George R. Kramer
SECURITIES INDUSTRY ASSOCIATION

Renee S. Dankner
Susan Hackett
ASSOCIATION OF CORPORATE COUNSEL

Marjorie E. Gross
THE BOND MARKET ASSOCIATION

Robin S. Conrad
Amar D. Sarwal
NATIONAL CHAMBER LITIGATION CENTER, INC.

William R. McLucas
Howard M. Shapiro (HS-3642)
Jonathan E. Nuechterlein
Christopher Davies (CD-2047)
WILMER CUTLER PICKERING HALE and DORR LLP
1875 Pennsylvania Avenue NW
Washington, DC 20006
(202) 663-6000

Attorneys 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

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

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[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[.]" *Penson 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").

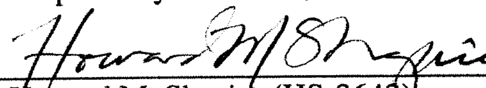
to deprive—and does in fact deprive—employees of the resources needed for effective legal representation in fact-intensive investigations.

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

Respectfully submitted,



Howard M. Shapiro (HS-3642)
William R. McLucas
Jonathan E. Nuechterlein
Christopher Davies (CD-2047)

WILMER CUTLER PICKERING
HALE and DORR LLP
1875 Pennsylvania Avenue NW
Washington, DC 20006
(202) 663-6000

Attorneys 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

George R. Kramer
SECURITIES INDUSTRY ASSOCIATION
1425 K Street NW
Washington, DC 20005
(202) 216-2047

Renee S. Dankner
Susan Hackett
ASSOCIATION OF CORPORATE
COUNSEL
1025 Connecticut Avenue NW
Suite 200
Washington, DC 20036
(202) 293-4103

Marjorie E. Gross
THE BOND MARKET ASSOCIATION
360 Madison Avenue
New York, NY 10017
(646) 637-9200

Robin S. Conrad
Amar D. Sarwal
NATIONAL CHAMBER LITIGATION
CENTER, INC.
1615 H Street NW
Washington, DC 20062
(202) 463-5337

CERTIFICATE OF SERVICE

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:

VIA ELECTRONIC CASE FILING (E-MAIL)

Counsel for Defendant Jeffrey Stein

Craig D. Margolis
Vinson & Elkins L.L.P.
1455 Pennsylvania Ave. NW, Suite 600
Washington, DC 20004
cmargolis@velaw.com

David Spears
Richards Spears Kibbe & Orbe LLP
1 World Financial Center
New York, NY 10281-1003
(c/o) mschneider@rsko.com

Counsel for Defendant John Lanning

Christopher Tarpy Schulten
Akin, Gump, Strauss, Hauer & Feld, L.L.P.
590 Madison Avenue
New York, NY 10022
(212) 872-1000
cschulten@akingump.com

Michael James Madigan
Akin, Gump, Strauss, Hauer & Feld, LLP
Robert S. Strauss Bldg, 1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4017
mmadigan@akingump.com

Counsel for Defendant Richard Smith

Robert Steven Fink
Kostelanetz & Fink, LLP
530 Fifth Avenue, 22nd Floor
New York, NY 10036
(212) 808-8100
rfink@kflaw.com

Caroline Rule
Kostelanetz & Fink, LLP
530 Fifth Avenue, 22nd Floor
New York, NY 10036
(212) 808-8100
crule@kflaw.com

Fran Obeid
Kostelanetz & Fink, LLP
530 Fifth Avenue, 22nd Floor
New York, NY 10036
(212) 619-3730
fobeid@kflaw.com

Counsel for Defendant Jeffrey Eischeid

Elizabeth Ann Fitzwater
Arkin Kaplan LLP
590 Madison Avenue, 35th Floor
New York, NY 10022
(212) 333-0203
efitzwater@arkin-law.com

Joseph V. Diblasi, Esq.
125-10 Queens Boulevard
Kew Gardens, NY 11415
(212) 333-0274
diblasilaw@verizon.net

Counsel for Defendant Philip Wiesner

Ronald E. DePetris
DePetris & Bachrach, LLP
240 Madison Avenue
New York, NY 10016
(212) 557-7747
rdepetris@depetrisbachrach.com

Counsel for Defendant John Larson

Alexandra A. E. Shapiro
Latham & Watkins, LLP
885 Third Avenue, Suite 1000
New York, NY 10022
(212) 906-1670
Alexandra.Shapiro@lw.com

Steven Mark Bauer
Latham & Watkins, LLP
505 Montgomery Street, Ste. 2000
San Francisco, CA 94111
(415) 391-0600
Steve.Bauer@lw.com

