

# DOJ announces new clawback, messaging and monitorship guidance, national security resources

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Last week, DOJ announced much-anticipated guidance on compensation clawbacks and the use of messaging apps, as well as modifications to its monitorship policies. The guidance provides companies facing a criminal resolution a roadmap to secure credit for clawbacks against fines imposed by DOJ and supplements existing guidance on financial compensation and the use and preservation of messaging apps. DOJ also announced a surge in resources to combat sanctions evasion and export control violations.

A new week brought additional guidance from DOJ, this time the much-anticipated compliance guidance on compensation structures to incentivize compliance and the use of personal devices and messaging apps to engage in business communications. The guidance was announced by the Deputy Attorney General (DAG) Lisa Monaco at the ABA's 38th Annual National Institute on White Collar Crime. Criminal Division Assistant Attorney General (AAG) Kenneth Polite provided greater detail in his keynote address at the same conference. The guidance comes in two forms: (1) a new Criminal Division three-year "pilot program" that will include clawbacks and compensation structures as requirements of criminal resolutions with the Criminal Division, and potential reductions of a resolving company's fine based on compensation that it is able to (or attempts to) claw back from employees who were involved in, or willfully blind to, the misconduct; and (2) revisions to the Criminal Division's Evaluation of Corporate Compliance Programs (ECCP) that add sections on financial incentives for compliance, including clawbacks, and the use of personal devices and messaging apps.

Because the ECCP is in the form of questions that Criminal Division prosecutors will ask companies as part of their evaluation of the companies' compliance programs, these new additions stop short of providing specific policies or procedures that companies are required to adopt. Moreover, we do not yet know how significant or outsized a role these additions will play—particularly for companies that for legitimate reasons (such as labor or employment laws, data privacy or resources) are unable to take significant steps to claw back employee compensation—as compared to other important components of a compliance program. Nonetheless, the new ECCP questions serve as a transparent and useful guide for companies trying to understand DOJ's evaluation of these complex issues.

With respect to the clawback "pilot program," DOJ has sought to incentivize companies that are resolving with the Criminal Division to claw back compensation from employees who were either involved in the underlying misconduct or had supervisory authority over the employees or business areas engaged in the misconduct and knew of, or were willfully blind to, that misconduct. In many cases, this will likely involve litigating such claims. There are several potential issues and concerns with this program, including that (1) it may disproportionately benefit companies in some geographical regions and/or industries with fewer impediments to these types of clawbacks over others, (2) it is likely to disproportionately benefit companies whose misconduct involved senior executives because those are the individuals most likely to have significant amounts of recoupable compensation, and (3) it is likely that companies litigating clawbacks will be forced to turn over discovery related to the underlying investigation and communications with the

government, potentially giving individuals charged by DOJ early and broader discovery than they otherwise would receive.

The Criminal Division also released a modified version of its monitorship policy, codifying DOJ's practice that monitor selection "be made in keeping with the Department's commitment to diversity, equity, and inclusion," and extending a monitor's "cooling off" period, during which they are prohibited from being employed by or affiliated with the monitored entity, from two years to three years.

Finally, DOJ announced "significant restructuring and resource commitments within the National Security Division," including the addition of "more than 25 new prosecutors who will investigate and prosecute sanctions evasion, export control violations and similar economic crimes." Although there is often a delay (sometimes years-long) between the announcement of additional resources and the realization of more investigations and prosecutions, these changes will undoubtedly have a meaningful impact over the long haul.

# 1. The pilot program on compensation incentives and clawbacks

The DOJ Criminal Division released the new pilot program on compensation incentives and clawbacks on Friday, March 3. The program will go into effect on March 15, 2023. This new DOJ guidance follows on the heels of recent announcements by the SEC, NYSE, and Nasdaq on clawbacks for publicly traded companies. The program has two key components relating to compliance requirements for criminal resolutions and credit against fines for clawbacks.

## A. Compliance requirements for criminal resolutions

According to the program, every Criminal Division corporate resolution will now include a requirement that the company implement criteria related to compliance in its compensation and bonus system and, as part of the company's annual compliance reports to the government (a longstanding requirement of such resolutions), the company will now also be required to report on its implementation of these new criteria. DOJ stated that the criteria "may include, but are not limited to: (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 willfully blind to, the misconduct; and (3) incentives for employees who demonstrate full commitment to compliance processes."

The Criminal Division acknowledged that "applicable foreign and domestic law" may create obstacles for some companies, leaving it to prosecutors' discretion to evaluate the company's criteria based on the facts and circumstances of a given case.

