

White Collar Practice Alert

July 28, 2006

*United States v. Stein**by Andrew Weissmann and Ana R. Bagan*

Exactly one month after holding a provision of the Department of Justice “Thompson Memorandum” unconstitutional in *United States v. Stein*, 05 CR 888 (S.D.N.Y.), on July 26, Judge Lewis Kaplan of the Southern District of New York dealt a second blow to the DOJ policy. The Thompson Memorandum – named after then-United States Deputy Attorney General Larry D. Thompson under whose leadership it was promulgated – requires federal prosecutors to consider a series of factors in deciding whether to indict a corporate entity. The Memorandum, formally known as *Principles of Federal Prosecution of Business Organizations*, can be found at www.usdoj.gov/dag/cftf/corporate_guidelines.htm.

The June 26th Kaplan Decision

Two of the Thompson Memorandum factors have come under assault in *Stein*, specifically whether a company elects to pay the legal fees of its employees and whether it continues to employ or support personnel who assert their Fifth Amendment privilege or otherwise refuse to cooperate in the government’s investigation. In its ruling last month, the *Stein* court held that the Thompson Memorandum’s factor that weighed in favor of indictment if a company chose to pay legal fees for employees who were not cooperating with the government violated the Sixth Amendment right to counsel and the due process clause of the Fifth Amendment. To read the June 26 opinion, [click here](#).

The July 26th Kaplan Decision

In its latest blow to the Thompson Memorandum, on July 26 Judge Kaplan ordered the suppression of two defendants’ statements because they were deemed to be coerced by the government. These defendants’ employer, KPMG, had threatened to fire and/or cut off

the legal fees of the employees if they did not submit to interviews with prosecutors investigating allegedly illegal tax shelters.

Under a 1967 Supreme Court decision, *Garrity v. New Jersey*, 385 U.S. 493 (1967), the constitution forbids State employers from coercing statements from its employees. Judge Kaplan found – in a key part of his ruling – that the combined effect of the Thompson Memorandum and the manner in which the prosecutors wielded it caused KPMG to act at the behest of the government in coercing KPMG employees to speak. By threatening KPMG with indictment – “the corporate equivalent of capital punishment” – the government left KPMG no real choice but to exert pressure on its employees to waive their constitutional rights. In fact, in a KPMG “White Paper” to the DOJ aimed at convincing the government not to indict the company, KPMG extolled the success of its efforts in inducing previously uncooperative employees to speak to the government. Under these circumstances, the court found that KPMG’s conduct could be legally attributable to the government.

Although the court suppressed two defendants’ statements, it refused to suppress those of other defendants. The court recognized that KPMG employees could have reasons to speak to the government – such as obtaining a cooperation agreement or convincing the government of their innocence – other than fear of losing their jobs or having their legal fees cut off. The operative question was thus not whether a defendant had opted to cooperate *after* being informed of the KPMG threat of loss of employment and legal fees. Rather, it was whether the employee elected to speak *because* of those threats. Unlike the two defendants as to whom

the court suppressed statements – whom Judge Kaplan found in fact spoke to the government because of KPMG's actions – the other defendants were not found to have so acted. To read the July 26 opinion, please [click here](#).

Commentary

First, unlike the June 26 decision, Judge Kaplan's recent suppression decision is clearly immediately appealable by the government and in our opinion likely will be. There is a clear legal issue presented, and the government is likely to place great weight on legal precedent that even actions taken by corporations in heavily regulated industries are not deemed to be the actions of the government.

Second, Judge Kaplan's first decision has already spurred action to revisit the propriety of the provisions of the Thompson Memorandum, and his new opinion will likely prompt further reconsideration. This September, the Senate Judiciary Committee intends

to hold hearings on the Thompson Memorandum in light of the *Stein* case. Jenner & Block partner Andrew Weissmann will testify about revisions that should be made to the Thompson Memorandum. Further, DOJ surely will consider how to mitigate some of the more severe aspects of the Memorandum so as to avoid the challenges successfully made in the *Stein* case.

Finally, although the Stein decision focused on the DOJ Thompson Memorandum, it is worth watching legal developments within the SEC with respect to challenges to the SEC's 2001 "Seaboard Order" – which embodies many of the same provisions in the Thompson Memorandum – and could find itself under similar attack. (See *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions*, <http://www.sec.gov/litigation/investreport/34-44969.htm>).

For more information, please contact:

Andrew Weissmann

Partner

Tel: 212 891-1650

Email: aweissmann@jenner.com

©Copyright 2005 Jenner & Block, LLP, One IBM Plaza, Chicago, IL 60611. Jenner & Block is an Illinois Limited Liability Partnership including professional corporations. Under professional rules, this communication may be considered advertising material. The material contained in this document has been authored or gathered by Jenner & Block for informational purposes only. It is not intended to be and is not considered to be legal advice. Transmission is not intended to create and receipt does not establish an attorney-client relationship. Legal advice of any nature should be sought from legal counsel. The attorney responsible for this publication is Andrew Weissmann. Cover image from the Collection of the Supreme Court of the United States.