

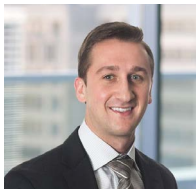
# Clawback Clause (Programmatic Real Estate Joint Venture Agreement)

A Practical Guidance® Clause by

Andrew T. White, Luke P. Haller, and Christina C. George, Winston & Strawn LLP



Andrew T. White  
Winston & Strawn LLP



Luke P. Haller  
Winston & Strawn LLP



Christina C. George  
Winston & Strawn LLP

## Summary

This clawback clause may be included in a limited liability company operating agreement (joint venture agreement) for a programmatic real estate joint venture between an operating member and one or more investor members who are working together to invest in multiple real estate projects over time. This clause includes practical guidance, drafting notes, and an optional clause.

This clause provides a mechanism under which the operating member must repay to the joint venture the amount of any promote payment (also referred to as a profits interest or

carried interest) received in excess of what it is entitled to receive under the terms of the joint venture agreement (i.e., a mechanism for the joint venture to recoup unearned promote distributions after they have been paid), which excess promote payment is then distributed to the investor member(s) or the operating members (potentially including the managing member) through the general waterfall distribution.

This clause assumes that:

- the programmatic joint venture agreement (also referred to as a portfolio or master joint venture agreement) uses a deal-by-deal distribution waterfall with loss carryforward (i.e., capital returned on prior loss investments before remaining capital enters the waterfall);
- the joint venture indirectly owns and manages a portfolio of real estate assets (in this clause, each is referred to as a “Project”), with each such property being owned directly by a separate special purpose entity (in this clause, referred to as the “Project Owner”) that is 100% owned by the joint venture limited liability company;
- the operating member (in this clause, referred to as the “Managing Member”) manages the joint venture, with the ability to earn promote payments pursuant to the terms of the joint venture agreement;
- the investor member(s) (in this clause, referred to as the “Capital Member” and collectively with Managing Member, “Members”) is the capital member(s) of the joint venture limited liability company; and
- there is one class of limited liability company interests in the joint venture.

The capitalized terms and section references used in this clause should be conformed to the relevant joint venture operating agreement.

For further guidance on real estate joint ventures, see [Real Estate Joint Ventures](#) and [Real Estate Joint Ventures for Commercial Real Estate Development](#).

## ARTICLE I. DEFINITIONS.

“**Promote**” means the amounts to be distributed to Managing Member pursuant to Section(s) [section reference(s) to distribution waterfall promote clauses].

### Drafting Note to Definitions

Include the definition for “Promote” in the definitions section of the limited liability company operating agreement for the joint venture. Also, conform the capitalized terms used in this clawback clause to the other defined terms in the agreement.

## ARTICLE II. CLAWBACK.

### Section 2.1. Clawback Payments.

- (a) The Members recognize that the IRR hurdles contained in Section(s) [section reference(s) to distribution waterfall promote clauses] are cumulative hurdles, to be calculated on a Project-by-Project basis as of the sale of each Project and winding up of the applicable Project Owner or the final liquidation of the Company. Notwithstanding the foregoing, subject to Section(s) [section reference(s) to distribution waterfall promote clauses], the Company shall make distributions attributable to the Promote on an interim basis [upon each distribution date following a Capital Event/ other agreed upon timeline], based on the applicable IRR calculations with respect to such Project as of the date of such distribution, as provided in Section(s) [section reference(s) to distribution waterfall promote clauses], subject to this Article II..

### Drafting Note to Section 2.1.(a)

In the brackets containing section references, insert the section(s) of the joint venture agreement that contain the waterfall promote provisions. In the bracket referencing when distributions shall be made, adjust the language to reflect to specific negotiated for the agreement.

For further guidance on real estate joint ventures, see [Real Estate Joint Ventures](#) and [Real Estate Joint Ventures for Commercial Real Estate Development](#).

