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## *DOJ Announces Pilot Program and Updated Guidance: Individual Accountability Is a Top Priority*

By [Leo Tsao](#), [Corinne A. Lammers](#), [Nisa R. Gosselink-Ulep](#) & [Joanne Joseph](#)

### **I. Introduction**

On March 3, 2023, Assistant Attorney General (“AAG”) Kenneth Polite, Jr. announced new guidance issued by the Department of Justice (“DOJ”) Criminal Division intended to encourage companies to implement compensation policies to incentivize compliance-driven behavior and punish wrongdoers. First, AAG Polite [introduced](#) a new “Pilot Program” that sets forth the framework DOJ will use in assessing compliance policies governing clawbacks, and the credit that companies can receive for implementing and carrying out those policies. Second, AAG Polite announced an update to the DOJ Criminal Division’s Evaluation of Corporate Compliance Programs (“ECCP”) that provides additional guidance on how Criminal Division prosecutors will evaluate these compensation structures. Through these developments, the Criminal Division is reinforcing individual accountability as a top priority, even absent criminal charges. As Deputy Attorney General (“DAG”) Lisa Monaco [stated](#) in describing the new guidance, “Our goal is simple: to shift the burden of corporate wrongdoing away from shareholders, who frequently play no role in misconduct, onto those directly responsible.”

In addition to the new policies governing compensation structures, DAG Monaco and AAG Polite also announced other changes, including to the Criminal Division’s monitorship policies and increased resources for enforcement in national security and financial services cases. These announcements are the latest of a series of expansive changes that the DOJ Criminal Division has made targeting white-collar crime.

### **II. Compensation Incentives and Clawbacks Pilot Program**

Under the new [three-year Pilot Program Regarding Compensation Incentives and Clawbacks](#) (the “Pilot Program”), the DOJ has implemented two compliance requirements tied to a company’s compensation systems that will impact all corporate resolutions handled by the Criminal Division.<sup>1</sup>

First, going forward, every corporate resolution entered into by the Criminal Division will include a requirement that the company “implement criteria related to compliance in its compensation and bonus system.” Under the Pilot Program, companies will also be required to report to the Division annually about implementation of these criteria during the term of these resolutions.

Second, the Pilot Program encourages companies to claw back compensation from implicated individuals by providing that, if the company has fully cooperated and timely and appropriately remediated, amounts that have been clawed back from culpable individuals can be credited against the company’s

overall fine. The Pilot Program encourages companies to recoup compensation from those who were directly engaged in, as well as those who had supervisory authority and were aware of, or willfully blind to, the misconduct.

The Pilot Program also recognizes that the process to claw back compensation can be lengthy and thus provides a process for awarding credit:

1. The company pays the applicable penalty, but receives a credit for 100% of the compensation that the company is seeking to claw back ("Possible Clawback Reduction").
2. If a company is successful at clawing back the entire amount initially sought during the term of the resolution (typically, three years), it can keep the Possible Clawback Reduction.
3. If the company does not recover the Possible Clawback Reduction, it will be required to pay back the amount not recovered; provided, however, that prosecutors have discretion to reduce the fine up to 25% of the Possible Clawback Reduction where a company has demonstrated a good faith attempt at recovery.

Requiring companies to leverage financial incentives is another way for the DOJ to ensure wrongdoers are held accountable without having to pursue charges against every culpable individual.

### III. Updated Evaluation of Corporate Compliance Programs

On March 3, 2023, the DOJ Criminal Division released an [updated ECCP](#) that provides additional guidance to its prosecutors on how to evaluate the design, implementation, and effective operation of corporate compliance programs with respect to (i) policies governing compensation systems and discipline and (ii) ephemeral messaging and use of personal devices (analyzed separately in [another client alert](#)).

Regarding compensation systems and consequence management, the ECCP recognizes that "[c]ompensation structures that clearly and effectively impose financial penalties for misconduct can deter risky behavior and foster a culture of compliance. At the same time, providing positive incentives . . . can drive compliance." Thus, under the new ECCP, prosecutors are now formally encouraged to consider the design and implementation of a company's compensation and consequence management systems when evaluating compliance programs. Specifically, the ECCP instructs prosecutors to take into account additional considerations in several areas by making the following inquiries:<sup>2</sup>

- **Human Resources Process:** How transparent has the company been with the design and implementation of its disciplinary process, including whether the company communicates the actual reasons for discipline to employees in all cases or restricts disclosure of information about the terms of separation for executives who have exited the company on account of compliance violations?
- **Disciplinary Measures:** What types of disciplinary actions are available to management when it seeks to enforce compliance policies, including procedures to recoup compensation that is attributable to misconduct and practices that put employees on notice that they will not benefit from any potential fruits of misconduct?
- **Consistent Application:** What metrics does the company apply to ensure consistency of disciplinary measures across all geographies, operating units, and levels of the organization?