Karli E. Sager
Latham & Watkins, LLP
505 Montgomery Street, Ste. 2000
San Francisco, CA 94111
(415) 395-8093
karli.sager@lw.com

Counsel for Defendant Robert Pfaff

David C. Scheper
Overland Borenstein Scheper & Kim LLP
300 S. Grand Ave., Ste. 2750
Los Angeles, CA 90071
(213) 613-4670
dscheper@obsklaw.com

Counsel for Defendant Raymond J. Ruble

Jack S. Hoffinger
Hoffinger Stern & Ross LLP
150 East 58th Street
New York, NY 10155
(212) 421-4000
(c/o) sburris@hsrlaw.com

Stuart Edward Abrams
Frankel & Abrams
230 Park Avenue
New York, NY 10169
(212) 661-5000
sabrams@frankelabrams.com

Susan D. Hoffinger
Hoffinger Stern & Ross LLP
150 East 58th Street
New York, NY 10155
(212) 421-4000
shoffinger@hsrlaw.com

Counsel for Defendant Mark Watson

Leif Thorsten Simonson
Kobre & Kim LLP
800 Third Avenue
New York, NY 10022
(212) 488-1236
leif.simonson@kobrekim.com

Michael Sangyun Kim
Kobre & Kim LLP
800 Third Avenue
New York, NY 0022
(212) 586-9151
michael.kim@kobrekim.com

Counsel for Defendant David Amir Makov

Gerald B. Lefcourt
Gerald B. Lefcourt, P.C.
148 E. 78th Street
New York, NY 10021
(212) 737-0400
lefcourt@lefcourtlaw.com

Jay Philip Lefkowitz
Kirkland & Ellis LLP
153 East 53rd Street
New York, NY 10022
(212) 446-4970
jlefkowitz@kirkland.com

Counsel for Defendant Larry Delap

Diana Davis Parker
Diana D. Parker
162 East 80th Street
New York, NY 10021
(212) 628-5566
dp@dianaparkerlaw.com

Ernest Lawrence Barcella
Paul, Hastings, Janofsky & Walker, LLP
875 15th Street, NW
Washington, DC 20005
(202) 551-1718
larrybarcella@paulhastings.com

John Russel Wing
Lankler Siffert & Wohl LLP
500 Fifth Avenue, 33rd Floor
New York, NY 10110
(212) 930-0233
rwing@lswlaw.com

Deborah Salzberg
Paul, Hastings, Janofsky & Walker LLP
75 East 55th Street
New York, NY 10022
(212) 318-6761
deborahsalzberg@paulhastings.com

Counsel for Defendant Steven Gremminger

John Francis Kaley
Doar, Rieck & Mack
217 Broadway, Suite 707
New York, NY 10007-2911
(212) 619-3730
jkaley@doarlaw.com

Counsel for Defendant Gregg Ritchie

Ann Carol Moorman
Law Offices of Ann C. Moorman
803 Hearst Street
Berkeley, CA 94710
(510) 845-3000
moormanac@aol.com

Cristina Claypoole Arguedas
Arguedas, Cassman & Headley LLP
803 Hearst Street
Berkeley, CA 94710
(510) 845-3000
arguedas@achlaw.com

Michael Evan Horowitz
Cadwalader, Wickersham & Taft, LLP
1201 F Street, NW
Washington, DC 20004
(202) 862-2407
michael.horowitz@cwt.com

Michelle Rose Seltzer
Cadwalader, Wickersham & Taft, LLP
1201 F Street, NW
Washington, DC 20004
(202) 862-2272
michelle.seltzer@cwt.com

Ted Walter Cassman
Arguedas, Cassman & Headley LLP
803 Hearst Street
Berkeley, CA 94710
(510) 845-3000
cassman@achlaw.com

Counsel for Defendant Randy Bickham

George Dominic Niespolo
Duane Morris LLP (CA)
One Market, Spear Tower, 20th Floor
San Francisco, CA 94105
(415) 371-2200
gdniespolo@duanemorris.com

Kathryn Emily White
Duane Morris LLP (CA)
One Market, Spear Tower, 20th Floor
San Francisco, CA 94105
(415) 957-3000
kwhite@duanemorris.com

Stephen Holbrook Sutro
Duane Morris LLP (CA)
One Market, Spear Tower, 20th Floor
San Francisco, CA 94105
(415) 371-2200
shsutro@duanemorris.com

Gregory P. Gulia
Duane Morris, LLP
380 Lexington Avenue
New York, NY 10168
(212) 692-1000
gpgulia@duanemorris.com

