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March 20, 2023

DOJ Announces Pilot Program and Updated Expectations on Corporate Compensation Programs



The U.S. Department of Justice (DOJ) on March 3, 2023, unveiled a new pilot program and announced several important updates to its Evaluation of Corporate Compliance Programs (ECCP) regarding corporate compensation incentives and clawbacks. These updates build on and clarify Deputy Attorney General (DAG) Lisa Monaco's policy announcements from [September 2022](#) regarding corporate criminal enforcement.

This most recent guidance provides valuable insight into the DOJ's expectations regarding compliance-conscious compensation. However, implementing this guidance will require navigating complex issues of labor and employment law, both domestic and foreign, and will produce potentially significant shifts in corporate culture around compensation.

The Pilot Program

The first-ever [Pilot Program Regarding Compensation Incentives and Clawbacks](#) is a three-year program that applies to all corporate matters handled by the DOJ's Criminal Division. While this program only directly implicates corporate criminal resolutions, it provides important information regarding compensation incentives and rewards that the DOJ believes are most critical to a culture of compliance. The Pilot Program took effect on March 15, 2023, and consists of two parts.

Part one specifies that every corporate resolution involving the Criminal Division must include a requirement that the resolving company develop compliance-promoting criteria within its compensation and bonus system. These criteria may include such factors as the following:

- Withholding bonus payments from employees who do not meet certain compliance requirements.
- Imposing disciplinary measures for employees who violate the law and any supervisors who were willfully blind to the employee's misconduct.
- Offering financial incentives to employees who demonstrate a commitment to compliance processes.

During the resolution's term, the company must also report to the Criminal Division annually regarding the implementation of its compliance-promoting criteria.

Part two specifies that the Criminal Division will provide fine reductions to companies that attempt to claw back compensation from individual wrongdoers and those with supervisory authority over the wrongdoer or business area in which the misconduct occurred who knew of, or were willfully blind to, its occurrence. In order to be eligible for a reduction, companies must also fully cooperate with the DOJ and remediate the misconduct in a timely and appropriate manner.

If a company seeks to claw back compensation from wrongdoers, fully cooperates, and timely and appropriately remediates, then it will be permitted under the Pilot Program to reduce the payment of any applicable fine by 100% of the compensation the company is attempting to claw back. *Notably, if a company succeeds in recouping compensation from culpable executives and employees, the company will be able to keep the amount it recovered and is still entitled to the full amount of the reduced fine.*

Additionally, prosecutors will have discretion to reduce a resolving company's fine by up to 25% in the event the company's good faith efforts to claw back compensation are unsuccessful.

As DAG Monaco noted in her [remarks](#) earlier this month about this new DOJ initiative, the Pilot Program is intended to "shift the burden of corporate wrongdoing away from shareholders . . . onto those directly responsible" and "encourage companies who do not already factor compliance into compensation to retool their programs and get ahead of the curve."

DOJ Corporate Compliance Guidance Updates

As [announced](#) by Assistant Attorney General for the Criminal Division (AAG) Kenneth Polite, prosecutors will now "consider more closely" a company's total compensation system. Total compensation encompasses all forms of monetary payments to employees, including the following: salary, bonus, or incentive pay; profit sharing; equity; fringe benefits; perquisites; and retirement and welfare plans. Noting that the "design and implementation of compensation schemes play an important role in fostering a compliance culture," the [updated ECCP](#) directs prosecutors to "consider whether a company has incentivized compliance by designing compensation systems that defer or escrow certain compensation tied to conduct consistent with company values and policies." In addition, prosecutors are advised to "consider whether provisions for recoupment or reduction of compensation due to compliance violations or misconduct are maintained and enforced in accordance with company policy and applicable laws."

The ECCP also significantly expands on the factors prosecutors may consider when measuring the effectiveness of a company's incentives for compliance and disincentives for noncompliance. Among the new "financial incentive system" factors prosecutors can weigh are the following:

- The role the company's compliance function has in designing and awarding financial incentives at the senior level.
- The percentage of executive compensation that is structured to encourage enduring ethical business objectives.
- Whether bonuses and deferred compensation arrangements are subject to cancellation or recoupment by the company should misconduct be discovered.
- Whether the company has a policy for recouping compensation that has been paid in the event of misconduct.

According to AAG Polite, while the DOJ has already been focused on these factors, the ECCP revisions "serve to recognize their importance and provide additional transparency about how our prosecutors will consider them." The changes also echo DAG Monaco's September 2022 remarks, in which she described the DOJ's policy updates as utilizing a "carrot-and-stick" approach.

Increasing Focus on Clawbacks

The DOJ's focus on clawbacks in negotiating resolutions is part of a broader set of enforcement reforms that rely on the use of clawback measures. Indeed, the U.S. Securities and Exchange Commission (SEC), like the DOJ, has sought to leverage clawbacks to carry out its enforcement mandates. Specifically, in October 2022, the SEC [adopted](#) final rules directing the national securities exchanges to establish listing standards requiring companies to adopt, enforce, and disclose policies for the recovery, or clawback, of excess incentive-based compensation from current and former executive officers in the event of an accounting restatement. On February 22, 2023, the New York Stock Exchange (NYSE) and Nasdaq Stock Market each released their [proposed listing standards](#) in response to this SEC rule. Should the use of clawbacks begin to bear fruit for the DOJ and SEC, there is no reason to doubt its continued expansion. Companies would be well-advised to begin reviewing their incentive compensation plans and grants to determine whether modification is appropriate.

Takeaways

The Pilot Program and ECCP revisions are the latest in a wave of announcements from the DOJ designed to incentivize companies to hold executives and employees accountable for wrongdoing, and reward conduct that promotes compliance. Taken together, these policies provide concrete and actionable guidance regarding the DOJ's expectations as to the implementation of compliance-conscious compensation policies. Companies should take a hard look at their policies around these issues to ensure that they are well-placed to meet the expectations that the DOJ—and the SEC—have articulated regarding executive and employee compensation. Given the complexities of implementing changes to compensation policies, particularly for global corporations, and the demonstrated importance of these issues to U.S. regulators, corporations should coordinate closely with experienced counsel as they adapt to this guidance.

Authors

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