

CLIENT ALERT

DOJ Issues Revised Guidelines on Corporate "Cooperation" Hours After Second Circuit Finds Prior DOJ Policies Unconstitutional

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On the same day the Second Circuit issued an eagerly anticipated opinion finding DOJ violated the constitutional rights of KPMG executives in *United States v. Stein*, and in the face of increasing pressure from Congress, the DOJ has revamped its policy on criminal prosecution of corporations for the second time in as many years. The new policy has implications for any company facing the decision whether – and to what extent – it should cooperate with a government investigation of alleged corporate misconduct.

The most important aspect of the new policy reverses DOJ's prior position that payment of employees' attorney's fees could be deemed "uncooperative" by prosecutors. The new policy makes clear that prosecutors may not interfere in a company's decision to advance attorneys fees to employees under investigation. DOJ had little choice, however, given that the Second Circuit ruled yesterday that the government violated the Sixth Amendment right to counsel when it coerced KPMG into cutting off attorney's fees for indicted executives.

The Second Circuit's decision may also have broader implications. The court held that because KPMG and DOJ were engaged in a "joint project," the actions of the company constituted state action. This aspect of the decision gives company counsel and prosecutors much to consider, including whether company counsel must issue *Miranda*-like warnings before interviewing employees in the course of an internal investigation.

Another important aspect of the new DOJ policy concerns demands by prosecutors that companies waive the attorney-client privilege in order to receive credit for "cooperation" and thereby avoid indictment. DOJ has been roundly criticized for undermining the privilege in this manner, and remedial legislation is pending in Congress that seems to have motivated DOJ to issue its new guidance to prosecutors.

But not much has changed. Under the new policy, DOJ still considers disclosure of all relevant information the key element of cooperation. Since the most valuable information DOJ seeks from corporations under scrutiny is the product of privileged interviews of employees and other witnesses, DOJ's revised policy still equates with an expectation of waiver because in most jurisdictions and under most circumstances, voluntary disclosure of attorney-client privileged information or attorney work product constitutes a waiver. Even in the wake of the new policy, companies will continue to have to carefully consider how they gather information and the implications of sharing that information with the government.

Links:

- Second Circuit: [*United States v. Stein*, No. 07-cr-3042 \(2d Cir. Aug. 28, 2008\)](#)
- USDOJ: [Principles of Federal Prosecution of Business Organizations, United States Attorneys' Manual \(August 28, 2008\)](#)

- USDOJ: Deputy Attorney General Paul J. McNulty, Memorandum re Principles of Federal Prosecution of Business Organizations (December 12, 2006)
- USDOJ: Deputy Attorney General Larry D. Thompson, Memorandum re Principles of Federal Prosecution of Business Organizations (January 30, 2003)

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