Counsel for Defendant Carol Warley

James R. DeVita
Bryan Cave LLP
1290 Avenue of Americas
New York, NY 10104
(212) 541-1241
jrdevita@bryancave.com

Counsel for Defendant David Rivkin

Patrick Quinn Hall
Seltezer Caplan McMahon Vitek
750 B Street, Suite 2100
San Diego CA 92101
(619) 685-3066
hall@scmv.com

J. Bruce Maffeo, Esq.
233 Broadway, Suite 2701
New York, NY 10279
(212) 404-7040
jbm@maffeolaw.com

Counsel for Defendant Carl Hasting

Russell Gioiella
Litman, Asche Lupkin, Gioiella & Bassin, LLP
45 Broadway, 30th Floor
New York, NY 10006
(212) 809-4500
rmg@lagnyc.com

Counsel for Defendant Richard Rosenthal

Priya Chaudhry
Hafetz & Necheles
500 Fifth Avenue, 29th Floor
New York, NY 10110
(212) 997-7595
priya@hafetzlaw.com

Susan Rose Necheles
Hafetz & Necheles
500 Fifth Avenue, 29th Floor
New York, NY 10110
(212) 997-7595
susan@hafetzlaw.com

Martin Joel Auerbach, Esq.
1345 Avenue of the Americas, 19th Floor
New York, NY 10105
(212) 903-9180
auerbach@mjaesq.com

Counsel for Defendant David Greenberg

John N. Nassikas, III
Arent Fox PLLC
1050 Connecticut Avenue NW
Washington, DC 20036
(202) 857-6014
nassikas.john@arentfox.com

Lee David Foreman
Haddon, Morgan, Mueller, Jordan, MacKey & Foreman, P.C.
150 East Tenth Avenue
Denver, CO 80209
(303) 831-7364
lforeman@hmflaw.com

Pamela Robillard Mackey
Haddon, Morgan, Mueller, Jordan, MacKey & Foreman, P.C.
150 East Tenth Avenue
Denver, CO 80209
(303) 831-7364
pmackey@hmflaw.com

David B. Pitofsky
Goodwin Procter, LLP
599 Lexington Avenue
New York, NY 10022
(212) 813-8972
dpitofsky@goodwinprocter.com

Joseph Ray Price
Arent Fox PLLC
1050 Connecticut Avenue NW
Washington, DC 20036
(202) 775-5769
price.joseph@arentfox.com

Richard Mark Strassberg
Goodwin Procter, LLP
599 Lexington Avenue
New York, NY 10022

(212) 813-8859
rstrassberg@goodwinprocter.com

Counsel for the United States of America

Justin S. Weddle
U.S. Attorney's Office, S.D.N.Y.
One St. Andrew's Plaza
New York, NY 10007
(212) 637-2200
justin.weddle@usdoj.gov

Margaret Garnett
U.S. Attorney's Office, S.D.N.Y.
One Saint Andrew's Plaza
New York, NY10007
(212) 637-2520
margaret.garnett@usdoj.gov

Stanley John Okula, Jr.
U.S. Attorney's Office, SDNY
300 Quarropas Street, 3rd Floor
White Plains, NY 10601
(914) 993-1961
stan.okula@usdoj.gov

VIA OVERNIGHT MAIL (FIRST AVAILABLE PICK-UP)

Counsel for Defendant Jeffrey Eischeid

Stanley Samuel Arkin
Arkin Kaplan LLP
590 Madison Avenue, 35th Floor
New York, NY 10022
(212) 333-0208

Counsel for Defendant Philip Wiesner

Leon Rodriguez
Ober, Kaler, Grimes & Shriver
1401 H Street NW, Suite 500
Washington, DC 20002
(202) 326-5070

Counsel for Defendant Gregg Ritchie

James K. Robinson

Cadwalader, Wickersham, & Taft
1201 F Street NW
Washington, DC 20004
(202) 862-2494

Counsel for Randy Bickham

M. Todd Welty
Meadows Owens et al.
901 Main Street
Suite 3700
Dallas, TX 75202
(214) 744-3700

Counsel for Defendant David Rivkin

Gregory Vega
Seltzer Caplan McMahon Vitck
750 B Street
Suite 2100
San Diego, CA 92101
(619) 685-3003

Counsel for KPMG LLP

Carl S. Rauth
Skadden, Arps, Slate Meagher & Flom LLP
1440 New York Avenue NW
Washington, DC 20005
(202) 371-7190

/s/ Christopher Davies

Christopher Davies (CD-2047)
WILMER CUTLER PICKERING
HALE and DORR LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 663-6000