

# Regulatory and Enforcement Alert

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## Wave of Corporate Compliance Guidance Continues: DOJ Criminal Division Issues Updated Compensation Guidance and Three-Year Pilot Program on Compensation Incentives and Clawbacks

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Last week, the U.S. Department of Justice (“DOJ”) Criminal Division issued more detailed guidance on what it views as appropriate compensation structures within an effective compliance program, as well as a three-year pilot program regarding corporate compensation incentives and clawbacks. In a speech introducing the guidance and related pilot program, Deputy Attorney General Lisa Monaco described the program as designed to increase the “skin in the game” for executives and employees in ensuring effective compliance programs.

### **Updated “Evaluation of Corporate Compliance Programs” Guidance**

The Criminal Division’s expanded guidance includes several compensation-related factors for prosecutors to consider when reviewing compliance programs in the context of corporate charging and cooperation decisions. They include whether a compensation system defers or escrows amounts based on meeting company values and policies, whether employee contracts include recoupment provisions triggered by compliance violations, and whether compensation-related disciplinary actions are enforced, announced, and tracked for consistency across the organization. It also directs prosecutors to evaluate whether a company offers opportunities for managers and employees to serve as compliance “champions,” how compensation for the compliance team itself is structured, and what role the compliance team plays in setting compensation for others. The percentage of executive compensation structured to “encourage enduring ethical business objectives” will be an important factor. Notice mechanisms to let employees know they will not benefit from violations, good faith efforts to follow company policies and relevant laws, and financial incentives tied to targets that are achievable if the business operates in a compliant manner will be considered. Ultimately, how much compensation has been impacted positively or negatively by compliance-related activities will bear on an assessment of its role in the overall compliance program.

### **New Pilot Program on Compensation Incentives & Clawbacks**

The DOJ’s new pilot program—which goes into effect on March 15, 2023, for a term of three years—has two principle parts: First, when entering into criminal resolutions, companies will be required to implement compliance-related criteria in their compensation and bonus systems and to report to the Department about implementation throughout the term of the resolution. Criteria may include prohibition of bonuses for employees who do not satisfy compliance performance requirements, disciplinary measures for violations (including against

supervisors and those who knew of or were “willfully blind” to misconduct), and incentives for employees who demonstrate full commitment to compliance. The precise requirements in any given matter will be at the discretion of Criminal Division prosecutors, and considerations in making that case-by-case determination will include the elements of a company’s existing compensation program.

Second, as announced, “the Criminal Division will provide fine reductions to companies who seek to claw back compensation from corporate wrongdoers.” A resolving company will be permitted to pay a fine, less a credit for the amount it has attempted to claw back from culpable executives and employees. If successful in recovery, the company will be permitted to retain the clawed-back money. Clawback efforts that are made in good faith but turn out to be unsuccessful will still make the company eligible for a discretionary fine reduction. The Criminal Division stated that the program is consistent with the DOJ guidance announced in September 2022: moving the burden of corporate wrongdoing from the shareholders to responsible parties. Companies will need to evaluate the extent of individual wrongdoing within identified misconduct, and assess the appropriate amounts to designate within the overall fine to claw back for its benefit.

Under the program, clawback targets should include those who had supervisory authority over employees or business areas where the misconduct occurred, or individuals who “knew of, or were willfully blind to, the misconduct.” Full cooperation, “timely and appropriate” remediation, and good faith initiation of the recoupment process before the time of resolution are conditions for a fine reduction. Criminal Division prosecutors are directed to reduce fines by 100% of the amount recouped during resolution. These fine reductions do not, however, affect applicable restitution, forfeiture, disgorgement, or other agreed-upon payments by the company. At the point of resolution, the company will be required to pay the full amount of the applicable fine, less the amount it is attempting to claw back. At the end of the resolution term, the company is required to pay the balance of any amount not recovered, unless a discretionary reduction is granted. Prosecutors have discretion to reduce the outstanding fine amount up to 25%, if, for example, the company has incurred significant litigation costs for shareholders—last week’s announcement offered little guidance on what precise categories of litigation costs may qualify—or shows it is “highly likely” to recoup shortly after the resolution term ends.

DOJ has stated that while this formalized guidance may be new, it incorporates principles long implemented by the Department. In her speech last week, Lisa Monaco described the DOJ’s recent plea agreement with Danske Bank, in which the Danish bank agreed to revise its performance review and bonus system that withholds bonuses from executives who have a deficient compliance score.

## What's Next

The DOJ continues, through a series of policy announcements, to provide companies with guidance about what it views as the elements of an effective compliance programs as well as what is required to receive credit for voluntary self-reporting and/or cooperation. Companies will want to be mindful of this guidance as well as requirements of the new pilot programs they weigh voluntary cooperation with the DOJ or other paths to a resolution.

*For further reading:* To read our previous analysis on the September 2022 Memo, [click here](#). To read our previous analysis on the new Corporate Enforcement Policy, [click here](#). To read our previous analysis on the new Voluntary Self-Disclosure Policy, [click here](#).

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