- (b) The Managing Member acknowledges, upon [each distribution] and upon the Company’s dissolution and the final distribution to the Members in accordance with Section [section reference to final liquidation] (in which event the Excess Promote Amount (defined below) shall be determined with respect to the Company and each and all of the Projects), the Managing Member and Capital Member agree:
- (1) Managing Member shall make the following computations which shall be set out in a notice in writing (attaching all relevant calculations and supporting documentation) to be delivered by Managing Member to the Members on or prior to the date of such distribution:
    - (i) the aggregate amount of Promote actually distributed to Managing Member as of such date (such amount, the “**Promote Disbursed**”); and
    - (ii) the aggregate amount of Promote that Managing Member would be entitled to receive pursuant to Section [section reference to liquidation waterfall] from the Effective Date up to and including the date on which the Available Cash (if any) from such final distribution event would occur (the “**Promote Owed**”).
  - (2) If the Promote Disbursed is greater than the Promote Owed (such difference, the “**Excess Promote Amount**”), Managing Member shall, within [ten (10) business days] of receipt of the notice from Capital Member, repay to the Company, for distribution to [Capital Member/to all Members in accordance with their respective Percentage Interests with respect to such Project(s)], the amount equal to the Excess Promote Amount (the “**Promote Clawback Amount**”).
  - (3) In the event an Excess Promote Amount exists, to cause all amounts otherwise distributable to Managing Member with respect to such Project(s) to instead be distributed to [Capital Member/to all Members in accordance with their respective Percentage Interests with respect to such Project(s)] until the Excess Promote Amount with respect to such Project(s), if any, on the date of such distribution has been reduced to zero; and/or
  - (4) In the event an Excess Promote Amount exists, to require Managing Member to make one or more Capital Contributions to the Company, which amounts shall be distributed to [Capital Member/to all Members in accordance with their respective Percentage Interests with respect to such Project(s)], in the amount necessary to cause the Excess
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Promote Amount with respect to such Project(s), if any, on such date to be reduced to zero. Any amount distributed to the Members (in lieu of being distributed to Managing Member) pursuant to this Section shall be treated as having been distributed to the Members pursuant to Section(s) [section reference to distribution waterfall].

**Optional Clause for “Additional Capital Contributions” Section:**

The amount of each Member’s share of the aggregate amount of Additional Capital Contributions being requested, which shall be determined as follows (in either case, such Member’s “**Required Share**”):

- A. Managing Member shall deliver the computations set forth in Section 2.1.(b)(1) to all Members;
- B. if at such time, no Excess Promote Amount exists (or the Excess Promote Amount has been fully recontributed pursuant to clause (C.) below or pursuant to Section 2.1.(b) herein), each Member’s share shall be equal to such Member’s Percentage Interest of the total amount of Additional Capital Contributions being requested by such [defined term for “Capital Call”]; and
- C. if, at such time, Excess Promote Amount exists, then such Additional Capital Contributions shall be made by the Members in accordance with the then-most recent proportions of the most recent distributions, until all Excess Promote Amount with respect to such Project(s), if any, on the date of such distribution has been reduced to zero (following which the preceding clause (A.) shall apply).

**Drafting Note to Optional Clause for “Additional Capital Contributions” Section**

The parties could agree to adjust the “Percentage Interest” for additional capital contributions required for a project by inserting the optional clause into the “Additional Capital Contributions” section of the joint venture agreement and adjust Section 2.1.(b) accordingly.

**Drafting Note to Section 2.1.(b)**

In the bracketed language in the first paragraph of Section 2.1.(b), include the applicable time period, which is negotiable as noted above.

This clause contemplates a clawback of promote following a distribution event (or other agreed upon timeline). Alternatively, the parties could agree to adjust the “Percentage Interest” for additional capital contributions required for a project by inserting the optional clause into the “Additional Capital Contributions” section of the joint venture agreement.

Section 2.2. **Clawback Guaranty.** [guarantor name(s)], [jointly and] severally, for good and valuable consideration, the receipt of which is hereby acknowledged, joins in the execution of this Agreement for purposes of agreeing to be bound by the obligations to pay the Excess Promote Amount set forth in Section 2.1.(b) of this Agreement, which obligations (a) are hereby fully guaranteed by such guarantor(s) and (b) shall be a primary guarantee of timely performance and not of collection. By each guarantor’s signature to this Agreement, each such guarantor hereby: (1) absolutely, irrevocably and unconditionally guarantees the full and timely payment of such obligations under the circumstances described in Section 2.1.(b) above; (2) waives diligence, presentment, demand, protest, or notice of any kind whatsoever, any defense based on suretyship principles, any defense based on statute of limitations, as well as any requirement that Capital Member exhaust any right or take any action against Managing Member, Managing Member or any other Person; and (3) consents to any supplement, amendment or other modification made to this Agreement in accordance with its terms without its consent or approval, other than any supplement, amendment or modification to this Section 2.2..

**Drafting Note to Section 2.2.**

The clawback guarantor(s) are typically personal guaranties from each owner of the managing member.

