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White Collar Crime Report™



*Justice Department*

## How the Yates Memo Will Play Out Depends on What Attorney You Ask

What effect the recently released new prosecution guidelines by the Justice Department requiring companies to report all individual wrongdoing in order to receive cooperation credit will have depends on who in the white collar crime bar you ask.

One view is that it is nothing more than puffery, the administration's way of being seen as tough on Wall Street.

Meanwhile, some contend it will erode one of the fundamental blocks of the U.S. justice system: attorney-client privilege.

Deputy Attorney General Sally Quillian Yates, the DOJ's No. 2 official, announced the new policy in a speech Sept. 10 at New York University School of Law (10 WCR 731, 9/18/15).

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T. Markus Funk
Perkins Coie LLP

The policy, which focuses on how a corporation can receive cooperation credit for alleged misconduct, was laid out in a memorandum sent to prosecutors around the country.

**'All Relevant Facts.'** The most notable aspect of the new policy is it requires companies to turn over ''all relevant facts'' pertaining to alleged misconduct by individual employees.

''It's all or nothing,'' Yates said in September in announcing the policy. ''No more picking and choosing what gets disclosed. No more partial credit for cooperation that doesn't include information about individuals.''

Another significant change is that only in ''extraordinary circumstances'' will corporate settlements shield individuals from prosecution or civil liability, and only with approval from top DOJ officials.

Yates reiterated her department's focus on prosecuting individuals at a Nov. 16 speech in Washington.

But is there really anything to the new policy, or is it just rhetoric to appease those calling for blood on Wall Street? The DOJ has consistently beaten this drum. For instance, former Attorney General Eric Holder espoused similar rhetoric in a speech he delivered in September 2014 (09 WCR 631, 9/19/14).

Experts contacted by Bloomberg BNA offered differing views on how the policy will play out.

**Emphasis Is Real.** The Yates memo has brought new focus on the issue of disclosure, and the emphasis on the individual is ''very real,'' T. Markus Funk, a partner at Perkins Coie LLP in Denver, told Bloomberg BNA in an e-mail.

Mary P. Hansen, former assistant director of the Securities and Exchange Commission's Enforcement Division, told Bloomberg BNA in a telephone interview that while the policy can be seen as the administration satisfying the public outcry over the lack of individual prosecution on Wall Street, it is ''more than just puffery, and the DOJ has been given its marching orders.''

However, Hansen had some reservations about the new policy.

''One thing that concerns me about memo is not so much the focus on individuals, but to companies that they have to turn over individuals to get cooperation credit,'' said Hansen, now a partner at Drinker Biddle & Reath LLP in Philadelphia and a member of the firm's white collar criminal defense and corporate investigations team.

Hansen explained that the policy is asking companies to ''throw their officers under the bus to get cooperation credit.''

One potential problem, according to Hansen, could be increased costs for internal investigations. Some employees will want their own attorney, and the higher-ups will know that they have a ''bullseye'' on their foreheads, she said.

**No Guidance.** The most glaring problem with the new policy, according to the experts, is that there is no guidance for companies to navigate, with several questions left unanswered.

For example, is hiring independent counsel for an employee going to be considered not cooperating, Hansen asked.

Another issue is what employees need to be on the list provided to the DOJ. For instance, does the DOJ

want a list of 200 employees, or just those for whom there is actual evidence of wrongdoing?

''The standard-of-proof lens through which the company must view potential employee misconduct, and on which it must base its decision of whether to identify a particular employee to the government, remains a bit cloudy,'' Funk said. ''Nevertheless, cautious company counsel will in most cases suggest that, given the typically high stakes, a default policy of over-inclusiveness is sensible. Put another way, there are big risks associated with 'holding back' information about possible misconduct—and that is potential exposure from which most companies will want to steer clear.''

However, in the end, the government ''continues to be the ultimate judge of what cooperation credit is appropriate,'' Funk said.

**Race to Talk.** A positive to the new policy could be to incentivise wrongdoers to come forward, Funk explained. An employee who knows ''he or she engaged in conduct that could be viewed as criminal, and who also suspects the company will ultimately self-disclose, will now have an additional incentive to be the 'first to the post' by approaching the government about cooperation before the company identifies them as a suspected bad actor,'' he said.

Michael Koehler, a Southern Illinois University law professor who focuses on corporate compliance and ethics, said that the all-or-nothing approach to cooperation credit is ''short sighted.''

Koehler, a member of Bloomberg BNA's White Collar Crime Advisory Board who maintains the FCPAProfessor.com website, said that he understands there needs to be more evidence to prosecute individuals. However, he questioned why so few individual prosecutions have resulted from corporate settlements.

''We will have to wait and see how the policy works,'' Koehler told Bloomberg BNA in a telephone interview. ''But if history is any guide, it will prove out to be hollow.''

Meanwhile, James M. Cole, a partner at Sidley Austin LLP and Yates's predecessor, contends the new policy may erode attorney-client privilege and decrease companies' willingness to self-report for fear of not reaching the standard . Cole, who said he supported the change, predicted that the DOJ will most likely back away from the announced all-or-nothing approach.

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