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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
	:	**S1 05 Crim. 888 (LAK)**
-against-	:	
JEFFREY STEIN, et al.,	:	
Defendants.	:	

AMENDED MOTION OF THE SECURITIES INDUSTRY ASSOCIATION, THE ASSOCIATION OF CORPORATE COUNSEL, THE BOND MARKET ASSOCIATION, AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF *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 respectfully submit this amended motion for leave to file a brief as *amici curiae* to address the broad legal and policy issues raised by defendants' motion concerning advancement of legal fees. This

amended motion incorporates by reference the previous motion of *amici*, which requested leave to file our brief by May 5, 2006, and attaches the brief as Exhibit A.

May 3, 2006

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Exhibit A

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SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
	:	**S1 05 Crim. 888 (LAK)**
-against-	:	
JEFFREY STEIN, et al.,	:	
Defendants.	:	

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

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OTHER AUTHORITIES

The Securities Industry Association, the Association of Corporate Counsel, the Bond Market Association, and the Chamber of Commerce of the United States of America submit this brief to address the broad legal and policy issues raised by defendants' motion concerning the advancement of legal fees.[1/] Although *amici* do not address the factual issues presented by this particular case, *amici* can give the Court the business community's perspective on the Justice Department's disquieting policy of thwarting private arrangements for the legal representation of corporate officers and employees.

INTRODUCTION AND SUMMARY

Under the Department of Justice Internal Policy Guidelines for charging corporations (the "Thompson Memorandum"), the Department treats "a corporation's promise of support to culpable employees and agents . . . through the advancing of attorneys fees" as a potential basis for finding that the corporation itself has failed to "cooperat[e]" with a government investigation.[2/] The government decides which unconvicted corporate employees the corporation should consider "culpable," and it coerces corporate counsel to withhold previously promised support for those employees' legal defense. The twin premises implicit in this policy are (i) that the employees in question are guilty, even though they have been convicted of no crime and (ii)

[1/] *See* Motion to Remedy the Violation of Defendants' Constitutional Rights to Counsel and a Fair Trial Resulting From the Prosecutors' Wrongful Interference With Defendants' Ability to Obtain Advancement of Legal Fees from KPMG (filed Jan. 12, 2006). Defendants, all former partners of KPMG LLP, have moved for dismissal of the indictments, or other appropriate relief, on the ground that the government has interfered with their constitutional right to counsel and a fair trial. The Court has scheduled an evidentiary hearing for May 8, 2006, to consider "whether the government, through the Thompson memorandum or otherwise, affected KPMG's determination(s) with respect to the advancement of legal fees and other defense costs." Memorandum and Order (Corrected), *United States v. Stein*, No. 05-888 (S.D.N.Y. filed Apr. 13, 2006).

[2/] 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.

that effective representation for targeted employees frustrates, rather than promotes, the cause of justice. The Thompson Memorandum's author summed up the essence of this policy when he explained that, in the government's view, employees subject to investigation "don't need fancy legal representation" unless they are guilty.[3/]

As discussed below, the government's intervention in private fee arrangements subverts the basic principles of our adversarial justice system; it places corporate counsel in the untenable position of having to accept a prosecutor's "culpability" determinations at face value even during the early phases of an investigation; and it creates perverse incentives that threaten business efficiency. An enormous number of private businesses agree to advance attorneys' fees to employees under investigation for conduct arising from their employment. Such arrangements are necessary both to recruit talented individuals to work in industries subject to close governmental scrutiny and to ensure that those individuals, once hired, act in the interests of their employers rather than serving their own self-interest by erring on the side of extreme caution, lest they face personally ruinous legal fees. For these reasons and those discussed below, the Thompson Memorandum is wrong both as a matter of constitutional law and as a matter of sound business sense.

STATEMENT OF INTEREST

Amici are organizations that represent the interests of the business community and corporate counsel. All of them have a strong interest in preserving the discretion of their members to advance legal fees to officers and employees under investigation for acts committed in the course of employment.

[3/] *See* Laurie P. Cohen, *In the Crossfire: Prosecutors' Tough New Tactics Turn Firms Against Employees*, Wall St. J., June 4, 2004, at A1.

The Securities Industry Association ("SIA") brings together the shared interests of approximately 600 securities firms active in all U.S. and foreign markets and in all phases of corporate and public finance. SIA's members include leading investment banks, broker-dealers, and mutual fund companies. Employing nearly 800,000 individuals, the securities industry generated $236.7 billion in domestic revenue and an estimated $340 billion in global revenue in 2004.

