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## CLAWBACK AND MALUS PROVISIONS IN THE U.S. AND BRAZIL: A COMPARATIVE OVERVIEW

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In today's corporate governance landscape, clawback and malus provisions have become key tools for promoting accountability and integrity. By incorporating these provisions, companies aim to align executive actions with the long-term interests of the company and its shareholders.

A "clawback" or "malus" provision<sup>1</sup> enables a company to recover previously paid compensation (either by requiring repayment or reducing future compensation) or trigger forfeiture of unpaid compensation if it is found that the grant or payment of such compensation was based on erroneous financial data or if the recipient engaged in misconduct. For example, if a bonus was paid based on financial results that were subsequently restated, the company could invoke a clawback provision to recover the bonus (or the portion that exceeds the amount that would have been paid had the correct financial results been known when the bonus was paid). The specific conditions under which clawback and/or malus provisions apply depend on local regulatory requirements and company-specific policies, as further discussed.

This article compares adoption of clawback and malus provisions by companies the securities of which are listed in the United States and Brazilian markets and the rules and outlook for these provisions in each jurisdiction.

### LEGAL AND REGULATORY FRAMEWORKS

#### U.S. REGULATORY PERSPECTIVE

Clawback rules were adopted in the United States in connection with the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), which regulates the U.S. financial markets and was enacted because of the 2008 global financial crisis. Section 954 of the Dodd-Frank Act mandated that the U.S. Securities and Exchange Commission ("SEC") establish rules requiring publicly traded companies to implement policies for recovering incentive-based compensation from current and former executive officers in the event of certain financial restatements. The rule covers incentive-based compensation received during the three fiscal years preceding the date on which the restatement is required.

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<sup>1</sup> In both the United States and Brazil, companies typically refer to these provisions collectively as "clawback policies," encompassing both the obligation to repay amounts already received and the forfeiture of future payments. The term "malus provisions" is rarely used in practice. For purposes of this article, however, the distinction between clawback and malus will be drawn where appropriate, in light of the technical differences between the two concepts and their occasional differentiation in regulatory discussions.

In 2022, the SEC implemented Section 954 of the Dodd-Frank Act through Rule 10D-1<sup>2</sup> under the Securities Exchange Act of 1934, as amended (the “Exchange Act”), which requires that national securities exchanges establish rules mandating that listed issuers adopt and implement clawback policies, as well as provide related disclosure, as required by certain filings with the SEC.

In June 2023, the SEC approved clawback listing standards proposed by each of the New York Stock Exchange (“NYSE”) and the Nasdaq Stock Market (“Nasdaq”), both of which took effect on December 1, 2023.<sup>3</sup> Both the Nasdaq and the NYSE listing standards align with the terms of the Dodd-Frank Act and Exchange Act Rule 10D-1 with certain additional procedural requirements. Therefore, for companies the securities of which are listed on a US national securities exchange, clawback policies must (i) cover individuals who served as executive officers during the performance period for the relevant incentive-based compensation or during the three fiscal years prior to the date on which the issuer is required to prepare the relevant accounting restatement and (ii) apply to erroneously-awarded incentive-based compensation in the event that the issuer is required to prepare an accounting restatement due to material noncompliance with any financial reporting requirement under the securities laws. The rule specifies that, generally, “erroneously awarded compensation” is any incentive-based compensation in excess of the amount that would have been received had such compensation been determined based on the restated amounts.

