

# Warning - Corporate Compensation Clawbacks Are Coming!

A photograph of a modern building with a curved facade and large glass windows, reflecting the sky. The building is partially visible on the right side of the page.

2 MIN READ

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On October 4, 2023, Deputy Attorney General Lisa O. Monaco announced a new “safe harbor” policy for voluntary self-disclosures in the context of mergers and acquisitions, whereby the Department of Justice will decline to prosecute companies that report criminal misconduct involving recently-acquired businesses. This news made antitrust headlines, and for good reason. The new policy furthers the DOJ’s push for increased voluntary self-disclosure, akin to its cartel enforcement Leniency Program. But a second, less widely-emphasized, aspect of Monaco’s speech also seems poised to impact everyday compliance — indeed, the very design of corporate compliance programs — going forward.

For several years, the DOJ has sought to deter criminal conduct by incentivizing the implementation of more effective corporate compliance programs. In a September 2022 memorandum, the DOJ emphasized the novel approach that, in assessing the effectiveness of a compliance program and corporate culture, prosecutors would consider whether the firm adopted compensation systems that impose financial penalties on executives and employees who engage in misconduct. To push this policy further, the DOJ launched a new pilot program in March 2023 that rewarded companies that implemented clawback measures and sought recoupment of compensation from culpable individuals.

Ms. Monaco’s recent speech notably extolled the early successes of this pilot program. Indeed, the DOJ touted two recent resolutions that included compensation incentive

overhauls or clawbacks: Albemarle and Corficolombiana. The DOJ expects to see further supportive results because the pilot now requires that every Criminal Division resolution include compliance-related criteria in compensation and bonus systems, with reporting obligations to the government about the implementation of these measures.

The takeaway is unmistakable: a once seemingly radical suggestion is now likely to become the corporate compliance standard. The DOJ will soon expect companies to have enacted compliance-promoting compensation policies long before they come under criminal investigation. To maximize the benefits of a thoughtful corporate compliance program in all aspects of a corporate resolution — from charging decisions to fining to compliance terms — companies ought to reconsider their policies now with an eye toward further incentivizing employees, executives, and directors to avoid suspect behaviors, rather than shift the costs of their misconduct to shareholders.

**Under the pilot program, every Criminal Division resolution now requires companies to add compliance-promoting criteria to their compensation systems. These criteria are tailored to the company's existing compensation system to ensure integration with its compliance program. . . .**

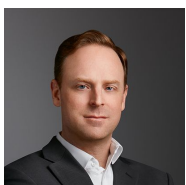
**The pilot program also rewards companies that claw back or withhold incentive compensation from executives responsible for misconduct – or attempt to do so in good faith. For every dollar that a company claws back or withholds from an employee who engaged in misconduct – or a supervisor that knew of or turned a blind eye to it – the Department will deduct a dollar from the otherwise applicable penalty that the resolving company would pay.**

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