

Study Finds Most Clawback Policies Follow Similar Patterns and Warns of Possible Accounting Consequences as Policies Innovate and Evolve

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The most common trigger for clawback of compensation is the occurrence of a restatement of financial results, according to a [PwC study](#) of 100 large public companies' proxy disclosure from 2009 to 2012. Evidence that the employee was directly involved in conduct that led to the restatement was required under 73% of those policies, and in many cases, the restatement needed to be material or the amount recouped was limited to the excess of the amount paid due to the restatement.

Personal misconduct, including violation of a company's ethics policy or code of conduct, may also lead to clawbacks at 84% of companies. Other disclosed triggers include committing fraud, misrepresenting performance results, negligence or lack of oversight over subordinates and violations of non-compete or non-solicitation agreements. Financial firms were most likely to adopt recoupment policies that also focused on excessive risk-taking.

The vast majority (86%) applied possible recovery efforts to both cash and stock awards, while 7% covered only cash and the remaining 7% included only equity awards. 90% of companies disregarded whether or not awards had vested, and 42% discussed look-back periods of one to three years, while 17% expressly indicated no limitation on the length of the look-back.

74% of policies retain the discretion to apply the policies on a case-by-case basis only after a triggering event, rather than permitting boards and compensation committees the flexibility to determine whether such an event occurred in the first instance. 14% appear to be mandatory and the remainder permitted both depending on the basis for the recoupment. The study warned that the accounting impact of providing for discretion is complex, since an ability to exercise any discretion on whether a clawback has been triggered and the amount recouped may result in an assessment that the agreement's key terms and conditions have not been established, causing an award to be marked-to-market, a result to be avoided.

In addition, while fairly standard clawback features do not impact the accounting of equity awards, as accounting recognition would only be needed at the time of recoupment, new types of clawbacks, for example those that add performance metrics affecting vesting or retention, may inadvertently cause those features to represent performance conditions instead of being considered clawbacks. This would significantly affect the accounting of awards.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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