For purposes of Rule 10D-1:

- “*executive officers*” includes the company’s president, principal financial officer, principal accounting officer (or controller), any vice-president in charge of a principal business unit, division, or function (such as sales administration or finance), and any other office or person who performs a policy-making function. This includes executive officers of the issuer’s parent(s) or subsidiaries if they perform policy making functions for the issuer, as well as general partners who perform similar tasks for limited partnership issuers;
- it applies to all companies listed on U.S national securities exchanges and their subsidiaries, including foreign private issuers, smaller reporting companies, emerging growth companies, controlled companies, and issuers of debt and other non-equity securities, subject to certain exemptions. Foreign private issuers may need to assess whether recoupment as required by the listing standards conflicts with their home country law and comply with certain related requirements;
- requires clawback of erroneously awarded compensation in the event of such restatements without regard to discretion by the board or compensation committee of the listed company to decide to reduce such repayment obligation except in certain very limited circumstances. Additionally, the

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<sup>2</sup> Available at: [Final Rule: Listing Standards for Recovery of Erroneously Awarded Compensation](#), page 12.

<sup>3</sup> With respect to the SEC’s approval of the NYSE’s clawback listing standards, see <https://www.sec.gov/rules/sro/nyse/2023/34-97688.pdf>. For the text of the NYSE’s clawback listing standards and related material, see <https://www.sec.gov/rules/sro/nyse/2023/34-97688-ex5.pdf>. With respect to the SEC’s approval of Nasdaq’s clawback listing standards, see <https://www.sec.gov/rules/sro/nasdaq/2023/34-97687.pdf>. For the text of the Nasdaq clawback listing standards and related material, see <https://www.sec.gov/rules/sro/nasdaq/2023/34-97687-ex5.pdf>.

full amount of the erroneously-awarded compensation must be repaid or recovered without regard to any taxes paid by the executive with respect to such amounts. Such policies include both the requirement to repay previously paid amounts and forfeiture of amounts that have not yet been paid. Finally, the policies adopted in compliance with Rule 10D-1 and the listing standards are no fault policies that require clawback without regard to the fault of the executive subject to the policy (*i.e.*, it does not matter whether the executive was at fault in any way with respect to the mistakes that led to the restatement);

Companies must disclose their clawback policies and any actions taken under these policies in their annual reports. Failure to comply with the NYSE's and Nasdaq's clawback rules can lead to suspension of trading and delisting.

## **BRAZILIAN REGULATORY PERSPECTIVE**

The debate in Brazil regarding greater control over executive compensation mirrors the global movement that emerged after the 2008 financial crisis. The crisis evoked widespread perception of misalignment between executive compensation and the long-term performance of companies, prompting various proposals to address this issue, such as capping salaries and bonuses for board members and directors, particularly within financial institutions. A significant development at the time was the implementation of the Brazilian Securities and Exchange Commission (*Comissão de Valores Mobiliários*, or "CVM") Instruction No. 480 in December 2009, now replaced by CVM Resolution No. 80, of March 28, 2022, which requires companies to disclose the total compensation of their management bodies, as well as its highest, lowest, and average compensation figures.

In 2010, the National Monetary Council (*Conselho Monetário Nacional* or the "CMN") issued Resolution No. 3,921 establishing rules regarding compensation policies for managers of financial institutions. While it did not explicitly require the adoption of clawback or malus provisions, it introduced measures that indirectly supported these principles, such as the requirement for financial institutions to implement mechanisms ensuring that compensation is linked to sustainable performance and effective risk management.

In 2024, CMN Resolution No. 5,177 replaced CMN Resolution No. 3,921, which became effective on January 1, 2025. This new resolution explicitly requires the inclusion of malus clauses in remuneration policies, applicable in cases of (i) significant reduction in actual recurring profits, or (ii) negative results during the deferral period for deferred compensation.

Beyond that, Brazil lacks a universally applicable rule mandating listed companies implement clawback and/or malus provisions.

An accounting fraud case involving Americanas, a Brazilian centenarian retail company, has fueled discussions about clawback provisions in Brazil. The fraud was first disclosed in January 2023, but shareholder approval of the civil liability lawsuit against Americanas' former executives for the damages caused to the company did not occur until December 2024 – almost two years later. Notably, Americanas did not have a clawback policy at that time.