The Association of Corporate Counsel ("ACC") represents the professional interests of attorneys who practice in the legal departments of corporations and other private sector organizations worldwide. The association has more than 19,000 members in over 50 countries who represent approximately 7,500 organizations. Its members represent 49 of the Fortune 50 companies and 98 of the Fortune 100 companies. Internationally, its members represent 42 of the Global 50 companies and 74 of the Global 100 companies. One of the primary missions of the ACC is to act as the voice of the in-house bar on matters that concern corporate legal practice and the ability of its members to fulfill their functions as in-house legal counsel to their employers.

The Bond Market Association ("TBMA") is a global trade organization that represents approximately 200 securities firms, banks, and asset managers that underwrite, sell, trade, and invest in debt securities and other credit products in the United States and in international markets. Its members include securities dealers and brokers that are large multi-product firms and those with special market niches, including all primary dealers in U.S. government securities and all major dealers in U.S. agency securities, mortgage- and asset-backed securities, corporate bonds, and money market and funding instruments, as well as asset management firms with nearly $9 trillion under management.

The Chamber of Commerce of the United States of America ("Chamber") is the largest business federation in the world. The Chamber's underlying membership includes more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

BACKGROUND

When they deem it appropriate, many companies provide for the advancement of legal fees to officers, directors, and (often at the company's discretion) employees who face legal problems arising from conduct within the scope of their employment.[4/] A survey of publicly available data reveals that 48 of the nation's largest 50 companies (in terms of annual revenue) provide for such fee advancement in their articles of incorporation, by-laws, or other organic documents. Large companies are hardly alone in this respect; for example, nine of *Forbes*' "Ten Best Small Companies" have also adopted such provisions. In addition, many states have formalized, through state legislation, an official policy endorsing each company's discretion to adopt such provisions.[5/] For example, "[r]ights to indemnification and advancement are deeply

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[4/] *See, e.g.*, Chevron Corporation, Restated Certificate of Incorporation, art. IX (May 9, 2005), http://www.chevron.com/investor/corporate_governance/docs/certificate_of_incorporation.pdf; Pfizer, Inc., By-laws, art. V (Feb. 24, 2005), http://www.pfizer.com/pfizer/download/investors/corporate/bylaws.pdf.

[5/] *See, e.g.*, Del. Code Ann. tit. 8, § 145(e); N.Y. Bus. Corp. Law § 723(c); *In re Republic Techs. Int'l, LLC*, 275 B.R. 508, 513 (Bankr. N.D. Ohio 2002); *see generally* Kurt A. Mayr, II, *Indemnification of Directors and Officers: The "Double Whammy" of Mandatory Indemnification Under Delaware Law*, 42 Vill. L. Rev. 223, 223-224 & n.4 (1997) (collecting statutes). Corporations face few state law *requirements* to adopt such policies against their will, and *amici* oppose any such legal compulsion.

rooted in the public policy of Delaware corporate law in that they are viewed less as an individual benefit arising from a person's employment and more as a desirable mechanism to manage risk in return for greater corporate benefits." *Kaung v. Cole Nat'l Corp.*, 884 A.2d 500, 509 (Del. 2003). For many years, this "deeply rooted" legal tradition has helped define the expectations and practices of the business community.

The Thompson Memorandum, issued in 2003, imperils this mainstay of corporate employment.[6] It directs that "a corporation's promise of support to culpable employees and agents . . . through the advancing of attorneys fees . . . may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation." Thompson Memorandum at 7-8. Put differently, this guidance encourages prosecutors to threaten businesses with indictment if they do not play ball by withdrawing prior commitments to advance legal fees to whatever employees those prosecutors deem "culpable" for some wrongdoing. The Thompson Memorandum thus encourages prosecutors to substitute their own judgment about an employee's culpability for the judgment of corporate counsel in determining whether to advance legal fees to that employee.

This policy is designed to, and does in fact, exert tremendous pressure on companies under investigation.[7] While even a mere allegation of wrongdoing can drive down a company's

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[6] The Thompson Memorandum built on policies previously adopted by former Deputy Attorney General Eric Holder by "increas[ing] emphasis on and scrutiny of the authenticity of a corporation's cooperation." Thompson Memorandum at 1; *see* Memorandum from Eric Holder, Deputy Attorney General, on Bringing Criminal Charges Against Corporations to Component Heads and United States Attorneys, U.S. Department of Justice (June 16, 1999), http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html; *see generally* Carmen Couden, Note, *The Thompson Memorandum: A Revised Solution or Just a Problem?* 30 J. Corp. L. 405, 413-416 (2005) (discussing the Thompson Memorandum's revision to previous DOJ guidance).

