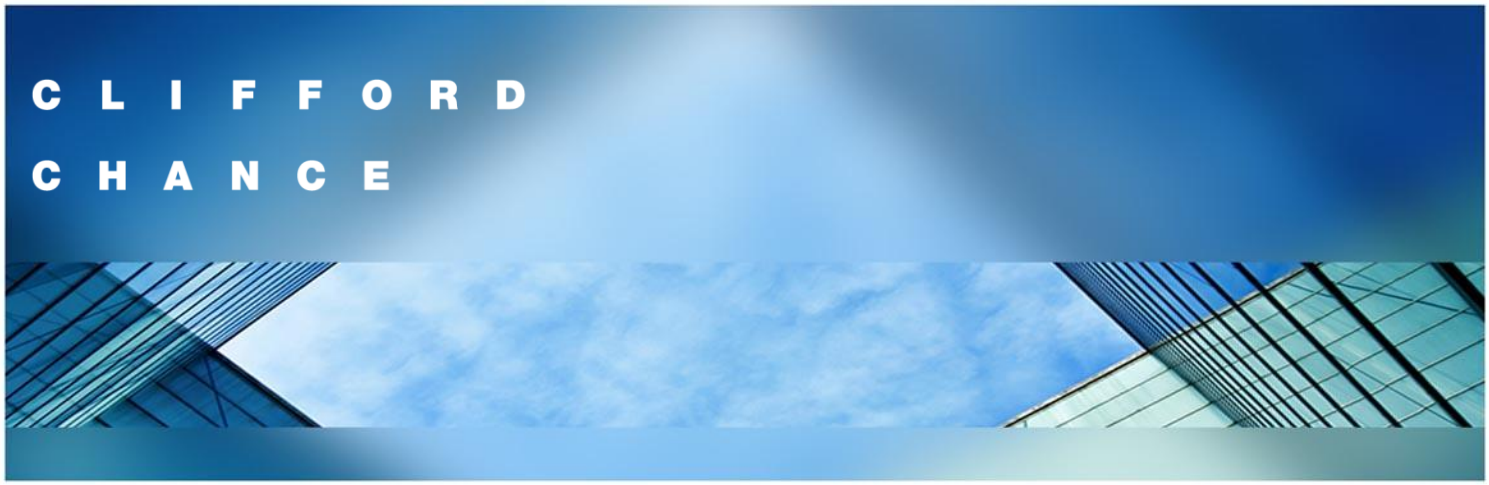

PLACING A PREMIUM ON COMPREHENSIVE TRANSACTIONAL DILIGENCE AND COMPLIANCE INTEGRATION, MORE CARROTS WITH DOJ'S NEW MERGERS & ACQUISITIONS SAFE HARBOR POLICY

On October 4, 2023, Deputy Attorney General Lisa Monaco announced the U.S. Department of Justice's ("**DOJ**") adoption of a new Mergers & Acquisitions Safe Harbor Policy ("**Safe Harbor Policy**") intended to incentivize acquiring companies to timely disclose criminal misconduct by the acquired company within a baseline of six months after closing and to remediate any such violations within one year of closing. The Safe Harbor Policy applies across DOJ, with each Department set to tailor its application for their specific enforcement regimes, with forthcoming guidelines expected.

The Safe Harbor Policy builds on industry practice regarding disclosure post-acquisition of a violation of the Foreign Corrupt Practices Act pre-acquisition by the acquired company that was derived from a 2008 DOJ Opinion Release, which technically was limited to a specific transaction. Going forward, acquiring companies that identify and voluntarily disclose pre-acquisition criminal misconduct by the acquired company within a baseline of six months after closing, and which "engage in requisite, timely and appropriate remediation" within the baseline one year post-closing, and pay restitution and disgorgement, regardless of whether there were aggravating circumstances at the acquired company, will receive a presumption of declination. The acquired company also can receive credit for a voluntary disclosure including possible declination, depending on the circumstances. Prosecutors may adjust these "baseline" time periods in response to the facts, circumstances, and complexity particular to the relevant transaction.

There are notable limitations to the Safe Harbor Policy's application. Significantly, DOJ advised that "companies that detect misconduct threatening national security or involving ongoing or imminent harm" cannot rely on the baseline periods to make self-disclosures. We note that the list of national security priorities has expanded in recent years, and that the scope of this carve-out beyond economic

sanctions and export controls, for example, may not be clear until it plays out in practice. We wrote about DOJ's continued focus on incentivizing disclosures previously here as well as the increased incentives for whistleblowers, which adds to the race to disclose for companies seeking the benefits of voluntary self-disclosure credit. The Safe Harbor Policy also will only apply to criminal conduct discovered in "bona fide, arms-length M&A transactions," which presumably is a reference to excluding internal corporate reorganizations, and not in circumstances where the conduct was otherwise required to be disclosed, was public, or already known to DOJ.

The Safe Harbor Policy thus "plac[es] an enhanced premium on timely compliance-related due diligence and integration," as DAG Monaco warned in her remarks that companies that fail to "perform effective due diligence or self-disclose misconduct at an acquired entity … will be subject to full successor liability for that misconduct under the law."

Thus, companies that anticipate or have recently made an acquisition should ensure that they expeditiously complete risk-based compliance diligence of acquired companies and promptly integrate them into their compliance programs upon closing. Companies will be well served by:

- Scoping potential areas of compliance risk at the inception of a transaction;
- Developing a plan to conduct diligence on the areas of identified compliance risk, considering pre- and post-closing access to relevant information based on the transaction structure,
- Adopting an iterative approach to compliance diligence, including developing a plan to conduct enhanced diligence and/or a risk assessment on a post-closing basis;
- Ensuring that issues that are identified are appropriately flagged and elevated for consideration for a disclosure to DOJ; and
- Using the post-signing to pre-closing period to develop a compliance integration, and if needed, remediation plan for the acquired company.

These steps may require increased compliance resourcing and spend for corporate transactions. As DAG Monaco noted, "Invest in compliance now or your company may pay the price – a significant price – later."

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