

CLIENT ALERT

Hit Them Where It Hurts (The Pocketbook): DOJ's Most Recent Corporate Enforcement Guidance

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Over the past year, the U.S. Department of Justice (“DOJ” or “the Department”) has taken several actions related to enhancing corporate criminal enforcement. Most recently in March 2023, the DOJ has added to these efforts, rolling out a new policy aimed at punishing corporate executives, financially, for their misconduct. In a speech given at the American Bar Association’s National Institute on White Collar Crime, Deputy Attorney General (“DAG”) Lisa Monaco addressed additional steps the DOJ is taking to drive compliance-promoting behavior. “Companies should ensure that executives and employees are personally invested in promoting compliance. And nothing grabs attention or demands personal investment like having skin in the game, through direct and tangible financial incentives,” DAG Monaco said as she announced the launch of a first-ever Pilot Program on Compensation Incentives and Clawbacks (“Clawback Pilot Program”).¹

The Clawback Pilot Program applies to all corporate matters handled by the Criminal Division for the next three years, beginning March 15, 2023.² The Clawback Pilot Program outlines both the circumstances under which a company will be considered eligible for a fine reduction when resolving corporate misconduct with the Criminal Division and the benefits that the company can expect for doing so. DAG Monaco noted that the DOJ was aware of the fact that companies often

¹ <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-monaco-delivers-remarks-american-bar-association-national>.

² <https://www.justice.gov/opa/speech/file/1571906/download>.

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pay fines to resolve corporate misconduct, where doing so results in harming shareholders yet leaving corporate executives unscathed: "Our goal is simple: to shift the burden of corporate malpractice from shareholders, who often play no role in wrongdoing, to those directly responsible."³ We briefly discuss the requirements of the Clawback Pilot Program before discussing its implications.

Clawback Pilot Program

The Clawback Pilot Program consists of two parts: (1) every corporate resolution involving the Criminal Division will require the resolving company to develop compliance-promoting criteria within its compensation and bonus system; and (2) the Criminal Division will provide fine reductions to companies that seek to claw back compensation from corporate wrongdoers.⁴

The Clawback Pilot Program maintains a relatively high bar for a company to be eligible for a fine reduction. First, a company will not be considered eligible for a fine reduction unless it first agrees to adopt compliance-related criteria in its compensation and bonus system.⁵ And a company will only be eligible if it also reports to the Criminal Division annually during the resolution term about its implementation of such criteria. The criteria that the Criminal Division may require include: (1) a prohibition on bonuses for employees who do not satisfy compliance performance requirements; (2) disciplinary measures for employees who violate applicable laws and others who both (a) had supervisory authority over the employee or business area engaged in the misconduct, and (b) knew of, or were willfully blind to, the misconduct; and (3) incentives for employees who demonstrate full commitment to compliance processes.⁶ The Clawback Pilot Program further places the burden on companies to demonstrate compliance.

Second, the Clawback Pilot Program promises significant benefits for compliance, as long as other criteria are met. For instance, where prosecutors determine a criminal resolution is warranted, Criminal Division prosecutors will initially exclude from the fine amount up to 100% of any amounts a company is attempting to claw back from employees responsible for the misconduct.⁷ In this regard, responsible employees include the individuals who *actually* committed the misconduct, as well as those who: (1) had supervisory authority over the employee or business area engaged in the misconduct; and (2) knew of, or were willfully blind to the misconduct.⁸ If the company is unsuccessful in clawing back the full amount, the company will have to pay the excluded amount as part of its fine; however, the DOJ may still accord the company up to 25% of the amount the company attempted to claw back based on the company's good-faith efforts in seeking recoupment. Companies seeking to claw back compensation will therefore need to consider the individuals from

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⁴ <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-monaco-delivers-remarks-american-bar-association-national>.

⁵ <https://www.justice.gov/opa/speech/file/1571906/download>.

⁶ <https://www.justice.gov/opa/speech/file/1571906/download>.

⁷ <https://www.justice.gov/opa/speech/file/1571906/download>.

⁸ <https://www.justice.gov/opa/speech/file/1571906/download>.

