



U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General

Washington, D.C. 20530

U.S. Department of Justice Criminal Division Corporate Enforcement Note: *Report on the Pilot Program Regarding Compensation Incentives and Clawbacks*

Key Takeaways

- Since March 2023, sixteen companies that have entered into corporate resolutions with the Criminal Division have implemented compliance criteria into their compensation systems.
- Three companies have taken advantage of the dollar-for-dollar fine reduction for withholding compensation from culpable individuals.
- Multiple companies have taken note and include compliance metrics in their performance and compensation programs pre-resolution.

Overview

In March 2023, the Department of Justice's Criminal Division announced its three-year [Pilot Program Regarding Compensation Incentives and Clawbacks](#) (Compensation Pilot). As set forth in the Compensation Pilot's preamble, compensation systems that clearly and effectively impose financial penalties for misconduct can deter risky behavior and foster a culture of compliance. At the same time, compensation systems that use affirmative metrics and benchmarks can reward compliance-promoting behavior. Through the Compensation Pilot, the Criminal Division has sought to reward companies that incentivize compliance through their compensation systems, including through the use of clawback policies, and has required all companies entering into corporate resolutions to implement compliance-related criteria in their compensation and bonus system.

Today, halfway through the pilot period, the Criminal Division releases this report to provide an update on the implementation of the Compensation Pilot and how companies that have resolved with the Criminal Division are updating their compensation systems to encourage compliance.

Background

In September 2022, the Deputy Attorney General announced that when evaluating the strength of a company's compliance program, prosecutors should consider whether companies incorporated compliance-focused elements in their compensation systems and asked the Criminal Division to develop further guidance on rewarding companies that adopted clawback policies or other

arrangements that shift the burden of corporate financial penalties from shareholders to those more directly responsible.¹

The Criminal Division formed a working group on compensation incentives to examine the issue and engage with relevant stakeholders. The Criminal Division heard input from in-house counsel and compliance experts, corporate counsel, and federal regulatory agencies. Four key takeaways emerged from these discussions.

First, both carrots and sticks are important in developing a culture of ethics and compliance at companies. Encouraging employees and executives to take compliance seriously requires a multi-faceted approach that identifies not only clear downsides for not adhering to a company's compliance and ethics program, but also clear upsides for demonstrating core values, including bonuses, awards, or other accolades.

Second, clawing back or withholding compensation can be a complex undertaking depending on the company's structure and the jurisdictions in which it operates. Companies noted that clawback efforts are often complex, difficult, and time consuming and, particularly where clawbacks result in litigation, can cost more than the amount that is ultimately recouped. Stakeholders noted that clawbacks are particularly challenging in global corporations that operate in jurisdictions that provide legal protections for employees such that recouping compensation is difficult even where employees have been prosecuted and convicted of misconduct. While recouping compensation in the U.S. is less challenging, global companies expressed concerns about employing different standards for their U.S. operations and international operations. In these sessions, experts also opined that withholding future compensation, including deferred compensation, is less complex than recouping compensation already paid.

Third, experts emphasized the need for flexibility when tailoring compensation programs for a specific company or industry. Given the complex legal and regulatory environment companies face globally, regulators advised that they had allowed companies significant latitude in designing compensation programs, encouraging companies to provide carrots and sticks but avoiding prescriptive requirements. Companies highlighted different approaches they had taken, where those approaches succeeded, and the cost-savings or expense associated with those efforts.

Fourth, many experts expressed the view that monetary incentives and disincentives are only one aspect of the approach necessary to promote a strong compliance program and culture of compliance.

Based on this feedback and experience, in March 2023, the Criminal Division announced the Compensation Pilot, amended its [Evaluation of Corporate Compliance Programs](#) (ECCP) to address compliance metrics in compensation programs, and updated the minimum corporate

¹ [Further Revisions to Corporate Criminal Enforcement Policies, September 15, 2022.](#)

compliance program requirements described in Attachment C to Criminal Division corporate resolutions.²

Amendments to Evaluation of Corporate Compliance Programs

The ECCP amendments provide prosecutors guidance on questions to ask about compensation structures in assessing corporate compliance systems, including whether the company has provided positive incentives for implementing a compliance program, engaging in ethical behavior, or demonstrating ethical leadership, designed compensation systems that defer certain compensation to incentivize conduct consistent with company policies and values, and took action to recoup or reduce compensation to the extent allowed under applicable law, how the company has sought to penalize breaches of the compliance program, and how much compensation has been impacted through compliance-related incentives and disincentives. This dialogue helps prosecutors understand how companies are incentivizing ethical behavior and remediating compliance breaches and gives companies an opportunity to continue that remediation in advance of any resolution.