[7] The government's efforts to suppress fee advancements are part and parcel of its broader program to weaken rights of legal representation for the subjects of its investigations.

stock price, companies and the government both know the ruinous practical consequences of indictment. "In the 212-year history of the U.S. financial markets, no major financial-services firm has ever survived a criminal indictment." Ken Brown et al., *Called to Account: Indictment of Andersen in Shredding Case Puts Its Future in Question*, Wall. St. J., Mar. 15, 2002, at A1. For example, Arthur Andersen LLP lost most of its clients soon after it was indicted and is now, for practical purposes, a dead firm, even though the Supreme Court later overturned its conviction.[8/] Indicted companies may also face an onslaught of lawsuits by shareholders who allege that the company's wrongdoing caused a decrease in its share price.[9/]

For example, the Thompson Memorandum states that "[i]n gauging the extent of the corporation's cooperation, the prosecutor may consider the corporation's willingness . . . to waive the attorney-client and work product protection." Thompson Memorandum at 6. Such demands are widespread. In a recent survey of more than 1,200 respondents, 30% of in-house counsel and 51% of outside corporate counsel who had recent experience with enforcement actions reported that the government had indicated an expectation that the company would waive the attorney-client privilege in order to engage in bargaining or to be eligible to receive more favorable treatment. *See* Association of Corporate Counsel et al., *The Decline of the Attorney-Client Privilege in the Corporate Context: Survey Results Presented to the United States Congress and the United States Sentencing Commission*, at 3, http://www.acca.com/Surveys /attyclient2.pdf (last visited May 2, 2006). The predictable result of such routine privilege waiver is to chill attorney-client communications in the long run and thus to frustrate the ability of corporate counsel to conduct effective internal investigations and to provide necessary legal advice to clients.

[8/] *See Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005); *see generally* Cohen, *supra*, at A1 (describing the effect of criminal charges on Arthur Andersen and Drexel Burnham Lambert); Jonathan D. Glater, *Enron Holders in Pact with Andersen Overseas Firms*, N.Y. Times, Aug. 28, 2002, at C3 (describing effects of indictment on Andersen's operations).

[9/] *See, e.g.*, John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working*, 42 Md. L. Rev. 215, 223 (1983) (describing the frequency with which derivative lawsuits piggyback on government injunctive actions or indictments).

ARGUMENT

I. The Government's Policy Violates Key Criminal Justice Principles.

For centuries, criminal suspects have been presumed innocent until proven guilty, *see, e.g.*, *Coffin v. United States*, 156 U.S. 432, 453 (1895), and effective representation for these suspects has been thought to serve, rather than thwart, the essential goals of the justice system, *see, e.g.*, *Penson v. Ohio*, 488 U.S. 75, 84 (1988). The government's policy on fee advancements turns both principles on their heads.

First, it pressures corporate counsel to acquiesce in a prosecutor's unilateral conclusion that particular employees are guilty of wrongdoing, are "uncooperative" if they assert otherwise (or remain silent), and are undeserving of the high-quality legal representation that few employees can afford on their own. Corporate counsel are typically hard-pressed to present evidence of their own contradicting that conclusion. Culpability is particularly difficult for anyone to assess in the early phases of complicated financial or accounting-related investigations, given the complexity of the issues involved and the volume of documents to be reviewed.[10/] Implicating corporate counsel in a prosecutor's pretrial "culpability" determinations undermines the ethic of fairness needed for healthy employer-employee relationships and

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[10/] *See* Am. Coll. of Trial Lawyers, *The Erosion of the Attorney-Client Privilege and Work Product Doctrine in Federal Criminal Investigations*, 41 Duq. L. Rev. 307, 337-338 (2003). Indeed, even courts often find it challenging to differentiate between culpable and lawful behavior notwithstanding a full trial record. Under the Sherman Act, for example, it is "often difficult to distinguish" illegal conduct "from the gray zone of socially acceptable and economically justifiable business conduct." *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 441 (1978); *see also* Pamela H. Bucy, *Indemnification of Corporate Executives Who Have Been Convicted of Crimes: An Assessment and Proposal*, 24 Ind. L. Rev. 279, 293 (1991).

subverts the basic presumption that investigatory targets are presumed innocent until convicted of a crime.

Here, the terms of the Deferred Prosecution Agreement ("DPA") between the government and KPMG exemplify the government's hostility toward any effort to slow down its own rush to judgment. In the DPA, the government extracted a commitment from KPMG that "it shall not, through its attorneys, agents, partners, or *employees*, make any statement, in litigation or otherwise, contradicting the Statement of Facts or its representations in this Agreement."[11/] Such provisions present employees with a Hobson's choice: either "cooperate" and keep quiet about any information that may undermine the DPA's Statement of Facts; or speak up and risk causing corporate counsel, fearful of "violating" the DPA, to distance the company from the inconsistent statements by withdrawing the advancement of legal fees. This dynamic fosters a culture of silence that is as inimical to principles of good corporate governance as it is to the effective functioning of the adversarial system.

