



WHITE COLLAR COMPLIANCE & DEFENSE PRACTICE AREA

ALERT

ADVANCEMENT OF COUNSEL FEES TO EMPLOYEES NO LONGER A BAR TO CORPORATE COOPERATION

By Patrick J. Egan and Eric E. Reed

In the latest development in the ongoing controversy surrounding the Department of Justice's policies and practices regarding privilege waivers and providing for the defense of corporate employees in the face of governmental investigations of business entities, on August 28, 2008, the Second Circuit affirmed a lower court's dismissal of indictments against former KPMG partners in a tax shelter case. The decision affirmed that the prosecutors violated the defendants' Sixth Amendment right to counsel by pressuring the company to restrict and ultimately not to pay the partners' legal bills. *U.S. v. Stein*, 07-3042-cr (2d. Cir. August 28, 2008).

The Second Circuit ruled that KPMG's actions resulted from the exertion of such pressure from the prosecution as to constitute governmental action, particularly, an unjustifiable interference with the defendants' relationship with their counsel and ability to raise a defense in violation of the Sixth Amendment. Dismissal of the indictments was the only effective remedy.

On the same day the Second Circuit released the *Stein* opinion, the Department of Justice announced new guidelines for the investigation and prosecution of business organizations. The new guidelines, announced by Deputy Attorney General Mark Filip, replace the prior "McNulty Memorandum" and instruct prosecutors not to consider a corporation's advancement of attorney fees to employees when evaluating the entity's cooperation. Of perhaps even

greater significance, the new guidelines also direct prosecutors not to request privilege waivers except as pertinent to advice-of-counsel defenses and communications made in furtherance of fraud.

These developments provide greater assurance to business entities facing governmental investigation that they may properly assert attorney-client privilege and fund the legal defense of corporate personnel without fear of being deemed "uncooperative" and thereby increasing the organization's exposure to civil and criminal charges. The developments should be considered in the context of legislation – approved in the House and stalled in the Senate for over a year – that would expressly prohibit federal attorneys and agents investigating business organizations from requesting privilege waivers or considering the advancement of attorney fees to corporate employees. The legislation, titled the "Attorney-Client Privilege Protection Act," is authored by Pennsylvania Senator Arlen Specter and enjoys support from a broad coalition of legal, business and civil liberties organizations and former prosecutors.

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