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EXECUTIVE COMPENSATION

Clawbacks: Challenges, Pitfalls, and Trends

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Recovering compensation through a clawback provision predates the Sarbanes–Oxley Act of 2002 (SOX), but it wasn't until scandals like Enron and the passage of SOX that clawbacks came squarely into focus for boards, executives, and other total rewards professionals. The Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010 promised to take the reach and scope of clawbacks to a new level, but no regulatory guidance has been finalized. Despite the lack of final Dodd–Frank clawback rules, media and corporate governance pressures have prompted prolific adoption of rigorous clawback provisions. Designing, negotiating, and communicating clawback provisions to those affected, however, is challenging and, even in 2021, clawback enforcement remains relatively uncharted territory.

Clawbacks of equity compensation awards present unique pitfalls. Poorly implemented

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clawback features can result in legal and accounting risk. Questions of interest include: Will clawback enforcement create employee relations issues or result in protracted litigation? Could these provisions undermine fixed accounting treatment for equity compensation awards? How might formal Dodd–Frank clawback rules alter the current state of play if these rules are ever finalized?

This article focuses on current trends in contractual clawbacks, design considerations, challenges applying clawbacks to equity compensation awards, and best practices in overcoming those challenges.

Overview

Compensation recovery, or clawback, policies allow companies to recover compensation paid to an employee (usually an executive) if that compensation was based on inaccurate financial statements or otherwise "should not have been paid"—which can be broadly or narrowly defined based on the board's objectives.

Companies use clawbacks to enforce restrictive covenants (like non-competes), to punish people for bad acts against the company (such as fraud or malfeasance), and to recover compensation paid in error (for instance, due to revenue recognized earlier than it should have been). Clawbacks have received significant press attention in the last decade based on the widespread support from institutional investors, high-profile scandals (*e.g.*, Wells Fargo and McDonalds), and general focus on more strict corporate governance.

In 2002, the Sarbanes–Oxley Act (SOX) permitted the U.S. Securities and Exchange Commission (SEC) to bring an action with respect to publicly-traded companies to recover compensation paid to chief executive officers and chief financial officers based on fraud under a limited set of circumstances. The Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd–Frank) requires the SEC to issue clawback rules requiring public companies to adopt clawback provisions for certain activities, even when no fraudulent activity exists. Although many are surprised that the SEC has not yet finalized its clawback rules, final rules are much more likely to be released under an SEC chaired by an appointee from a Democrat president. Despite the lack of SEC rulemaking, the fabric of clawbacks has changed drastically in the last five years—taking on a much broader reach than ever before.

With this anticipated expansion in clawback scope—and more expected in the years ahead—additional ambiguity in the language of these compensation recovery provisions could naturally follow, leading to enforcement and accounting surprises.

While clawbacks are an appropriate corporate governance measure, poorly written policies can create far-reaching problems, including expensive and protracted litigation with affected employees and unforeseen financial reporting implications for an equity compensation award subject to a clawback—such as variable accounting stemming from a deferred grant date or performance classification. The best way to avoid undesirable consequences is to take a holistic approach to clawbacks and bring all necessary stakeholders to the table before going too far down the clawback design path.

Why Have Clawback Policies?

Sarbanes–Oxley Act of 2002 (SOX)

SOX was the first U.S. federal law related to the recovery of improperly paid compensation. Its applicability, however, is quite limited. Section 354 of SOX requires the CEO and CFO of public companies to disgorge bonus and incentive compensation and the profits from stock sales if a financial restatement is caused by misconduct that leads to material non-compliance with an accounting rule. Only the SEC may enforce a SOX clawback; there is no company or private clawback right under SOX.