Compensation Pilot Program

The Compensation Pilot has two parts:

(1) a **mandatory** requirement that all companies resolving with the Criminal Division implement compliance-related criteria into their compensation systems. The Criminal Division affords flexibility in the language adapted based on the facts of each case but generally requires companies to implement clear mechanisms to incentivize behavior consistent with the company's compliance and ethics programs and to disincentivize violations of the compliance program through financial consequences. 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.

(2) a **voluntary** fine reduction for companies that withhold or claw back compensation from certain culpable employees. Companies can receive a dollar-for-dollar credit for compensation withheld or recouped during the resolution's term and up to 25% credit for compensation the company unsuccessfully attempts to recoup or withhold in good faith.

² The Criminal Division had previously required some companies resolving with it to incorporate mechanisms designed to appropriately incentivize compliance in compensation decisions, and afforded significant flexibility in how those programs were designed.

Part One—Sixteen companies have now entered into agreements requiring compliance-promoting criteria in compensation systems as part of corporate resolutions with the Criminal Division.

In each of its corporate resolutions after March 2023, the Criminal Division has required the company to incorporate criteria related to compliance into its compensation and bonus system. In short, the Criminal Division encourages companies to provide clear metrics to employees not only to reward behavior consistent with compliance values and promote ethical behavior, but also to deter misconduct.

To date, we have required the incorporation of such criteria in corporate resolutions with sixteen different companies.³ Under their agreements with the Criminal Division, these companies—whether their core business is tech, finance, crypto, manufacturing, or energy—now align compensation not just with the company’s financial performance but also with conducting business in an ethical manner. These companies are setting the tone for others in the marketplace.

As outlined above, while we require companies resolving with the Criminal Division to ensure that their compensation and bonus systems are designed to incentivize compliance with their ethics and compliance policies, we recognize the importance of tailoring a compensation system to address and mitigate company-specific and industry-specific risks. Our resolutions have included language prohibiting bonuses to employees who do not satisfy compliance performance requirements, requiring compensation reduction provisions for culpable employees, and providing compensation and bonus incentives for employees who demonstrate full commitment to ethical values.

These innovations are changing corporate behavior for companies under agreements with the Criminal Division. For example, one company under agreement with the Criminal Division required consideration of adherence to compliance standards and reporting of misconduct in its annual reviews. As a result of these efforts, and a company-wide messaging campaign, the company is seeing more internal reports of potential compliance issues.

We have also seen many companies incorporating compliance into their compensation systems through performance reviews that include an assessment of how employees demonstrate the company’s core values. For example, one company incorporated a performance review metric that measured employees based on their demonstration of ethical values. The review process for all company employees requires that managers evaluate both what employees have accomplished and how they have accomplished their goals. Ratings on these metrics factor into both compensation and promotion decisions. We are asking companies to continuously evaluate the real-world effectiveness of such incentives, share that feedback with us, and adjust their compensation metrics.

³ [Corficolombiana](#); [Albemarle](#); [Tysers](#); [H.W. Wood](#); [Freepoint](#); [SAP](#); [Gunvor](#); [Trafigura](#); [Austal USA LLC](#); [TD Securities](#); [Raytheon](#); [Binance](#); [TD Bank N.A. and TD Bank U.S. Holding Company](#); [Telefónica](#); [500.com](#).

Likewise, more companies are now reporting to the Criminal Division that they are incorporating compliance metrics into their compensation programs voluntarily pre-resolution. For example, one company reported that it has removed metrics related to winning contracts from its commercial team bonus structure and has tied incentive compensation to completion of ethics training and participation in an annual integrity review process. Several other companies have reported incorporating ethics and compliance goals and achievements into their performance evaluation and compensation processes.

Part Two—Companies can reduce their financial penalties by recouping or withholding payments made or due to certain culpable individuals.

The second part of the Compensation Pilot provides clear and predictable monetary incentives for companies to claw back, or withhold, compensation paid or otherwise due to individual wrongdoers. To that end, the Criminal Division provides companies with a dollar-for-dollar fine reduction if they recoup or withhold compensation from culpable employees and others who had supervisory authority over the employees engaged in the misconduct and knew of, or were willfully blind to, the misconduct.