The CVM has not issued any rules requiring that companies adopt clawback provisions. However, since 2024, it has been releasing annual guidelines addressing the disclosure of clawback policies that are voluntarily adopted by publicly held companies.<sup>4</sup>

B3, on the other hand, has conducted a public consultation on requiring clawback provisions for companies listed on the *Novo Mercado* (which is the highest corporate governance segment in Brazil), within the ongoing reform of its regulations. More specifically, B3 posed the following questions to the market: (a) whether it should require companies listed on the *Novo Mercado* to include minimum rules on deferral and recovery of compensation in their compensation policies; (b) in the case of clawback provisions, whether such rules should be limited to officers directly involved in the circumstances that triggered the recovery of compensation, or whether they should apply to all officers; and (c) whether there were any concerns from labor perspective.<sup>5</sup>

B3's consultation gathered a variety of views on both clawback and malus provisions. Many participants recognized the importance of implementing these compensation-related rules, both because they enhance enforcement in cases where executives' responsibility is proven and because they are aligned with international practices (which are strictly observed by foreign investors). However, most respondents believed that greater understanding of the subject in Brazil is needed before clawback, or malus, provisions are required for listed companies. Key concerns included the need for thorough research to better align clawback regulations with Brazil's labor laws and concerns about potential downsides, such as increasing compensation packages linked to the clawback or malus clause.

As a result of the feedback received, B3 has not included clawback or malus provisions in the latest draft of the *Novo Mercado Regulation*,<sup>6</sup> which is still subject to further review. Nonetheless, B3 has pledged to continue supporting the market by promoting research and providing guidance on best practices in compensation, including future discussions on clawback and malus provisions.

## BRAZILIAN EMPLOYMENT PERSPECTIVE

In Brazil, the regulatory framework governing clawback and malus provisions strikes a careful balance between enforcing accountability and protecting employee rights. The principle that incentive-based compensation paid in error, particularly to executives, must be recoverable is central to clawback policies. Brazilian law not only endorses this principle but also provides a practical and enforceable mechanism within its legal system.

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<sup>4</sup> Available at: <https://conteudo.cvm.gov.br/export/sites/cvm/legislacao/oficios-circulares/sep/anexos/oc-anual-sep-2024.pdf>, page 130.

<sup>5</sup> Available at: <https://www.b3.com.br/data/files/DF/A6/B3/5E/51B3F8100E866AE8AC094EA8/Public%20consultation%20-%20Novo%20Mercado%20Evolution.pdf>

<sup>6</sup> Available at: <https://www.b3.com.br/data/files/B2/86/3A/68/400C29106EEC8429AC094EA8/Second%20Public%20Consultation%20-%20Novo%20Mercado%20Evolution.pdf>

For non-employee officers and contractors, clawback enforcement is straightforward. These individuals are typically subject to clear contractual clauses or company policies that authorize recovery of any erroneously paid compensation. This clarity enables companies to act decisively and uphold accountability at the highest management levels.

The application of clawback provisions to employees, however, involves greater complexity due to protections under the Brazilian Labor Code (CLT). Salary deductions require stringent justification, transparent communication and the employee's consent. Employers must substantiate that payments were made in error, and any recovery is usually treated as an advance against future wages. Importantly, deductions are capped at 30% of the employee's monthly salary, based on applicable Labor Court precedents. To enhance compliance and enforceability, companies are advised to establish comprehensive internal protocols that ensure transparent communication and secure explicit employee authorization throughout the clawback process. This approach fosters trust and reinforces governance standards. In instances of willful misconduct resulting in demonstrable losses, the CLT permits additional recovery measures, reflecting the broader commitment to financial integrity and ethical conduct.

Ultimately, Brazil's approach to clawback and malus provisions embodies a dual commitment: enforcing financial accountability while upholding fairness and transparency. This balanced framework protects organizational interests and employees alike, underpinning sound governance.