## B. Credits against fines for clawbacks

In addition to requiring new compensation criteria as part of a compliance program for resolving companies, the pilot program also offers discounts off of the fine amount imposed by DOJ where the company has fully cooperated and remediated, and has demonstrated that it is seeking to "recoup compensation from employees who engaged in wrongdoing in connection with the conduct under investigation, or others who both (a) had supervisory authority over the employee(s) or business area engaged in the misconduct and (b) knew of, or were willfully blind to, the misconduct, and has in good faith initiated the process to recoup such compensation before the time of resolution."

In such circumstances, the Criminal Division "shall accord, in addition to any other reduction available under applicable policy, a reduction of the fine in the amount of 100% of any such compensation that is recouped during the period of

the resolution.” Clawbacks will not have an impact on restitution, forfeiture, disgorgement or other non-fine/penalty amounts. The company will have until the end of the resolution term (usually three years) to actually recoup the money, or otherwise will be required to pay the full amount of the fine.

In addition, even where a company is unable to recoup compensation, so long as it demonstrates a “good faith attempt” to do so, prosecutors have the discretion to reduce the fine by up to 25% of the amount of compensation the company sought to claw back. The guidance goes on to state that “reductions may be warranted where, for instance, a company incurred significant litigation costs for shareholders or can demonstrate that it is highly likely that it will successfully recoup the compensation shortly after the end of the resolution term.”

## **C. Issues and consequences arising from the pilot program**

There are a number of issues and consequences (some likely unintended) arising from the new pilot program. As an initial matter, although it only impacts companies that are resolving with the DOJ Criminal Division, companies would likely need to promulgate compensation recoupment policies sooner rather than later in order to put themselves in the best position to take advantage of this program should they ever find themselves in DOJ’s crosshairs.

Second, with respect to the credits for clawbacks, companies are only eligible for such credits where they have fully cooperated and remediated. Particularly in conjunction with other recent guidance raising the bar to achieve such a result, prosecutors will have considerable discretion in determining whether a company has qualified for the crediting.

Third, the discounts accorded for clawbacks (or attempted clawbacks) create some interesting, and potentially incongruous, results. There are certain countries and types of companies where clawbacks are more easily executed than others. For example, the EU’s labor and employment laws make it difficult to claw back compensation from employees. As a result, the pilot program will likely disproportionately benefit certain companies over others, through no fault of the company.

Similarly, depending on the company, it is often the more senior executives who receive the type of compensation that can be clawed back—i.e., bonuses and equity compensation. Even in cases where most employees receive compensation that can be recouped, it is almost certainly the most senior executives who receive the largest amount of such compensation. As a result, ironically it will be the company whose senior-most executives engaged in or were willfully blind to the misconduct that will be eligible for the biggest benefits under this program (because there will be more to recoup and therefore more to credit).

Lastly, even in countries where clawbacks are permitted, the process to claw back compensation is often protracted, contentious and expensive. In addition, the targeted employee oftentimes has rights and the ability to seek and obtain discovery of relevant materials, which most likely would include the company’s underlying investigation and communications with the government. This may mean that culpable individuals who are charged (or even still just being investigated) by the government will get earlier and broader access to discovery than they otherwise would, something that the government oftentimes seeks to avoid by attempting to stay parallel civil cases.

## **2. Revised compliance guidance**

The DOJ Criminal Division also announced revisions to the ECCP, which outlines the questions that prosecutors ask companies in evaluating their compliance programs. The revised guidance now incorporates questions related to financial compensation as a method to incentivize compliance, as well as policies and controls around the use of messaging apps and personal devices.

Although the guidance is in the form of questions, which each company will answer based on its own unique circumstances and risk profile, the questions do provide insight into DOJ's thinking about these issues. Moreover, many of the questions are leading and reveal DOJ's preferences. For example, DOJ asks whether a company has "policies or procedures in place to recoup compensation that would not have been achieved but for misconduct attributable directly or indirectly to the executive or employee," and "[w]ith respect to the particular misconduct at issue, has the company made good faith efforts to follow its policies and practices in this respect?" In short, this suggests that DOJ expects companies to put in place broad policies to allow it to recoup compensation in the event of misconduct, and to actually enforce those policies when misconduct occurs.