American Recovery and Reinvestment Act of 2009

The American Recovery and Reinvestment Act of 2009 (RRA 2009) requires financial institutions receiving federal funds as part of the Troubled Asset Relief Program to implement clawback policies that do not require culpability before they are triggered. If bonuses, retention awards, or incentive compensation are paid based on statements of earnings, revenues, gains or other criteria later found to be materially inaccurate, the institution's CEO, CFO, and next three highest paid executives are subject to clawback of their bonuses, retention awards, and incentive compensation on a strict liability basis even with no malfeasance or any fault at all. The next 20 most highly-compensated employees can also be subject to the same clawback, but only if they knowingly engaged in providing inaccurate information.

Dodd–Frank Act of 2010

As part of a continuing effort by Congress to provide increased oversight of corporate governance, Dodd–Frank Section 954 requires public companies to adopt clawback policies. As of January 2021, implementation of the clawback provisions under Dodd–Frank is on hold until further guidance from the SEC is released. A majority of S&P 500 companies, however, have voluntarily instituted clawbacks that extend far past what is otherwise required under SOX.

Dodd–Frank clawbacks are expected to require public companies to recover any incentive compensation paid to current or former executive officers during a three-year lookback period ending on the date of an accounting restatement resulting from material non-compliance with the securities laws applicable at the time of the original filing. The clawback amount will equal the incentive compensation that would not have been paid had the restated financials been correctly reported in the first place.

General Governance

Shareholders and proxy advisors embrace clawbacks as a core governance tool. The voting guidelines from Institutional Shareholder Services (ISS), the most prominent proxy advisory firm, do not mandate the use of clawbacks but mention in several places that "rigorous clawback provisions" are looked upon favorably and can "potentially mitigate the impact of risky incentives." More importantly, clawbacks are broadly expected by the governance organizations of institutional investors. Even without external pressure, many companies believe that clawbacks have a deterrent effect on undesirable behavior by employees. Even where there is high trust in the executives and the risk of malfeasance is low, clawbacks can be part of a proactive governance program.

Before implementing a clawback policy, it is important for the company to analyze what it is trying to accomplish with the policy and how it will be enforced. Is the goal to prevent fraud or other illegal activity, or is it to also address situations where an employee performs poorly or inappropriately when such behavior is not apparent until after compensation is paid? The former is a traditional function of a clawback, whereas recent clawbacks have focused on the latter.

The textbook example is Wells Fargo in which reported financial results looked outstanding and were masking problematic behaviors that took additional time to reach the surface. The Wells Fargo clawback policy included discretion to recover compensation in the event of problematic behaviors, and this policy was used to recover substantial amounts from certain executives determined to have engaged in such activity. Nonetheless, clawbacks aimed at addressing poor behavior or risk oversight can give rise to unintended consequences and enforceability problems.

For the clawback policy to be a deterrent to bad behavior, the deterrent threat must be credible. Failing to enforce a clawback or being unsuccessful in enforcement because a court strikes it down could shatter credibility with current executives, prospective hires in the labor market, and investors. Enforcement is easier to accomplish with basic clawbacks that are focused on financial statement fraud but less so in the context of non-fraudulent poor performance.

Covered further below, non-fraudulent poor performance is broad—from failing to exercise adequate oversight on risk matters to engaging in behaviors that trigger reputational harm. In these cases that can often be more gray than black-and-white, the decision to enforce the clawback is not necessarily obvious. Reasons a company may think twice are if enforcement may impair recruiting abilities in the labor market, carry a likely chance of failure if challenged in court, have a greater economic cost to the company than the amounts potentially available for recoupment, or have consequences related to an investigation of the company by a regulator or law enforcement agency.

These considerations related to non-fraudulent instances of bad behavior apply at both the executive officer level and beyond. At the executive officer level, there is tension between wanting to send a harsh signal in support of shareholder goals and a desire to avoid protracted and public dispute. Below the executive officer level, enforcing a clawback could send a valuable message to other actors in the company or, in the alternative, create shockwaves that prompt those other actors to interview with competitors. Especially in industries like financial services where top producers are highly portable, the pros and cons of enforcement may not always be obvious. Companies will need to think carefully about enforcement implications when implementing a clawback policy.

