

CEOs AND CCOs MAY BE REQUIRED TO CERTIFY THAT A COMPLIANCE PROGRAM IS EFFECTIVE FOLLOWING A DOJ RESOLUTION

On March 25, 2022, Assistant Attorney General Kenneth A. Polite Jr. [delivered remarks](#) on corporate compliance and enforcement at NYU Law. He reiterated several points that have been made previously by his predecessors, but also referenced a new requirement that will directly impact the Chief Executive and Chief Compliance Officers of companies settling cases with the U.S. Department of Justice ("DOJ").

Polite expounded on DOJ's June 2020 [Evaluation of Corporate Compliance Programs](#), providing details of how DOJ will assess the effectiveness of a company's program. But Polite also announced that his team will consider requiring Chief Executive Officer ("CEO") and Chief Compliance Officer ("CCO") certifications of compliance programs in the resolution of certain enforcement scenarios. He [gave the same warning](#) a few days earlier at the ACAMS 2022 Hollywood Conference.

Polite emphasized the following in evaluating compliance programs.

Compliance Programs Must be "Well Designed"

In evaluating corporate compliance programs, DOJ will seek to determine whether the program is built on the foundation of a well-constructed risk assessment and is tailored to the company's specific risk profile. Policies, procedures, and training implemented as part of the program should be accessible and understandable to employees and partners and should address the key risk areas for the company. DOJ will also examine reporting protocols to ensure they encourage employees to speak up and result in appropriate investigation, documentation, and remediation.

Compliance Programs Must be "Adequately Resourced" and "Empowered"

Beyond funding, staffing, and reporting lines, DOJ will examine the qualifications and expertise of key personnel. Compliance officers need to be able to engage with the business and access the highest levels of decisionmakers within a company. 'Tone from the top,' as it is often referred, is critical and should convey that compliance is a resource.

Compliance Programs Must "Work in Practice"

An effective program includes regular testing and updating of all elements, including financial controls, training, communications, and culture. As resources and risks change, so should the compliance program. DOJ will look for a track record of the company identifying violations and addressing the root cause to prevent recurrence. As Polite stated, DOJ "want[s] to see examples of compliance success stories," including discipline and rewards handed out, rejected transactions, whistleblowing, and partnerships between compliance and business. Companies may use data analytics to monitor compliance in practice. Demonstrating how regular testing has resulted in upgrades to a sustainable compliance program will be an important part of any future conversations with DOJ.

Executive Certifications in DOJ Resolutions

In addition to these existing metrics, DOJ will now consider requiring both the CEO and CCO to certify at the end of the term of a resolution agreement—such as a guilty plea, deferred prosecution agreement, or non-prosecution agreement—that "the company's compliance program is reasonably designed and implemented to detect and prevent violations of the law (based on the nature of the legal violation that gave rise to the resolution, as relevant), and is functioning effectively." In addition, when a company is required to submit annual self-reports—not via a monitor—on the state of its compliance program, DOJ will consider requiring the CEO and CCO to certify that all compliance reports submitted during the term are true, accurate, and complete.

Previously, CEOs and Chief Financial Officers—and various other officers depending on the DOJ Division involved—have sometimes been required to certify that the company met its disclosure obligations during the term of an agreement by disclosing all evidence and allegations of violations of relevant laws. Indeed, in 2020, DOJ added standard certification language to certain resolution agreements. (See, e.g., [Attachment E](#) to The Bank of Nova Scotia's August 2020 Deferred Prosecution Agreement). However, this new requirement would add an additional certification with respect to the state of the compliance program and directly implicate CCOs.

Polite characterized this potential requirement as a tool to empower compliance professionals in the corporate structure. By giving the CCO a personal stake, it will ensure their voice in corporate decision-making and their access to necessary information and resources. Polite stated that "Chief Compliance Officers and their functions should have true independence, authority, and stature within the company." While DOJ's intention according to Polite is not punitive, this requirement will create new exposure to liability for CCOs and CEOs and involve a

significant expenditure of time and resources to collect supporting documentation on which the certifications will rely.

Since criminal liability under Title 18, United States Code, Section 1001 can attach to any material false statement knowingly made to federal officials in the context of an investigation, CEOs and CCOs will be incentivized to ensure that a compliance program is effective before certifying. Should DOJ allege a certification to be false based on information that comes to light after the fact, DOJ will hold powerful leverage to negotiate an extension of agreement terms, require additional remediation, or even threaten individual criminal charges against those who signed the certification. The risk of exposure for companies and their executives is heightened by DOJ's recent [stated prioritization](#) of ensuring companies live up to the terms of their resolution agreements.

The obvious path to documenting a reasonable basis on which to certify is for CEOs and CCOs to obtain underlying certifications from key personnel, likely resulting in a situation where a cascade of certifications all create potential liability. To manage this risk, companies will need to invest significant resources in auditing the effectiveness of a compliance program before producing the required certification.

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