Second, the government's policy on fee advancements rests on a contemptuous and legally baseless view of the role of defense counsel in the judicial process. The author of the Thompson Memorandum summarized the government's attitude with the remark that if employees contest criminal liability in good faith, then "they don't need fancy legal representation." Laurie P. Cohen, *In the Crossfire: Prosecutors' Tough New Tactics Turn Firms Against Employees*, Wall St. J., June 4, 2004, at A1 (internal quotations omitted). Nothing could be further from the truth. Particularly in complex financial or accounting cases, all defendants, not just those with something to hide, benefit from effective legal representation. In fact,

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[11/] Letter of David N. Kelley, United States Attorney, Southern District of New York, to Robert S. Bennett, Aug. 26, 2005, at 16, http://www.usdoj.gov/usao/nys/Press%20Releases/August%2005/KPMG%20dp%20AGMT.pdf (emphasis added).

employees whom the government considers culpable have an even greater need for high-quality legal representation than employees who have not been so prejudged, because they face more severe consequences.[12/]

The government's antipathy toward effective representation of those it deems "culpable" for wrongdoing also runs headlong into basic constitutional principles. For example, when (as in this case) the government issues an indictment, the Sixth Amendment entitles the defendant not just to a competent lawyer, but to the defendant's lawyer of choice, precisely because the Framers understood that some lawyers are especially adept at defending individuals against particular types of charges.[13/] Although the government need not itself subsidize the defendant's retention of his lawyer of choice, the government may not unilaterally interfere with his ability to

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[12/] The role of defense counsel in white collar cases is all the more critical now that, according to the government, employees can be indicted for making false statements to private corporate counsel. *See, e.g.*, Indictment, *United States v. Kumar*, No. 04-846 (E.D.N.Y. filed May 17, 2004); *see generally* Lisa M. Fairfax, *Spare the Rod, Spoil The Director? Revitalizing Directors' Fiduciary Duty Through Legal Liability*, 42 Hous. L. Rev. 393, 437-438 (2005) (discussing enhanced penalties for securities fraud); Testimony of Gerald B. Lefcourt Before the ABA Task Force on Attorney-Client Privilege (Apr. 21, 2005), at 4-5 & n.10, http://www.abanet.org/buslaw/attorneyclient/publichearing20050421/testimony/lefcourt.pdf (discussing the case against former Computer Associates' executives).

[13/] *See Powell v. Alabama*, 287 U.S. 45 (1932) ("It is hardly necessary to say that, the right of counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice."); *see also United States v. Gonzalez-Lopez*, 399 F.3d 924 (8th Cir. 2005), *cert. granted*, 126 S. Ct. 979 (Jan. 6, 2006) (addressing whether erroneous denial of counsel of choice is so inimical to our justice system that it invariably requires reversal of any ensuing conviction). Protection for a criminal defendant's right to choose his own counsel likely arose in part as a reaction to the infamous efforts of prosecutors in New York to deprive a newspaperman of the right to his choice of counsel in his trial on charges of seditious libel against the colonial governor. *See* Bruce J. Winick, *Forfeiture of Attorneys' Fees Under Rico and CCE and the Right to Counsel of Choice*, 43 U. Miami L. Rev. 765, 790-798 (1989). The newspaperman subsequently published an account of his trial that was widely read at the time. *See* James Alexander, *A Brief Narrative of the Case and Trial of John Peter Zenger, Printer of the New York Weekly Journal* (S. Katz, 2d ed. 1972).

secure such funding through private means.[14/] The government's policy here thwarts the right to counsel in precisely that respect by encouraging prosecutors to obstruct private legal fee arrangements.

This case thus raises a fundamental question: With all the formidable resources it brings to any investigation of a major business, what interest could the government have in depriving individuals of the privately obtained financial resources needed for a level playing field? One commentator reasonably contends that the natural consequence of the government's policy is to "mov[e] the process governing the American system away from the form the Founders expressly meant it to take—an accusatorial system—and toward something they feared—an inquisitorial system." George Ellard, Essay, *Making the Silent Speak and the Informed Wary*, 42 Am. Crim. L. Rev. 985, 991 (2005). And the government has inflicted that choice on businesses because it believes that most of its targets are guilty and that most effective lawyers serve only to frustrate the search for truth. Again, each position violates the basic premises of our adversarial system of justice.