- **Financial Incentive System:** What percentage of executive compensation is structured to encourage ethical business objectives and are the terms of bonus and deferred compensation subject to cancellation or recoupment in the event non-compliant behavior is discovered before or after the award was issued?
- **Effectiveness:** How has the company ensured effective consequence management of compliance violations in practice, such as by analyzing company hotline data, substantiation rates, average time for completion of investigations, and consistency of disciplinary actions? How much compensation (either positively or negatively) has been actually impacted for compliance reasons?

The new ECCP guidance reflects DOJ's continued focus on individual accountability by directing prosecutors to evaluate how companies hold individuals responsible for misconduct through clawbacks and other financial incentives or consequences.

#### **IV. Other Changes to the DOJ's Corporate Enforcement Policies**

##### **A. Revised Memorandum on Selection of Monitors**

The DOJ also [released](#) revised guidance on the selection of monitors in Criminal Division matters. These updates include: (1) prosecutors should not apply presumptions for or against monitors and should consider the ten non-exhaustive factors cited in DAG Monaco's September 2022 memorandum when assessing the need for, and potential benefits of, a monitor; (2) many of the requirements for monitors also apply to monitor teams; (3) monitor selections will be made in keeping with the DOJ's commitment to diversity, equity, and inclusion; and (4) the cooling off period for monitors and their teams is now at least three years, rather than two years, from the date of the termination of the monitorship.

##### **B. Increased Resources**

DAG Monaco announced two important resource commitments to combat corporate crime. First, DOJ intends to increase resources to the National Security Division through the hiring of 25 new prosecutors and the creation of a new Chief Counsel of Corporate Enforcement. Second, DOJ will make a substantial investment in the Bank Integrity Unit in the Criminal Division's Money Laundering and Asset Recovery Section.

#### **V. Takeaways for Companies Relating to Compensation and Discipline**

As described in our recent alerts, DOJ continues to announce new policies and guidance at a rapid pace. The new changes governing compensation clawbacks and the use of messaging platforms and personal devices are the most recent steps in that effort. As AAG Polite stated in his remarks, however, "these are also only two facets of corporate compliance programs that [DOJ will] be assessing." Thus, companies should remember that the new policies and guidance are just one element in the overall framework for building and implementing effective compliance programs.

Still, the new Pilot Program and ECCP guidance provide welcomed enhanced transparency in how DOJ assesses the effectiveness of compliance programs, including with respect to compensation structures and clawbacks. Companies should consider updating their compensation frameworks and compliance policies to incorporate incentives that deter misconduct and encourage compliance-driven behavior, and to incorporate compliance considerations in compensation assessments and promotion decisions. In doing this, companies should consider the following:

- Different compensation and incentive packages may be appropriate for employees with different functions and exposures to risk.
- Companies can clarify how compliance criteria may be tied to actual financial impact, such as through evaluation of compliance metrics that help determine bonus eligibility or eligibility for promotion.
- Changes to compensation systems may require revisions to employment agreements, including contract provisions that allow the company to recoup compensation after an employee leaves the company if wrongdoing is discovered later.
- Local law may limit certain compensation policies, as for example, some jurisdictions may not permit companies to claw back compensation from employees. In these circumstances, companies should consider alternatives, such as compensation structures that defer or hold back a portion of compensation until after a set period of time has passed.
- To receive credit under the Pilot Program, companies will need to document their good faith attempts to reduce or claw back compensation, and keep track of all compensation successfully recouped, as well as other initiatives to incentivize compliance-driven behavior.
- Increasing transparency with respect to disciplinary actions, including where appropriate, communicating the actual reasons for disciplining executives and employees for compliance violations, may help to promote compliant behavior.
- To improve implementation and enforcement, companies should track data measuring the effectiveness of policies relating to investigations and discipline, such as management of hotline reports, substantiation rates, over or under reporting, and average time of completion of investigations.



*If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings Washington, D.C. lawyers:*

Nisa Gosselink-Ulep  
1.202.551.1746  
[nisagosselinkulep@paulhastings.com](mailto:nisagosselinkulep@paulhastings.com)

Leo Tsao  
1.202.551.1910  
[leotsao@paulhastings.com](mailto:leotsao@paulhastings.com)

Corinne A. Lammers  
1.202.551.1846  
[corinnelammers@paulhastings.com](mailto:corinnelammers@paulhastings.com)

Joanne Joseph  
1.202.551.1909  
[joannejoseph@paulhastings.com](mailto:joannejoseph@paulhastings.com)

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<sup>1</sup> The Pilot Program is effective March 15, 2023.

<sup>2</sup> This is not an exhaustive list of the additional considerations.

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