corporate criminals.

---

<sup>5</sup> Financial Times, “US to Incentivise Companies to report misdeeds of businesses they buy,” Stefania Palma, October 4, 2023, <https://www.ft.com/content/debf32f3-b33e-469a-8c69-6ee4ba8794d1>.

<sup>6</sup> *Id.*

<sup>7</sup> Harvard Business Review, “Why Compliance Programs Fail – and How to Fix Them,” Hui Chen and Eugene Soltes, March-April 2018, <https://hbr.org/2018/03/why-compliance-programs-fail>.

<sup>8</sup> U.S. Department of Justice, “Deputy Attorney General Lisa O. Monaco Announces New Safe Harbor Policy for Voluntary Self-Disclosures Made in Connection with Mergers and Acquisitions,” press release, October 4, 2023, <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-announces-new-safe-harbor-policy-voluntary-self>.

<sup>9</sup> Financial Times, “US to Incentivise Companies to report misdeeds of businesses they buy,” Stefania Palma, October 4, 2023, <https://www.ft.com/content/debf32f3-b33e-469a-8c69-6ee4ba8794d1>.


<sup>10</sup> The 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/>.

<sup>11</sup> *Id.*

I also ask that you provide answers to the following questions no later than October 13, 2023:

1. If the policy remains in place, how many new mergers does DOJ expect to be approved in the next five years?
2. If the policy remains in place, how many corporate criminals does DOJ expect to take advantage of the safe harbor provision?
  - a. What peer-reviewed studies or analyses – if any – did DOJ rely on to conclude that this policy would reduce corporate crime?
3. Does DOJ believe this policy is consistent with President Biden’s 2021 Executive Order on Promoting Competition in the American Economy?
4. Are there any open corporate crime cases that could be dismissed under this policy if the conduct previously had been disclosed to DOJ? If so, please provide a list of all such cases.
5. Did DOJ officials consult with FTC officials about the impact of this new policy on competition? If so, what advice did DOJ receive?
6. Did DOJ officials consult with the Department’s public integrity unit or DOJ prosecutors?
7. Did DOJ officials consult with federal inspectors general, or state attorneys general or other law enforcement entities?
8. Which other outside entities or interest groups – if any – did DOJ consult with regarding this policy?
  - a. Did DOJ consult with any entities or groups representing victims of corporate crime?
9. Will DOJ provide transparency regarding any entities that take advantage of this safe harbor provision, including full public disclosure of any and all misconduct admitted to DOJ officials by corporate entities, and of whether and how this misconduct was remediated to DOJ’s satisfaction?
  - a. Will this information be shared with other agencies and will it be considered for determinations of whether a company is responsible, for purposes of receiving government contracts?
10. Will DOJ take any additional steps to formalize or publicize this policy?

Sincerely,

  
Elizabeth Warren  
United States Senator