Clawback Design Considerations

Clawbacks are generally only required at the highest levels in a company, and after that, there is flexibility around which employees should be covered by the policy. The lower in an organization that an employer goes with its clawback policy coverage, the greater potential there is that it will have a challenge in enforcing the clawback against an employee who argues that they didn't understand what they were agreeing to. In addition, the potential value that can be recovered from a lower level employee may not merit the cost of enforcement. As a result, in some organizations, the use of "no-fault" clawbacks is limited to those situations where required by law and less senior employees have clawbacks that only apply to the employee's clearly defined bad behavior.

Additionally, there are some jurisdictions that don't allow an employer to take back wages that have been paid to employees and employers will need to carefully draft any incentive compensation documents to maximize the chances of enforcement. For example, in many jurisdictions, including a statement such as "this compensation will not be earned until all applicable clawback periods have passed" may provide a stronger, legal position for later enforcement of a clawback.

If a clawback trigger includes a subjective component, like misconduct, there has to be a body designated to make a decision that misconduct occurred. The body making this determination is often an independent committee of the board of directors, such as the compensation committee. Some directors do not like policies that put them in a situation where they are making culpability decisions because those decisions could result in protracted employee litigation, media scrutiny, and public challenges to their determination.

Additionally, if a culpability determination is being made with respect to actions that are related to regulatory enforcement or shareholder litigation, the decisions with respect to culpability in the clawback context could influence the outcomes of those other actions. If you are saying that someone was a bad actor who should forfeit his incentive compensation, it will be harder to defend to the SEC that it should close an investigation because no bad acts were committed.

Further, to the extent that an individual who is subject to a clawback provision is eligible for indemnification due to the company's organizational documents (e.g. bylaws or charter), an indemnification agreement between the individual and the company, or a state law provision providing indemnification, the attempted enforcement of a clawback provision could require the company to fund the individual's defense costs (sometimes in advance). The right to advancement of potentially indemnifiable expenses is distinct from the right to indemnification after a final decision on the merits and is often provided by contract, so it is important when designing a clawback provision and deciding whether to enforce it to understand what rights the individuals you may seek to recover from have for advancement and whether you can contractually agree in the clawback policy that those rights don't apply with respect to enforcement of a clawback.

Should the clawback policy include a mandatory clawback provision or allow the enforcing party the discretion to determine that the potential cost and other burdens of enforcement outweigh the benefits of enforcement? One of the many criticisms of the Dodd–Frank clawback regime is that it requires a mandatory clawback without regard to the cost and likelihood of enforcement. For clawback policies that go beyond the minimum legal requirements, there may be advantages to including flexibility in the policy to not pursue a clawback action. However, as discussed below, this flexibility could affect the accounting analysis.

How Do Clawbacks Work?

The details of enforcement depend on the clawback provision language. Most clawback provisions specify a recoupment trigger and, if well-written, spell out a process for how recoupment will be effectuated. The process often explains when the analysis will be done and how conclusions will be drawn from that analysis.

Overall, the raw mechanics of this process are simple:

- We pay you $X if Y occurs
- Y occurs
- Oops, Y didn't really occur; instead, Z is the true outcome
- Please return the portion of $X that would not have been paid had Z been identified the first time around

This might sound easy but it rarely is once you leave the world of tit-for-tat (formulaic) bonus programs and consider other long-term incentive (LTI) equity awards.

