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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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UNITED STATES OF AMERICA :
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-against- :
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:
JEFFREY STEIN, et al., :
:
Defendants. :
----- X

S1 05 Crim. 888 (LAK)

**SUPPLEMENTAL BRIEF FOR AMICI CURIAE THE SECURITIES INDUSTRY
ASSOCIATION, THE ASSOCIATION OF CORPORATE COUNSEL, THE BOND
MARKET ASSOCIATION, AND THE CHAMBER OF COMMERCE
OF THE UNITED STATES OF AMERICA**

In light of the Court's request for further briefing concerning the Thompson

Memorandum,^{1/} *amici curiae* Securities Industry Association, the Association of Corporate

^{1/} Memorandum from Larry Thompson, Deputy Attorney General, on Principles of Federal Prosecution of Business Organizations to Heads of Dep't Components and United States Attorneys (Jan. 20, 2003), http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm.

Counsel, the Bond Market Association, and the Chamber of Commerce of the United States of America submit this brief to supplement the previous brief they filed on May 3, 2006 (“5/3/06 Br.”).

Our previous brief explained why the Thompson Memorandum’s attack on private fee advancement policies is as bad for business as it is inimical to basic constitutional principles. As a business matter, the Justice Department’s policy subverts the private sector’s efforts (i) to recruit talented individuals to work in highly scrutinized industries and (ii) to prevent the threat of ruinous legal bills from causing employees to serve their own self-interest, rather than their employers’ interests, by erring on the side of unreasonable caution in their business affairs. *See* 5/3/06 Br. 11-12.

The Justice Department’s policy is just as problematic from a legal perspective. Although no one is entitled to *government* funding of attorneys’ fees for his counsel-of-choice, an investigatory target does have a protected liberty and property interest, before and after indictment, in governmental non-interference with existing *private arrangements* for such funding. *See* NACDL Br. 13-20. Even if that right must sometimes yield to countervailing government interests, there can be no such interest here. The government’s rationale for undermining corporate-funded fee arrangements is that effective legal representation for criminal suspects would frustrate the government’s efforts to convict its investigatory targets and, for that reason alone, would harm the public interest. But our adversarial system, rooted in hundreds of years of Anglo-American jurisprudence, presumes the exact opposite: “that truth—as well as fairness—is best discovered by powerful statements on *both* sides[.]” *Penon v. Ohio*, 488 U.S. 75, 84 (1988) (emphasis added) (quotation marks and citations omitted); *see* 5/03/06 Br. 7-10.

The briefs for the defendants and *amici* NACDL *et al.* address these doctrinal issues in detail, and we will not repeat that discussion here.

We nonetheless wish to supplement our earlier brief to address the practical dimensions of the distinction, raised at the May 10 hearing, between (i) advancements of attorneys' fees to employees from the outset of an attorney-client relationship and (ii) indemnification of attorneys' fees to employees that are exonerated of wrongdoing at the conclusion of an investigation or legal proceeding. *See, e.g.,* 5/10/06 Tr. 426. Companies often choose to advance attorneys' fees (and not simply indemnify employees after the fact) because they recognize that many employees cannot otherwise front the amounts needed for effective legal representation in complex accounting or financial investigations.^{2/}

Without an advancement of fees, the mere prospect of indemnification offers little support for investigatory targets of limited means. Financial institutions may be reluctant to loan large amounts to a targeted employee given the risk that the employer will refuse to make indemnification if the employee is later found liable or strikes a plea bargain to gain closure. For the same reason, criminal defense attorneys—particularly the busiest and most effective ones—will be reluctant to represent such employees under a deferred-payment arrangement. In short, the Thompson Memorandum's suppression of privately negotiated fee advancements is designed

^{2/} *See generally* *Ridder v. Cityfed Fin. Corp.*, 47 F.3d 85, 87 (3d Cir. 1995) (“The [Delaware] statutory provisions authorizing the advancement of defense costs, conditioned upon an agreement to repay if a right of indemnification is not later established, plainly reflect a legislative determination to avoid deterring qualified persons from accepting responsible positions with financial institutions for fear of incurring liabilities greatly in excess of their means, and to enhance the reliability of litigation-outcomes involving directors and officers of corporations by assuring a level playing field”); *United States v. Wittig*, 333 F. Supp. 2d 1048, 1054 (D. Kan. 2004) (the presumption of innocence justifies advancement of legal fees by corporation to accused employees, subject to their acknowledgement “that their ultimate right to keep those payments depends on whether their . . . underlying conduct is indemnifiable”).

to deprive—and does in fact deprive—employees of the resources needed for effective legal representation in fact-intensive investigations.

CONCLUSION

For the foregoing reasons, and those addressed in our May 3 brief, the relevant provisions of the Thompson Memorandum are unlawful.

May 22, 2006

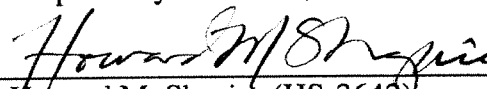
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I, Christopher Davies, hereby certify that I have on this 22nd day of May, 2006, caused copies of the foregoing SUPPLEMENTAL BRIEF FOR AMICI CURIAE to be served upon the following via the method indicated, as the addresses listed:

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