## **FUTURE TRENDS AND CHALLENGES FOR CLAWBACK AND MALUS PROVISIONS**

### **WHAT TO EXPECT IN THE U.S.?**

Recent surveys and proxy voting guidelines indicate a growing shift among companies toward implementing clawback provisions that exceed the Dodd-Frank requirements. A study published by Dragon GC in the Harvard Law School Forum on Corporate Governance<sup>7</sup> reviewed 401 S&P 500 companies that filed independent clawback policy disclosures within the 12-month period ended May 7, 2024. The findings show that more than 70% of these companies adopted clawback policies that extend beyond the Dodd-Frank requirements. The five most frequently cited discretionary triggers included: breaches of company policies or legal requirements (51.4%), breaches of fiduciary duty or fraud (48.6%), misconduct with reputational or financial harm (32.9%), crimes committed by the executives (23.9%) and harmful or inappropriate conduct (20%).

Additionally, a survey conducted by the executive compensation consulting firm FW Cook<sup>8</sup> indicates that, by the December 2023 deadline, many large public companies in the U.S. had already voluntarily adopted provisions that materially exceeded the conditions set forth by the Dodd-Frank Act. Specifically, 80% of

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<sup>7</sup> DragonGC, "Compensation Clawbacks Report," Harvard Law School Forum on Corporate Governance, July 24, 2024. Available at: [Compensation Clawbacks Report](#).

<sup>8</sup>"Clawback Policies: Beyond Compliance," available at: <https://www.fwcook.com/content/documents/Publications/24-09-13 Clawback Policies Beyond Compliance CBM 4Q24.pdf>.

large-cap companies reported having clawback provisions that go beyond those laid out in Rule 10D-1. Their policies generally cover: (a) a broader group of employees, such as the entire executive leadership team, all incentive plan participants, or all corporate officers, (b) broader compensation, applying to discretionary cash and/or time-based equity awards in addition to incentive pay; and/or (c) a broader set of triggers, extending to events other than financial restatements, such as fraud, misconduct, violations of company policy/code of conduct, violations of restrictive covenants, reputational harm, or any other financial harm. Finally, a recent ISS US-Benchmark Research team's report,<sup>9</sup> which analyzed 2298 issuers listed in the U.S. (51.5% listed in NYSE and 48.0% listed in Nasdaq), stated that more than 50% of such issuers that updated their executive compensation from 2023 to 2024 expanded their clawback provisions to encompass broader compensation (including time-based incentives).

Reflecting this trend, many proxy advisory firms and asset managers, such as Glass-Lewis,<sup>10</sup> ISS<sup>11</sup> and BlackRock,<sup>12</sup> have publicly stated that they support more expansive clawback policies than those required by current regulations. For instance, Glass Lewis' proxy voting guidelines for the 2025 proxy season in the United States placed more emphasis on the need for expansive clawback policies than its 2024 guidelines, explicitly stating that the absence of such provisions would negatively impact its recommendations.

## WHAT TO EXPECT IN BRAZIL?

Despite ongoing discussions regarding the Novo Mercado listing standards, Brazilian listed companies are not yet generally required to implement clawback or malus provisions. Currently, the only Brazilian companies subject to similar obligations are financial institutions and companies listed in the US as foreign private issuers.

As highlighted by B3's public consultation, one of the main challenges in implementing clawback and malus provisions in Brazil is their alignment with Brazilian labor legislation. The Brazilian labor market is highly

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<sup>9</sup> "SEC Clawback Rules: Initial Impacts in the 2024 Proxy Season," available at: <https://corpgov.law.harvard.edu/2025/01/06/sec-clawback-rules-initial-impacts-in-the-2024-proxy-season/#:~:text=The%20great%20majority%20of%20the,changes%20in%20their%20clawback%20policy.&text=Amon%20these%20companies%2C%2081%25%20already,in%20either%202023%20or%202024.>