In practice, this aspect of the Compensation Pilot works as follows: if a company has already withheld, reduced, or clawed back compensation, it receives a fine reduction of an equal amount up front. If a company predicts future withholding or clawbacks, the company pays its fine less the predicted amount of future withheld or clawed back compensation. By the end of the term, the company is required to pay the remaining amount of the fine less any compensation it successfully recoups. Companies may also receive a credit of up to 25% of the compensation they sought to recoup if they attempt in good faith to claw back or withhold compensation—even if those efforts are unsuccessful.

This is a double savings—the company not only receives the benefit of not paying a wrongdoer—it is also rewarded with an additional fine reduction in its resolution with the Department. This is also something we look at when we consider a company’s remediation and the credit the company should receive for cooperation and remediation, because taking steps to hold individuals financially accountable is a critical way a company can send a strong message to employees that it is committed to compliance.

To date, three companies have received fine reductions under the Compensation Pilot, two in Foreign Corrupt Practices Act (FCPA) cases and one in a Bank Secrecy Act case, and one company has deferred a portion of the fine while it attempts to withhold additional compensation.

[Albemarle](#) proactively implemented procedures to freeze future bonuses for those suspected of misconduct, who directly oversaw employees engaged in the misconduct, or who were aware of red flags but failed to prevent the misconduct. Because Albemarle had proactively implemented procedures to freeze future bonuses for those suspected of misconduct, the company was able to withhold compensation, rather than have to claw it back, and was rewarded with a reduction in its criminal monetary penalty equal to the amount of the bonuses that were withheld. Albemarle was also awarded a 45% reduction from the low end of the applicable penalty range—the highest percentage reduction to date—in light of its substantial cooperation and significant remediation,

as well as because it voluntarily self-disclosed the misconduct to the Criminal Division (albeit not in a reasonably prompt manner, thus not qualifying for a CEP declination).

SAP also withheld compensation from culpable employees and defended the decision through litigation. As a result, SAP received a fine reduction equal to the amount of withheld compensation. This was also an important aspect of the company's remediation that supported our decision to award a 40% fine reduction, along with other factors set forth in the relevant considerations.

TD Bank withheld compensation from employees at multiple levels and received a commensurate reduction in its fine. Like Albemarle and SAP, TD Bank withheld future bonuses and did not claw back bonuses already paid. TD Bank is also the first company that has predicted future withholding and received a deferral of a portion of its fine while it attempts to complete that withholding. If the Bank is successful, it will receive an additional fine reduction equal to the amount successfully withheld.

Trends and Takeaways

Thus far, the Compensation Pilot is generating positive results. Over a dozen companies under the Criminal Division's supervision have been required to adopt compliance metrics in their compensation systems, and the Compensation Pilot is driving other companies to think creatively about how to incentivize behavior consistent with core compliance and ethics values, not just through compensation but also through other metrics. Three companies have taken advantage of the credit for withholding compensation from those involved in or supervising misconduct, shifting costs from shareholders to those more culpable.

And since March 2023, we have seen companies increasingly take steps in the right direction by promoting leaders who demonstrate ethical values and adopting compensation and incentive policies that encourage responsible corporate behavior. Almost every company we encounter has incorporated compliance metrics into its compensation system or is considering compensation policies that take into account compliance. Some of these include measures to support compliance through financial incentives and disincentives for employees company-wide. And most companies incorporate adherence to compliance in performance reviews for senior executives.

Based on the success of the Compensation Pilot, we are directing our prosecutors to highlight the Compensation Pilot and other compliance-related policies early in an investigation, which ensures that companies that have not yet incorporated compliance into their core compensation or review metrics have the opportunity to start that process during our investigations and allows companies that have such metrics to consider the effectiveness of these metrics and other compliance-related policies. This is one step that should position companies to show their progress toward the end of the investigation when we are evaluating their remediation efforts and the effectiveness of their compliance program at the time of a charging decision.

Companies that make compliance a critical factor in determining compensation and that hold individuals financially accountable for misconduct are sending a clear message to employees—engaging in ethical behavior is critical to success in business. We have seen that this can encourage

employees to speak up and supervisors to take note when misconduct is identified and then move more quickly to remediate this misconduct.

Companies that proactively design their compensation systems to incentivize behavior consistent with ethical values and company policies, as part of an overall commitment to compliance, put themselves in the best position to prevent misconduct. This approach results in more reports of misconduct, allows companies to address incidents before they metastasize, and facilitates building a company-wide culture of compliance. And where misconduct nonetheless occurs, companies that use every lever to encourage compliant behavior and punish misconduct will achieve better results under the Criminal Division's policies.