Now, most senior executives of public companies receive a substantial majority of their compensation in the form of LTI awards and the large parts of an LTI portfolio tend to be performance-based. Performance provisions will either reference financial metrics like EPS or EBITDA or a shareholder value metric like total shareholder return (TSR). Let's start with a simple case:

- Performance-based restricted stock units (RSUs) vest at 125% of target based on three-year EPS growth
- One year after payout, the company restates its financials and the revised EPS growth for that period implies that only 50% of target should have been paid out

That's not too difficult since there's mathematical simplicity to recouping 75% of the RSU payout. But what if the performance metric was TSR (*e.g.*, a payout of 0% to 200% of target occurs based on a cumulative average growth rate (CAGR) between 10% and 20%)? Suppose the company paid out 125% based on a CAGR of 18% and then the same restatement occurred to the financials—which of course devastates the share price and undoes the appreciation realized over the prior multi-year period. Does this suggest that some or all of the LTI awards should be recouped? If so, how should that amount be calculated?

Modern finance theory is not designed to explain how stock prices *would* have performed *had* the financials not been restated. While models in the genre of what are called event studies exist to answer these sorts of questions, there's obviously more room for disagreement and controversy than in the simple case involving an EPS metric. Intuitively, it doesn't seem right for there to be a simple means of effectuating on a clawback on an award with an EPS metric and an impediment to doing so on an otherwise identical award that uses a TSR metric.

The combination of the increased use of stock price–based performance goals and broad Dodd–Frank clawbacks likely will force tough topics like this to be dealt with in a way they may not have been in the past.

An Even More Basic Enforcement Challenge Example

Many financial services companies have enacted clawbacks at divisional leadership levels. Their experience with clawbacks has been mired in ambiguity and friction. One financial services executive explained that clawback policies in their asset-backed lending (ABL) division penalize lead performers for doing exactly what they are supposed to do. Bonuses paid are being recouped in subsequent years when loans default. But, in these environments, the most talented portfolio managers are intentionally given the trickiest loans to manage, making the people who are most valuable to the organization also most subject to losing incentive pay.

Continuing with this loan case study, who should determine whether a series of risky loans involved healthy risk-taking or unhealthy risk-taking? Even if the company has a rigorous and intellectually robust process for making these decisions, what signals and implications does this send to other producers in the firm? How will they alter their behavior, potentially over-correcting, to avoid the same fate? Will it overly dampen all risk-taking, even the "good" kind, when all is said and done? These are worthwhile questions to explore when making clawback structuring decisions.

Potential Accounting Issues

Accounting considerations are one consideration in compensation design decisionmaking. In addition to the potential materiality of adverse compensation accounting outcomes to the financials, key parts of the compensation disclosure in the proxy statement are based on the accounting rules in ASC 718. In other words, unintended accounting outcomes impact both the 10-K and the proxy disclosure.

In their simplest form, clawbacks received a "clean bill of health" in ASC 718 as not having any adverse accounting implications. They do not result in variable accounting and do not alter the classification of an award. ASC 718-10-55-47 dictates that standard clawback provisions should be essentially ignored until the clawback is actually enforced. If the clawback is enforced, the company must reverse the lesser of (1) the current fair market value of the consideration returned to the company and (2) the grant-date fair value of that consideration through the income statement.

The simple accounting model in ASC 718 was written largely in the context of clawbacks that are tied to the violation of a non-compete clause. The framework in ASC 718 isn't fully prepared for a new generation of clawbacks geared toward recouping compensation in cases of fraud, accounting errors, non-fraudulent bad behavior, no-fault accounting restatements, and other acts of poor risk oversight or governance.

Being a fundamentally principles-based accounting standard, ASC 718 is more interested in the substance of an event than its form. Calling something a clawback doesn't necessarily trigger the clawback process in ASC 718 if the substance of the action resembles something else. There are two key questions when considering more complex clawbacks:

1. Does the language in the clawback prevent upfront specification of an accounting grant date such that the fair value should be marked to market until the clawback contingency is fully resolved?

2. Does the clawback more generally resemble a performance condition, as defined in ASC 718, and therefore necessitate performance condition accounting?

Some stock compensation experts at the accounting firms have adopted the view that broad clawback provisions prevent the upfront specification of an accounting grant date (which, as a result, leads to variable accounting). Because of this potential pitfall, lawyers and compensation professionals drafting clawback provisions and award agreements should understand how different structures could undermine the ability to specify an ASC 718 accounting grant date at award issuance. Let's discuss the mechanics in more detail.