Finally, the government's policy may, if anything, *hinder* the search for truth over the long term, even if it proves expedient to the government in the short term. Employees with important information relevant to an investigation may be less willing to give complete (or any) information to investigators unless they are represented by counsel they trust. And, so long as

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[14/] *See, e.g.*, *United States v. Monsanto*, 924 F.2d 1186 (2d Cir.) (*en banc*) (government cannot prevent defendant from using private funds to pay defense fees absent showing of probable cause that the restrained funds derive from a crime), *cert. denied*, 502 U.S. 943 (1991); *United States v. Farmer*, 274 F.3d 800, 803 (4th Cir. 2001) (collecting cases); *United States v. Noriega*, 746 F. Supp. 1541, 1545-1546 (S.D. Fla. 1990) (holding that "where a criminal defendant's only assets available for payment of attorneys' fees have been placed out of reach by government action, due process mandates that the government be required to demonstrate the likelihood that the restrained assets are connected to illegal activity").

corporate counsel remain under pressure to acquiesce in a prosecutor's hasty determinations of culpability, even employees who *have* counsel will think twice before divulging all they know about alleged improprieties, lest their knowledge be turned on them and taken as a sign of complicity. The government's policy will likewise discourage some potential informants from seeking plea agreements with the government. Many people will negotiate plea bargains with the government only if they have faith in their counsel, and such individuals are less likely to come forward with information if they lack the means to hire trusted legal representation.

II. The Government's Attack on Fee Advancements Threatens the Integrity of the Employment Relationship and Efficient Corporate Operations.

Quite apart from its incompatibility with traditional legal principles, the government's fee advancement policy is bad for business. As an initial matter, it threatens to distort the economic marketplace. Companies routinely exercise their discretion to use indemnification and advancement policies as recruiting tools to attract the best-qualified directors and officers. *See Homestore, Inc. v. Tafeen*, 888 A.2d 204, 218 (Del. 2005). In addition to serving the interests of the company, indemnification provisions serve the interests of the public because they encourage highly skilled executives to serve in important corporate roles that expose them to a high risk of legal trouble. *Mooney v. Willys-Overland Motors*, 204 F.2d 888, 898 (3d Cir. 1953). If the government regularly coerces companies to deny fee advancement to employees the government deems "culpable" for some wrongdoing, many talented employees may well decide to avoid working in fields subject to detailed regulation, such as accounting or finance, for fear of incurring exorbitant legal fees in defending themselves against complex, document-intensive charges.

Even more troubling, the government's policy gives corporate managers perverse incentives to exalt their own self-interest over their company's interests. Companies function

best when the interests of the company and its employees are aligned.[15/] Fear of massive personal exposure to legal fees, however, can lead employees to err on the side of extreme caution in their daily work, even when doing so disserves their companies' interest in a more sensible approach. This divergence in individual and corporate interests is particularly pronounced in fields, such as accounting or finance, in which everyday decisions can carry complex and financially enormous consequences.

Fee advancement guarantees reduce that divergence in interests by giving employees the confidence they need to act assertively when the company's business interests so require. A fitting analogue is the business judgment rule, a mainstay of corporate law. This rule enables directors, for example, to make difficult but necessary and prudent business decisions by shielding them from liability for the later adverse results of those decisions. But for the business judgment rule,

> the entire advantage of the risk-taking, innovative, wealth-creating engine that is the Delaware corporation would cease to exist, with disastrous results for shareholders and society alike. That is why, under our corporate law, corporate decision-makers are held strictly to their fiduciary duties, but within the boundaries of those duties are free to act as their judgment and abilities dictate, free of *post hoc* penalties from a reviewing court using perfect hindsight.

In re Walt Disney Co. Derivatives Litig., No. Civ. A. 15452, 2005 WL 2056651, at *2 (Del. Ch. Aug. 9, 2005) (unpublished); *see also Unitrin, Inc. v. American Gen. Corp.*, 651 A.2d 1361, 1372-1373 (Del. 1995). Likewise, fee advancement guarantees permit managers to act with the security that, should the need arise, they will be able to defend themselves effectively against complex but ultimately unfounded allegations of wrongdoing. The government's policy here

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[15/] *See, e.g.*, *Restatement (Second) of Agency* § 387, cmt. b (2006) ("[A]n agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency.").

undermines that sense of security and thereby creates precisely the types of the perverse incentives these fee advancement guarantees are designed to preclude.

CONCLUSION

For the foregoing reasons, the relevant provisions of the Thompson Memorandum are unlawful.

May 3, 2006

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