

Investigations, Compliance and Defense

DOJ Initiatives Aim to Empower Chief Compliance Officers and Strengthen Corporate Compliance Programs

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On March 25, 2022, Kenneth Polite, Assistant Attorney General for the Department of Justice (DOJ)'s Criminal Division, delivered a [speech](#) at NYU Law School's Program on Corporate Compliance and Enforcement announcing initiatives that DOJ is undertaking regarding corporate compliance programs and Chief Compliance Officers (CCOs). AAG Polite anchored his remarks in his own experience as a former Chief Compliance Officer at Entergy. He emphasized that the goal of these initiatives is to improve the stature of CCOs, help ensure CCOs can express concerns, and try to ensure CCOs feature prominently in an organization's remedial efforts. The initiatives include:

1. Asking Criminal Division prosecutors to consider requiring as part of corporate resolutions that CEOs and CCOs certify at the end of the resolution term that the company's compliance program is reasonably designed and implemented to detect and prevent violations of law; and
2. "Revamping" the Fraud Section's former Strategy, Policy, and Enforcement Unit into a newly named Corporate Enforcement, Compliance, and Policy ("CECP") Unit that includes new management and former compliance and defense lawyers with experience in compliance, monitorships, and corporate enforcement.

The initiatives announced by AAG Polite follow the [policy guidance](#) issued in October 2021 by Deputy Attorney General Lisa Monaco regarding significant changes to DOJ's corporate criminal enforcement policies that reflected DOJ's increased willingness to impose corporate compliance monitors on companies resolving criminal investigations.^[1] AAG Polite's speech also underscored themes addressed in [guidance](#) issued by DOJ in 2017, updated most recently in June 2020, regarding how DOJ evaluates compliance programs and the factors that it considers when making corporate resolution decisions.^[2] The guidance, among other things, instructs prosecutors to examine how a corporation's senior business leaders demonstrate their "shared commitment" to a culture of compliance and to remediation efforts. The proposed compliance certification appears intended to advance that objective—though in practice it may shift the weight of responsibility away from business leaders and to CCOs.

1. Certifications by the CEO and CCO of Compliance with Corporate Resolutions

AAG Polite has directed Criminal Division prosecutors to consider whether to require as part of certain corporate resolutions that when a company reaches the end of the term of the resolution, the company's CEO and CCO certify that "the company's compliance program is reasonably designed and implemented to detect and prevent violations of the law . . . and is functioning effectively."^[3] Specifically, in resolutions that do not include an independent compliance monitor, companies are typically required to provide to DOJ annual self-reports on the state of their compliance program. In such cases, whether guilty pleas, deferred prosecution agreements, or non-prosecution agreements, prosecutors would consider whether to require "additional certification language" from the CEO and CCO attesting that all compliance reports submitted during the term of the resolution are "true, accurate, and complete."^[4] Polite said his goal for this change was to provide CCOs and compliance functions "true independence, authority, and stature within the company." Currently, resolutions that do

not include an independent compliance monitor do not require the company to make certifications specifically addressing the effectiveness of the compliance program or reflecting any input from the CCO. (AAG Polite indicated that he would not seek to include new certification requirements in resolutions that include independent compliance monitors.)

Although AAG Polite's remarks did not specify who in the Fraud Section would make the decision whether to require the new compliance-related certifications in each case, presumably attorneys in the CECP Unit will play a role in any such decision. AAG Polite emphasized that the proposed certification requirements are not intended to be "punitive in nature," perhaps anticipating that the proposed certification may be viewed as creating additional burdens for companies resolving matters with the Criminal Division. Rather, he stated, the certification was meant to ensure that CCOs "receive all relevant compliance-related information and can voice any concerns they may have prior to certification."⁵ AAG Polite described the certification as a "new tool" in CCOs' "arsenal" and "the type of resource that compliance officials, including myself, have wanted for some time, because it makes it clear that you should and must have appropriate stature in corporate decision-making."