Specifying a Grant Date

For an equity-based award, the accounting grant date is when the fair value is measured and solidified for expense recognition purposes. These five basic criteria in ASC 718-10-55-82 govern when an accounting grant date can exist:

1. the parties have a mutual understanding of key award terms and conditions (vesting conditions);

2. the company has become obligated to issue the awards if the vesting conditions are met;

3. Subsequent changes in the stock price that positively or negatively affect the value of the award by a material amount may need to be adjusted or reset;

4. any necessary approvals are given (unless it is highly likely the approval will be obtained at the time the grant is conditionally awarded); and

5. the award is made to a person meeting the definition of an "employee" in IRS Revenue Ruling 87-41.

As described shortly, when an accounting grant date cannot be established because one or more of these criteria isn't satisfied, the fair value is marked to market until the criteria can be met. Broad and far-reaching clawback provisions can easily violate the first and most important criteria that a mutual understanding or meeting of the minds exists on the key award terms.

Take, for example, a clawback that permits the company, in its sole discretion, to recover the award if an employee fails to exercise good business judgment and risk oversight. What does this mean? How will it be determined? Can hindsight bias influence the decision made? This degree of subjectivity and contingency could make it difficult to argue that there is a clear meeting of the minds between the employee and employer at the time of grant.

Where does the FASB draw the line: what sort of clawback language is too broad and permits too much discretion for there to be a grant date? ASC 718 offers no bright line. The experience in 2020 where many compensation committees considered exercising discretion regarding incentive payouts due to COVID-19's consequences boldly resurfaced this issue. After all, if the compensation committee can choose, ex post, to forgive some degree of underperformance due to extenuating circumstances like COVID-19, then was there truly a meeting of the minds at the time of grant? Most auditors say that if the later forgiveness is not treated as a modification of the original award that this necessarily means that there was no meeting of the minds up front and that the accounting grant date doesn't occur until the final decision about performance.

We've developed a basic framework to help guide this analysis. The framework centers on two questions:

1. Does the award agreement contain “shall” or “may” language?

2. Are the circumstances permitting compensation committee discretion narrow or broad?

“Shall” language is deterministic whereas “may” language hinges on discretion. Clawback language that obligates the compensation committee to act if certain triggers occur is more likely to support the view that a mutual understanding existed at the time of grant. Similarly, broad, vague, and generic clawback language suggests the compensation committee wishes to preserve flexibility and discretion, conflicting with the idea that a clear understanding existed up front.

A clawback provision tied to something like a financial restatement is very clear. There is no getting around fixed, independently verifiable objective events. The occurrence of a restatement is not subject to interpretation (if the term is properly defined in the award). Use of more subjective triggers like poor business judgment, impropriety, insufficient risk oversight, and reputational harm introduce subjectivity and make it harder to establish a grant date at the of the legal action granting the award (an “upfront grant date”).

Strategies for Securing an Upfront Grant Date

While there are no bright lines and universal points of consensus, good planning can improve the odds of securing an upfront grant date that matches the date of the action legally granting the equity award, even when adopting a more advanced clawback provision. Coming back to the two-part framework of using “shall” language and narrow terms, let’s examine a clawback that is focused on addressing acts of impropriety and reputational harm—two seemingly subjective events. What can be done to improve the odds that such a clawback will not taint the accounting grant date?

The award agreement language should be deterministic and a specific process should be spelled out. Consider two paraphrased versions of such language:

A. If the compensation committee determines, in its sole discretion, that the award recipient has acted with impropriety and in a manner that is not in the best interest of the company.

