

## TWO-SIDES OF THE COIN: NEW DOJ PILOT PROGRAM TIES EMPLOYEE COMPENSATION TO COMPLIANCE IN CORPORATE CRIMINAL SETTLEMENTS

In furtherance of the U.S. Department of Justice's ("DOJ") new corporate criminal enforcement [policy](#) that has been rolled out through a series of speeches and guidance documents since October 2021, on March 3, 2023, Assistant Attorney General and head of the Criminal Division, Kenneth A. Polite Jr., provided [details](#) on DOJ's new three-year Pilot Program on Compensation Incentives and Clawbacks ("[Pilot Program](#)"), which Deputy Attorney General ("DAG") Lisa Monaco [previewed](#) on March 2, 2023. The Pilot Program includes new settlement undertakings requiring a company to adopt positive and/or negative incentives for employee bonus and performance evaluations, and offering credit towards settlement payments for clawing back compensation from responsible employees.

In September 2022, we [advised](#) that there would be DOJ policy changes and department programs that would provide more "Sticks" than "Carrots" to promote corporate compliance. We [reported](#) that the February 22, 2023 announcement of the Voluntary Self-Disclosure Policy ("[VSD Policy](#)") came as no surprise, and the Pilot Program is the next effort in the DOJ's focus on building a base for corporate criminal enforcement and prevention, reemphasizing individual accountability, and rewarding companies' investments in compliance.

### NEW SETTLEMENT REQUIREMENT: COMPLIANCE-PROMOTING COMPENSATION PROGRAM

As part of the Pilot Program, DOJ will, as of March 15, 2023, require that a company settling a criminal matter institute "compliance-promoting criteria" within its compensation and bonus system.

The [memo](#) on the Pilot Program discusses how companies can create both positive and negative incentives through their compensation and bonus programs to promote executives' and employees' adherence to compliance policies and provides examples:

1. a prohibition on bonuses for employees who do not satisfy compliance performance requirements;
2. disciplinary measures for employees who violate applicable law and others who both:

- A. had supervisory authority over the employee(s) or business area engaged in the misconduct and
  - B. knew of, or were wilfully blind to, the misconduct; and
3. incentives for employees who demonstrate full commitment to compliance processes.

According to DOJ, by including compliance-related criteria in compensation and bonus systems, individuals will have "skin in the game" and personal incentives to comply with a company's compliance framework. However, there appears to be an understanding that the development and implementation of such policies, particularly in larger, multi-national corporate entities may be complicated. The Pilot Program provides some discretion to prosecutors to work with companies, including to address the limitations that non-U.S. law may impose on being able to institute such policies.

## **FINE REDUCTION FOR COMPANY-IMPOSED CLAWBACKS**

The second part of the Pilot Program is that the Criminal Division will reduce fines for companies who claw back compensation from wrongdoers. The settling company will receive a credit against any penalty due equal to the amount of compensation the company is attempting to claw back from the corporate wrongdoers ("Possible Clawback Reduction"). If the company successfully claws back the compensation, the company gets to keep the money it recoups, a strong incentive to do so. If the company is unsuccessful in its clawback efforts, the company must pay the Possible Clawback Reduction less any amount the company successfully recouped. How the Possible Clawback Reduction amount will factor into global settlements with other U.S. (or non-U.S.) authorities and regulators, remains to be seen.

DOJ also recognizes the potential difficulty with clawback programs. If a company makes a good faith effort to claw back compensation from executives and employees who engaged in wrongdoing but is unsuccessful, the company may still be eligible, at the prosecutor's discretion, to receive a penalty reduction of up to 25% of the amount of compensation the company attempted to claw back.

Clawback programs are becoming an increasingly popular tool in the United States in efforts to promote individual accountability. [NYSE](#) and [NASDAQ](#) just released their proposed clawback rules for listed companies, as required by an [SEC rule](#) that came into effect January 27, 2023. The proposed rules would require that listed companies adopt a clawback policy for all incentive-based compensation erroneously received by executive officers triggered when the listing company is required to prepare an accounting restatement due to material non-compliance with any financial reporting requirement under the securities laws (which we wrote about [here](#)).

## **KEY TAKEAWAYS**

The Pilot Program is indicative of DOJ putting real money on the line when it comes to individual accountability and incentivizing companies to implement programs to support the DOJ's initiative. DAG Monaco explicitly stated that the DOJ "intend(s) this program to encourage companies who do not already factor compliance into compensation to retool their programs and get ahead of the

curve." To follow this advice, companies should bring together compliance, litigation and executive compensation counsel, to determine how best to implement compliance-related criteria into their performance reviews and bonus systems, as well as develop sustainable clawback procedures for executives and employees who engage in misconduct, and be prepared to use and defend them if the need arises.

## **HOW WE CAN HELP**

Watershed developments in U.S. enforcement initiatives increasingly need to be considered on a global enterprise-wide basis. With our integrated approach across regulatory compliance, litigation and employment law disciplines in the United States and through our global network, Clifford Chance can help your company assess whether and how to react to DOJ enforcement trends with respect to compliance issues and individual accountability.

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