

## **The Criminal Division's Pilot Program Regarding Compensation Incentives and Clawbacks<sup>1</sup>**

March 3, 2023

The Department of Justice (Department) is committed to tackling corporate crime and will continue to investigate and prosecute companies (and responsible individuals) who engage in such misconduct. But the Department's ultimate goal is to prevent corporate crime before it occurs. Through its policies and enforcement actions, the Department strives to deter criminal conduct, incentivize the development and implementation of effective compliance programs, and promote ethical corporate cultures.

Compensation systems that use affirmative metrics and benchmarks can reward compliance-promoting behavior. Compensation systems that clearly and effectively impose financial penalties for misconduct can also deter risky behavior and foster a culture of compliance. Consistent with the Deputy Attorney General's September 15, 2022 memorandum setting forth revisions to the Department's corporate criminal enforcement policies, the Department's Criminal Division (Division) has considered how to reward corporations that develop solutions to incentivize better compliance through their compensation systems, including the use of clawback policies. Throughout this process, one consideration has been how policies may seek to potentially shift the burden of corporate financial penalties away from shareholders—who in many cases do not have a role in misconduct—onto those more directly responsible. In this review, the Division has consulted with its agency partners, members of the defense bar, academics, experts on executive compensation, and other regulators to gain valuable perspectives and data points.

Accordingly, the Division is conducting a Compensation Incentives and Clawbacks Pilot Program (Program). As set forth below, the Program provides that, when entering into criminal resolutions, companies will be required to implement compliance-related criteria in their compensation and bonus system and to report to the Division about such implementation during the term of such resolutions. The Program also directs Division prosecutors to consider possible fine reductions where companies seek to recoup compensation from culpable employees 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.

The Program is a three-year initiative applicable to all corporate matters handled by the Division and is effective March 15, 2023. This Program does not modify the Criminal Division's Corporate Enforcement Policy, the Evaluation of Corporate Compliance Programs, or the Principles of Federal Prosecution of Business Organizations. At the end of this pilot period, the Division will determine whether the Program will be extended in duration or modified in any respect.

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<sup>1</sup> This memorandum is for internal use only and does not create any privileges, benefits, or rights, substantive or procedural, enforceable by any individual, organization, party or witness in any administrative, civil, or criminal matter.

## **I. Compliance Enhancements**

During the Program, every corporate resolution entered into by the Division shall include a requirement that the resolving company implement criteria related to compliance in its compensation and bonus system. The company must also report to the Division annually during the term of the resolution about its implementation of such criteria. These 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. Division prosecutors will use their discretion in fashioning the appropriate requirements based on the particular facts and circumstances of the case, including, but not limited to, applicable foreign and domestic law. In making this determination, prosecutors will be mindful of, and afford due consideration to, how the company has structured its existing compensation program.

## **II. Deferred Fine Reduction**

Where a criminal resolution is warranted, if a company fully cooperates and timely and appropriately remediates<sup>2</sup> and demonstrates it has implemented a program 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<sup>3</sup> initiated the process to recoup such compensation before the time of resolution, an additional fine reduction may be warranted. Specifically, in such circumstances, Division prosecutors 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. Any fine reduction afforded under the Program does not affect any applicable restitution, forfeiture, disgorgement, or other agreed-upon payment by the company.

To accommodate the process required to recoup such compensation, at the time of resolution, the company will be required to pay the full amount of the otherwise applicable fine (Original Fine) less 100% of the amount of compensation the company is attempting to claw back (Possible Clawback Reduction). At the conclusion of the resolution term, if the company has not recouped the full amount of compensation it sought to claw back, the company will be required to pay the Possible Clawback Reduction minus 100% of the compensation actually recovered.

If a company's good faith attempt to recoup any such compensation is unsuccessful, Division prosecutors may in their discretion accord a reduction of up to 25% of the amount of compensation the company attempted to clawback such that the company must at the conclusion of the resolution term make an additional fine payment of the Possible Clawback Reduction less the determined

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<sup>2</sup> These terms have the same meanings as those set forth in the Criminal Division's Corporate Enforcement Policy.

<sup>3</sup> The Criminal Division shall determine in its sole discretion the presence or absence of a company's good faith. For instance, attempts to recoup compensation against only a certain class of individuals, such as whistleblowers or those suspected of cooperating with the government, may evince a company's bad faith.

reduction percentage of the compensation sought. Such 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.