If there is more than one clawback guarantor, then the clawback guaranties would typically be joint, but not several (i.e., each guarantor will only be liable for its individual share of the promote clawback amount).

This clause contemplates that a separate signature block of the guarantor(s) will be added to the signature page of the joint venture agreement, acknowledging this Section 2.2.. Alternatively, the form of clawback guaranty may be included as an exhibit to the joint venture agreement or stated to be “in form and substance acceptable to the Capital Member.” In any case, the clawback guaranty(ies) should be executed and delivered simultaneously with the execution of the joint venture agreement.

For further guidance on real estate joint ventures, see [Real Estate Joint Ventures](#) and [Real Estate Joint Ventures for Commercial Real Estate Development](#).

Section 2.3. **Clawback Escrow.** As security for Managing Member’s clawback obligations under this Article II., the Company, at its cost, shall maintain an escrow account (the “**Escrow Account**”) with a commercial bank reasonably acceptable to Capital

Member into which [number in words] percent ([number])% of all [section reference(s) to distribution waterfall promote clauses] shall be deposited, it being understood and agreed that: (a) distributions made to the Escrow Account, and all earnings from the investment and reinvestment thereof, shall inure solely to the benefit of the Managing Member, except to the extent required to pay the Excess Promote Amount; (b) prior to the date that the Managing Member has satisfied in full its obligations, if any, under Section 2.1., the Managing Member shall not be entitled to withdraw any amounts from the Escrow Account except (1) for amounts equal to the amounts that the Managing Member or its direct or indirect members or partners must pay in respect of federal, state or local income taxes relating to: (i) amounts deposited into the Escrow Account, or (ii) earnings generated by the investment and reinvestment of amounts in the Escrow Account, (2) to the extent the Managing Member is required to pay an Excess Promote Amount pursuant to Section 2.1.(b), and (3) as approved by Capital Member pursuant to its prior written consent; (c) amounts in the Escrow Account shall be released to the Capital Member to satisfy the Managing Member's obligations under Section 2.1., if the Managing Member shall not otherwise satisfy those obligations in full in accordance with Section 2.1.; and (d) once the Managing Member has satisfied in full its obligations under Section 2.1., all amounts then in the Escrow Account shall thereupon be distributed to the Managing Member.

#### **Drafting Note to Section 2.3.**

This clause contemplates additional security for the capital member to ensure the managing member satisfies its clawback obligations. The clause is drafted to require the managing member to divert a portion of each promote payment. The parties may negotiate the percentage required, along with when funds in the escrow account are released.

For further guidance on real estate joint ventures, see [Real Estate Joint Ventures](#) and [Real Estate Joint Ventures for Commercial Real Estate Development](#).

Section 2.4. **Survival.** This Article II. shall survive the dissolution and liquidation of the Company, and the obligations of the Managing Member under this Article II. shall survive the removal and replacement of the Managing Member under Section [number].

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#### **Andrew T. White, Partner, Winston & Strawn LLP**

Chair of Winston & Strawn's Real Estate Practice, Andrew distinguishes his practice in various aspects of commercial real estate, including acquisitions, dispositions, financings, private equity capital raising, and joint ventures.

Andrew represents real estate private equity funds, hedge funds, REITs, developers, and other institutional investors and operators in a wide variety of real estate transactional matters, including joint ventures and co-investments, real estate debt financings, complex acquisitions and dispositions, leasing (including sale-leasebacks), and ground-up development. Andrew also advises clients across industries and asset classes on real estate issues including borrowers, lenders, landlords, and tenants.

Additionally, Andrew represents purchasers and landlords in sales, leasebacks, and the financing of single-tenanted, net-leased properties, including those leased to credit tenants and non-credit tenants.

#### **Luke P. Haller, Associate, Winston & Strawn LLP**

Luke focuses his practice on real estate law.

Luke assists a broad range of prominent clients properly transfer owned and leased real property during commercial real estate transactions and corporate transactions. His experience includes a broad range of real estate matters, with a particular focus on acquisitions and dispositions, leasing, renewable energy projects, and financing projects.

#### **Christina C. George, Associate, Winston & Strawn LLP**

Christina concentrates her practice on a wide range of real estate matters, including commercial real estate transactions and financing.

Christina has experience representing owners, developers, investment firms, borrowers, and lenders in financing, workout, purchasing, selling, leasing, and developing of commercial real estate. She represents clients in a range of real estate transactions, including the financing of retail, office, hospitality, multi-family, and mixed-use properties.

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