B. If during a period beginning on the grant date and ending on the first anniversary of the vesting of recipient’s award, the compensation committee becomes aware of a potential violation of the company’s code of conduct, the compensation committee shall review the actions that could violate the company’s code of conduct and within ninety days of commencing this review, it will determine if the code of conduct was violated, with such determination final, binding, and irrevocable upon the recipient.

Version B is much more likely to permit an upfront accounting grant date. The formality and focus on process supports the argument that even though the eventual outcome of a clawback is unknown, there is little ambiguity as to the upfront deal.

Here we can draw a metaphor to a standard performance condition like EPS. No recipient fully knows how to achieve EPS when first granted an award. (Should they cut cost, enter new markets, grow the sales organization, etc.?) That doesn’t matter as long as the deal being struck is clear in terms of what outcome is needed to earn the award. However, suppose the award agreement language specifies that a non-GAAP measure of EPS will be used. This changes the story, because now it’s not a matter of how the executive should execute against a clear target, but rather, what outcome will and will not be rewarded.

Implications of a Deferred Grant Date

As noted, if the accounting grant date cannot be specified when the award is legally granted, then a “mark-to-market” accounting model is applied (also commonly referred to as variable accounting). Most CFOs tend to shy away from events causing mark-to-market accounting, though it's worth stating that the effect of mark-to-market accounting is really an empirical question about what actually happens and not a theoretical question—if the notion of a floating non-cash expense in the financials isn't bothersome then perhaps this grant date topic doesn't matter.

Let's delve into the mechanics behind a deferred grant date and mark-to-market accounting. Under ASC 718, the proper trigger for recognizing expense is the "service inception date." The service inception date is usually the grant date, but may precede the grant date under limited circumstances. ASC 718-10-55-108 specifies that the service inception date can precede the grant date if:

(a) an award is authorized,

(b) service begins before a mutual understanding of the key terms and conditions of a share-based payment award is reached, and

(c) either of the following conditions applies:

    (1) the award's terms include no substantive future requisite service condition that exists at the grant date (refer to paragraph 718-10-55-113 for an example illustrating that condition) or

    (2) the award contains a market or performance condition that, if not satisfied during the service period preceding the grant date and following the inception of the arrangement, results in forfeiture of the award (refer to paragraph 718-10-55-114 for an example illustrating that condition).

Subjective clawback provisions that defer the grant date fit this framework of having a service inception date when the award is granted: (a) is met because the award is authorized; (b) is met because service begins before the key terms are mutually understood; and (c)(1) is met because the award will not require future service after the deferred grant date because the deferred grant date is the end of the clawback contingency period.

Performance Condition Classification

Enough on grant dates. Let's look at clawbacks that could be construed to be in-substance performance conditions under ASC 718. Some clawback provisions are worded to sound more like performance conditions than compensation recovery. For example, a clause that states, "We will reclaim your compensation if, within the one year period after vesting, divisional revenue falls below X" seems more akin to a performance condition than a clawback. ASC 718 defines a performance condition as relating to the employer's own operations and activities, with reference to peer firm operations being acceptable if the metric is the same between the issuing company and comparison group.

ASC 718-10-55-47 defines a clawback as a contingent feature that kicks in after shares have been earned or transferred. This is not helpful for performance-like clawbacks: even when the clawback is measured after vesting, if an argument can be made that it more closely resembles a performance condition, then perhaps it is more appropriate to classify it as a performance condition from the outset that has an implicit service period.

To date, this scenario has been far less common than the grant date one we've focused on above. However, as clawbacks grow in their diversity and versatility, it's important to bear in mind that the substance of the measure is more important than its label. After all, if an animal weighs 5 tons and is gray with tusks and a long trunk, it's an elephant and won't fly—no matter how many times you call it a duck.

When in doubt, it is a best practice to present the proposed clawback language to the financial reporting team so it can assess the impact of the language on the accounting classification and discuss potential accounting implications. If this is done prior to the board of directors or compensation committee action granting the award, these implications can be assessed with other factors playing into the business judgment involved in granting equity awards.