All of that said, it is far from clear whether the newly envisioned certification requirement would have the effect foreseen by DOJ. In its public compliance guidance, DOJ emphasizes that a company's business leaders should take ownership of compliance efforts and not simply delegate the function to compliance professionals. It is true that the certification as described would require sign-off from both the CEO and the CCO, but in practice a certification from the CCO could send the message that business leaders can defer judgment. It will of course remain to be seen whether, in cases where DOJ chooses to impose the new certification requirement, the requirement has a discernable effect on companies' compliance efforts.

2. Creation of the Corporate Enforcement, Compliance, and Policy Unit

AAG Polite also highlighted enhancements to the Corporate Enforcement, Compliance, and Policy Unit, known as the Strategy, Policy, and Training Unit until it was renamed in November 2021. The CECP Unit sits within the Criminal Division's Fraud Section; among the prosecutors in the section are former compliance attorneys and defense counsel.

In his speech, AAG Polite emphasized that the CECP Unit would not only provide training to prosecutors within and outside of the Fraud Section but also help ensure that companies are maintaining effective compliance programs in the post-resolution phase. The CECP Unit's mandate will include helping the Fraud Section use a consistent approach when evaluating whether appointment of a compliance monitor is appropriate as part of a corporate resolution, and helping ensure corporations are maintaining effective compliance programs post-resolution. Echoing DAG Monaco's remarks from October, AAG Polite also highlighted the consequences that companies could face if they fail to comply with the compliance obligations in DOJ resolutions, including extension of a monitorship term, extension of a resolution term, or declaring breach of a DPA and seeking a corporate conviction. Indeed, in the last several months alone, DOJ has reportedly informed at least four companies that they were or might be in breach of their resolution agreements with DOJ.

According to AAG Polite, these new policy initiatives are intended to set up CCOs for success and incentivize the creation of compliance programs that deploy strong controls to detect and prevent misconduct. To that end, AAG Polite reiterated in his speech the key qualities that [DOJ guidance](#) urges companies to employ in their compliance programs:

- **Well-Designed:** Compliance programs should be company- and industry-specific so they can home in on key risk areas; a one-size-fits-all approach should not be used. Compliance policies and procedures should be easily accessible and understandable to employees at all levels, which will facilitate employee reports of law or policy.

- **Empowered with Resources:** Even the best programs will fail if not properly funded or endowed with the necessary resources. While objective requirements, like funding and employees, are necessary, a company’s program and processes need to empower compliance personnel in practice—for example, by giving them access to high-level executives.
- **Works in Practice:** DOJ is wary of compliance programs that merely live on paper. Compliance programs must be dynamic, and organizations are expected to implement changes they identify to address compliance risks and potential misconduct. Companies are also encouraged to use data and analytics to identify the features of compliance programs that work and, equally important, do not work.

As AAG Polite noted in his speech, CCOs face many challenges in effectuating meaningful compliance reforms in a corporation that is subject to a criminal resolution. Whether the certification from CCOs accomplishes DOJ’s stated objectives—namely, to improve the stature of CCOs and empower them within the corporate hierarchy—or instead as a practical matter shifts accountability for compliance reform away from business leaders to compliance leaders, will play out over time. At a minimum, these new initiatives reflect DOJ’s increased scrutiny of corporate compliance programs, and the Fraud Section’s stated intention to inquire rigorously into whether corporations have instituted meaningful compliance programs that reflect their “commitment to compliance and an ethical culture.”

[1] See Client Alert: [Deputy Attorney General Announces Significant Changes to DOJ’s Corporate Criminal Enforcement Policies](#) (Nov. 11, 2021)

[2] See Client Alert: [DOJ Updates Guidance Regarding the “Evaluation of Corporate Compliance Programs” — Key Take Homes](#) (June 4, 2020)

[3] Kenneth A. Polite, Jr., [Prepared Remarks by U.S. Assistant Attorney General Polite at the NYU Law Program on Corporate Compliance and Enforcement](#), NYU Program on Corporate Compliance and Enforcement (Mar. 25, 2022)

[4] *Id.*

[5] *Id.*

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