<sup>10</sup> Glass Lewis states that clawback policies are crucial for mitigating excessive risk-taking and should extend beyond the SEC's Rule 10D-1 requirements – including cases of material misconduct, reputational failures, risk management failures, or operational failures, not just material accounting restatements. The absence of such comprehensive clawback provisions will negatively impact Glass Lewis' recommendation for the advisory vote on executive compensation. However, the appropriateness of the company's decision not to pursue recovery is analyzed on a case-by-case basis expecting detailed disclosure explaining why the company is not adopting comprehensive clawback provisions. Source: <https://resources.glasslewis.com/hubfs/2025%20Guidelines/2025%20US%20Benchmark%20Policy%20Guidelines.pdf?hsCtaAttrib=182973839166>.

<sup>11</sup> For ISS, a company's clawback policy must extend beyond the minimum Dodd-Frank requirements and explicitly cover all time-based incentives in addition to the performance-based compensation elements. Additionally, ISS considers that the policy should authorize recovery of equity compensation upon a financial restatement and cover all or most equity-based compensation for all named executive officers (including both time and performance-vesting equity awards). Source: <https://www.issgovernance.com/file/policy/active/americas/US-Compensation-Policies-FAQ.pdf?v=2024.12.1>.

<sup>12</sup> Available at: [https://www.blackrock.com/corporate/literature/publication/blackrock-active-investment-stewardship-engagement-and-voting-guidelines.pdf?utm\\_source=chatgpt.com](https://www.blackrock.com/corporate/literature/publication/blackrock-active-investment-stewardship-engagement-and-voting-guidelines.pdf?utm_source=chatgpt.com).

regulated with respect to employees with employment agreement governed by the CLT, and any changes to executive compensation policies must consider the legal framework governing employment contracts. For instance, the principle of worker protection and salary irreducibility are deeply rooted in Brazilian labor law, which could make the implementation of clawback provisions more complex, by requiring companies to balance accountability measures with employee safeguards, preferably upon implementation of specific internal policies.

Another concern for companies is a potential increase in executive salaries that could result from the implementation of clawback and malus provisions. Companies argue that they may need to offer higher compensation packages to attract and retain top talent if they are required to implement these provisions. This could lead to a rise in overall compensation costs, which may not be sustainable for all companies.

Despite that, Brazilian listed companies without controlling shareholders (true corporations) may face growing expectations from proxy voting advisors and investors – especially foreign institutional investors – to implement clawback and malus provisions. Proxy voting guidelines released for the 2025 proxy season in Brazil evidence this trend: notably, Glass Lewis expanded its expectations regarding clawback policies from 2024 to 2025, stating that *"despite these practices still not being standardized in Brazil, [...] all companies, not just financial institutions, should provide that bonuses will be subject to clawback provisions, allowing companies to reclaim bonuses in the case of poor results in subsequent fiscal years."*<sup>13</sup>

## CONCLUSION

In conclusion, the adoption of clawback and malus provisions is gaining traction globally, driven by the need to ensure accountability and integrity in executive compensation. In the United States, the implementation of these provisions is well-advanced, with the SEC, NYSE, and Nasdaq working together to establish rules applicable to companies listed on a U.S. national securities exchange. Today, such companies often adopt more comprehensive clawback provisions than those required by regulators. In Brazil, the discussion is still evolving, with regulatory bodies like the CVM and B3 exploring the possibility of implementing similar provisions.

Despite the challenges posed by the Brazilian legal framework, recent cases of financial restatements by listed companies and subsequent executive liability investigation have underscored the importance of these provisions. As the debate continues, it is expected that more Brazilian companies will adopt clawback and malus provisions, reflecting their increasing significance in corporate governance.

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<sup>13</sup> Source:

<https://resources.glasslewis.com/hubfs/2025%20Guidelines/2025%20Brazil%20Benchmark%20Policy%20Guidelines.pdf?hsCtaAttrib=184089442214> .



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