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whom to try to claw back, the amount of compensation to attempt to claw back, the likelihood of success, and the expected cost of litigation to obtain such compensation.

Implications

There has been internal consistency in the Department's approach to transparency since it started altering its plan for corporate criminal enforcement in 2021.⁹ This Clawback Pilot Program is an expansion of the Department's efforts at providing companies more and better incentives to police themselves—particularly by voluntarily reporting misconduct and creating or improving internal compliance programs. We view the Clawback Pilot Program as another evolutionary, not revolutionary, step in the Department's ongoing desire to incentivize responsible corporate behavior.

This Clawback Pilot Program largely brings to the Criminal Division officially a practice previously informally in place for Main Justice components, with some slight modifications. For example, DAG Monaco first suggested prosecutors take into account whether a company has a clawback program for executives involved in wrongdoing in her September 2022 memorandum, *Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group*.¹⁰ DAG Monaco instructed Main Justice components to “examine whether compensation systems are crafted in a way that allows for retroactive discipline, including through the use of clawback measures, partial escrowing of compensation, or equivalent arrangements.”¹¹ The Clawback Pilot Program reads similarly, explaining that criterion with more clarity as “a prohibition on bonuses for employees . . . disciplinary measures for employees who violate applicable law . . . and incentives for employees who demonstrate full commitment to compliance processes.”¹² Not only the language but the intent of the programs are aligned, as both reward transparency with leniency.

Several features of the Clawback Pilot Program warrant mentioning. As with all nationwide policies, ambiguities in the text of the Clawback Pilot Program raise the risk of inconsistent application. For example, the enumerated list of criteria the Criminal Division may require a company to include is nonexclusive. Since use of the Clawback Pilot Program will become pervasive—as it will be required for all corporate resolutions for three years—it is not hard to imagine that the Criminal Division will consider different, unenumerated factors to be warranted in some cases: “Division prosecutors will use their discretion in fashioning the appropriate requirements based on the particular facts and circumstances of the case.”¹³ While inconsistent application is always a risk, the vagueness in the specific criteria outlined in this policy leaves to the Criminal Division a great deal of discretion.

⁹ For previous client alerts discussing developments in DOJ's corporate enforcement efforts, please see, e.g., [here](#); [here](#); and [here](#).

¹⁰ <https://www.justice.gov/opa/speech/file/1535301/download>.

¹¹ <https://www.justice.gov/opa/speech/file/1535301/download>.

¹² <https://www.justice.gov/opa/speech/file/1571906/download>.

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Similarly, two of the “compliance enhancement” criteria include “disciplinary measures for employees who violate applicable law” and “incentives for employees who demonstrate full commitment to compliance processes.”¹⁴ The Clawback Pilot Program does not define either “disciplinary measures” or “incentives” with any clarity. Under the Clawback Pilot Program, it is unclear whether a certain dollar amount is enough to constitute a disciplinary measure. Would 10% of one’s salary be sufficient? 20%? 30%? Would simply forfeiting a bonus be enough? Would a threat of losing money only after a certain number of violations suffice? Would a policy which results in the loss of one’s job for failure to report misconduct be a valid incentive for full commitment to compliance? Does the ability to receive a bonus constitute an adequate incentive? These terms are vague and subject to interpretation. The Department seems to be asking companies to be creative in imposing internal discipline in accord with the general deterrent approach reflected in the policy.

We reiterate our strong belief that the Clawback Pilot Program—similar to other changes made by the Criminal Division in the past year—does not change the fact that the decision to self-disclose is highly *individualized and context-specific*. The considerations set out in the Clawback Pilot Program must be made carefully, and one must be mindful of the unique facts and circumstances in a given situation. The Clawback Pilot Program reinforces the Department’s commitment to reward forthright cooperation, though the risk of inconsistent interpretation makes the results of such disclosure difficult to precisely predict. As always, companies should continue to seek out advice from counsel so they can immediately begin weighing the pros and cons of a situation and work to position themselves for as much leniency as could be had.

¹⁴ <https://www.justice.gov/opa/speech/file/1571906/download>.

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