With respect to messaging apps and personal devices, the revised ECCP focuses on three new topics: communication channels, policy environment, and risk management. According to the ECCP, prosecutors will want to know what communication channels the company permits and why, that the company has given thought to how this should vary by jurisdiction and business function, and the mechanisms put in place to preserve electronic communication channels (including with respect to the deletion settings on the apps). Where companies have a "bring your own device" (BYOD) program, prosecutors will want to know what policies are in place and whether the company is permitted to review business communications on personal phones pursuant to the BYOD policy, whether the company has a policy that requires employees to transfer business-related data and information from a personal phone to company platforms, whether these policies are reasonable in light of the company's circumstances and profile, and whether these policies are actually being enforced. Finally, prosecutors will probe what type of controls the company has in place to monitor and ensure compliance with these policies, and what discipline the company has imposed for employees who violate the policies. Whether this policy provides sufficient incentives for companies to revise their retention plans as they relate to messaging apps and personal devices in order to gain some form of "credit" from DOJ should they find themselves under investigation remains to be seen.

### **3. Modifications to Criminal Division monitorship policy**

The Criminal Division also released a revised version of its monitorship policy, largely codifying existing practice. First, it formalized, "[c]onsistent with the Criminal Division's approach for the past several years," that "any submission or selection of a monitor candidate by either the Company or the Criminal Division should be made in keeping with the Department's commitment to diversity, equity, and inclusion, and without unlawful discrimination against any person or class of persons." Second, "consistent with the Criminal Division's practice since at least 2018, many of the requirements for monitors apply to monitor teams, in addition to the titular monitors," including ethical certifications and requirements. And finally, "the cooling off period for monitors [during which the monitor may not be employed by or affiliated with the monitored entity] is now not less than three years, rather than two years, from the date of the termination of the monitorship."

### **4. Surge in resources to combat sanctions evasion and export control violations**

In addition to the new guidance that DOJ announced last week, DAG Monaco also announced that DOJ would be infusing resources into and restructuring the National Security Division "to address the increasing intersection of corporate crime and national security." These resources and restructuring will include adding 25 new prosecutors, appointing the National Security Division's first-ever Chief Counsel for Corporate Enforcement, and issuing "joint advisories with the Commerce and Treasury Departments—akin to the FCPA guidance we have for years published jointly with the SEC—to inform the private sector about enforcement trends and to convey the department's expectations as to national security-related compliance." DAG Monaco also announced a "substantial investment" in the Bank Integrity Unit in the Criminal Division's Money Laundering and Asset Recovery Section, though unlike with

respect to the National Security Division, the DAG did not specify what this “substantial investment” would entail.

## 5. Key takeaways

As we have noted for many of the previous guidance announcements over the past few months, these announcements provide yet further transparency and predictability for companies seeking to understand DOJ’s view of clawbacks and the use of messaging apps and personal devices.

Nonetheless, it is important to bear in mind that these new aspects of the Criminal Division’s ECCP are but two of many other critical components of an effective compliance program, and companies should not place an outsized emphasis on these two items at the expense of other (arguably more important) matters, such as risk assessment, third-party management, an effective reporting mechanism, training and monitoring.

Given the importance of these other aspects of the compliance program, it is interesting that DOJ has chosen to offer potential financial rewards to companies that seek to claw back compensation, but not to companies that, for example, terminate employee wrongdoers, sever relationships with questionable third parties, or have an effective preexisting compliance program at the time of the misconduct.

Likewise, because clawbacks are not attainable by every company, because not all companies have the financial resources to pay large bonuses that can be clawed back, and because companies with executive-level involvement in the misconduct can likely claw back the most compensation, the new pilot program may disproportionately benefit certain companies over others, ironically those with the most egregious and high-level involvement by executives in the wrongdoing.

Lastly, as with most guidance documents, prosecutors still retain a great deal of discretion in determining whether and how to credit companies on all of these fronts, including in determining whether the company fully cooperated and remediated (and therefore is eligible for the clawback credit), whether the company attempted “in good faith” to recoup compensation even when it was unsuccessful (and therefore is eligible for up to 25% credit), and whether the company has satisfactorily answered the questions in the ECCP.

With that said, companies should consider implementing—where local law permits—policies that permit them to recoup compensation from employees who engage in wrongdoing or are supervisors who knew of or were willfully blind to misconduct. Moreover, companies should consider implementing—again, where local law permits—policies governing messaging apps and personal devices that make clear:

- What messaging platforms and devices are permitted to be used for business communications;
- The requirements and prohibitions for using personal devices and messaging apps for business;
- The expectations for business communications that occur on non-approved platforms and devices (e.g., that they be transferred to approved platforms);
- The retention expectations for data and information on approved platforms, including what the deletion settings (to the extent the platform has them) should be set to; and
- What the disciplinary consequences would be for failing to comply with these policies.

Companies should also consider training employees on these policies and taking steps to monitor and enforce violations of them.

Finally, although we do not expect that the surge in resources to combat sanctions evasion and export control violations

will have an immediate impact, this move is consistent with messaging from the DOJ for the past 18 months and is likely to have a meaningful impact over time.

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