In Closing

In the last few years, clawback provisions have grown significantly in their scope of reach and adoption. While the requirements in Sarbanes–Oxley focused on recovering incentive payments earned due to fraud, recent clawbacks have focused on non-fraudulent bad behavior—often reaching as far as inadequate risk oversight, impropriety, violating the company's code of conduct, and creating reputational harm. If not already implemented voluntarily, finalization of the Dodd–Frank clawback rules would broaden the reach even further by including no-fault financial statement restatement.

Time will tell whether such far-reaching clawback frameworks are optimal. We applaud the ex ante incentives created and the desire to force a tighter link between pay and performance. There are also benefits in taking a principles-based approach that keeps executives on their toes and thinking about what is right in the context of their business' operating environment.

On the other hand, far-reaching clawback provisions may be difficult to enforce and operationalize. Simply figuring out how much to recoup is not always objective or straightforward. Unexpected accounting problems are also likely.

A rigorous design process involves the right people early in the planning process to minimize surprises down the road. It also means developing use cases to collectively think about what actions the company would take under different states of nature.

To assist, we have created a basic checklist you might find useful to help ensure that the right questions are asked before any decisions are made.

Clawback Implementation Checklist

1. Why have a clawback/ what are the goals?	• What is required under applicable laws and regulations? • What business problems do we want to solve via a clawback? • What business problems might we create via a clawback?
2. What clawback design alternatives should be considered?	• Who does the clawback apply to? • Does this retroactively apply to existing awards, or just new ones? How will you get any required consent? • How much discretion is there? Should the same rules apply to all participants? • Should the same rules apply to all types of awards? • Will the clawback be incorporated into award agreements or contained in a separate document?
3. Who makes design decisions?	• Compensation Committee of Board of Directors • Board of Directors • Members of executive management. Is this permitted by state corporate law?
4. Who makes enforcement decisions?	• Compensation Committee of Board of Directors • Board of Directors • Members of executive management. Is this permitted by state corporate law?

5. Who are the stakeholders, and what are their concerns?	• Stakeholders include the compensation committee of the board of directors, legal, human resources (including representing participants), stock administration, and accounting groups. Some key concerns for each group are listed below.
a. Compensation Committee	• What behaviors are we trying to encourage/discourage? • What portions/types of pay should be subject to conditions subsequent? • How broad is the range of behaviors that would trigger the clawback? • Is this intention to enforce the clawback policy strictly or loosely? • Have other stakeholders vetted the potential unintended consequences affecting their areas?
b. Legal	• Will the clawback be enforceable? • Will it comply with the legal requirements applicable to the business? • Will it comply in all states and countries?
c. HR	• How deep in the organization should a clawback go? • What is common industry practice? • What fallout might implementation cause in the labor market for talent and with current employees in similar roles, etc.? • How will you introduce and explain the introduction of a clawback policy? • Who will deliver the message when a clawback will be enforced?
d. Stock Administration	• How does the provision affect vesting and expiration dates? • How would the clawback be entered in the system if it does occur? • Would compensation be clawed back in the form of shares or cash? • Is accounting aware of potential downstream implications from the way the feature is implemented in the administration system?
e. Accounting/Tax	• Is the clawback a de facto performance condition under ASC 718? • Does the clawback result in a deferred grant date under ASC 718? • Is the clawback implementation a modification under ASC 718? • Are systems and controls in place to flag when a clawback occurs and to reverse the correct amount of expense, which may not be equal to the expense initially recognized? • Will clawback transactions flow through from the data received from stock administration? If so, can the expense model reverse expense for cancels after a vest date? If not, how would on-top adjustments affect other parts of the accounting process? • Would compensation be clawed back in the form of shares or cash? • How do you deal with the tax consequences of clawing back compensation for which you've taken a deduction? • How will the deduction be reported to the employee for tax purposes? This is especially important when the clawback occurs in a different tax year than the original income.