UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA **CRIMINAL NO. 3:09 CR00197 (JBA)**

v.

STEVEN E. SCHLEIFER **November 12, 2009**

GOVERNMENT'S MEMORANDUM IN AID OF SENTENCING

This memorandum is submitted in aid of the sentencing of Defendant Steven E. Schleifer. The sentencing is currently scheduled before this Court for November 20, 2009. For the reasons set forth below, the Government asserts that the Defendant should receive a sentence within the Guidelines' range of 18-24 months as calculated and agreed to by the parties in the Plea Agreement. A prison sentence within this range is a reasonable and just sentence, and is not greater than necessary given the seriousnes of the defendant's conduct and the goals of sentencing. Accordingly, such a sentence should be imposed in this matter. Moreover, for reasons set forth below, the Government would not object to a sentence at the low end of the range.

As part of his plea agreement, the Defendant agreed to waive his right to appeal if the sentence imposed does not exceed 24 months' imprisonment and a one-year term of supervised release.

I. Brief Procedural Background

On September 1, 2009, Defendant Schleifer waived indictment and pleaded guilty to a one-count Information charging him with corruptly obstructing and impeding the due administration of the Internal Revenue laws, in violation of 26 U.S.C. § 7212(a).

For the reasons set forth below, the Court should impose a sentence of imprisonment within – but at the low end – of the applicable range. This assertion is based on the seriousness of the offense, the need to promote respect for the law, to provide just punishment for the offense, and to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct. Moreover, as this is a tax case the matter of general deterrence is even more important. The Government believes that a sentence that includes incarceration at the low end of the Guidelines range is warranted in this case.

II. The Offense Conduct

The Participants

Defendant Schleifer resided in Monsey, New York, and opened and controlled accounts at a financial institution which is engaged in and the activities of which affected interstate and foreign commerce and the deposits of which were insured by the Federal Deposit Insurance Corporation.

An associate of Defendant Schleifer (referred to herein as Associate #1), who was not named as a defendant in the Information, resided in New Haven County and controlled accounts in her own name and in the name of a business entity at a number of financial institutions including New Haven Savings Bank (now known as NewAlliance Banc Corp. ("NABC")), and at Citizen's Bank, both of which were financial institutions which engaged in and the activities of which affected interstate and foreign commerce. Associate #1 had been a depositor at New Haven Savings Bank for a sufficient length of time prior to the offering, (*i.e.*, before the record date for the conversion, described in more detail below), such that she was eligible to purchase shares in NABC in tier 1 of the initial public offering, on behalf of both herself and on behalf of a business entity she controlled.

At the direction of Defendant Schleifer, Associate # 1 opened and controlled an account at Oppenheimer and Company, Inc. ("Oppenheimer"), a brokerage institution through which she eventually sold shares of stock of NABC, which became a publically traded bank located in the District of Connecticut, upon conversion from mutual form to stock form (hereinafter "Shares" or "Securities").

The Mutual Bank Conversion

New Haven Savings Bank ("NHSB") was organized in 1838 as a Connecticut-chartered mutual savings bank. In 2003, NHSB was headquartered in New Haven, Connecticut, with offices located in the Connecticut counties of New Haven and Middlesex. In 2003, NHSB adopted a plan of conversion, completed in 2004, pursuant to which NHSB converted from a Connecticut-chartered mutual savings bank to a Connecticut-chartered capital stock savings bank, and became a wholly-owned subsidiary of NewAlliance Bancshares, Inc.

NewAlliance Bancshares, Inc. is a Delaware corporation organized in 2003 in connection with the then-proposed conversion of NHSB to capital stock form. NABC filed an application with the Board of Governors of the Federal Reserve to become a bank holding company and did not issue stock prior to the 2004 initial public offering.

Federal and state banking regulations require a converting mutual bank that is conducting an Initial Public Offering ("IPO" or "Offering") to give eligible depositors priority rights in purchasing newly issued Shares, these priority rights or "subscription rights" are non-transferable and allow depositors to purchase Shares at the "subscription price" or "offering price."

Under the terms of the NABC Offering, detailed in the prospectus that was distributed to those eligible to subscribe in the subscription offering, including Associate #1, the shares of

common stock of NABC were offered for sale at a price of $10.00 per share in a "subscription offering." The rights to subscribe for the Shares were granted to potential purchasers with first priority being given to "eligible account holders," defined as each holder of deposit accounts with aggregate balances of $50.00 or more on the "record date" or "cut-off date" of June 30, 2002 ("the cut-off date").

Under the terms of the Offering, eligible account holders who sought to exercise their subscription rights were required to submit a stock order form setting out the number of Shares they sought to purchase and include full payment for the Shares requested. Additionally, account holders were required to affirm that they were purchasing the Shares for their own account and that there was no agreement or understanding regarding the sale or transfer of the Shares or the right to subscribe for the Shares. An original stock order form properly executed and full payment was required to be received by the bank by 10:00 am on March 11, 2004, by mail or commercial delivery service.

The NABC Offering was oversubscribed in tier one and accordingly, Shares were not sold beyond the first tier. As a result of the over subscription, Shares were allocated in accordance with the plan of conversion and in accordance with a formula, described in the prospectus. The formula based Stock allocations primarily upon the amount of money on deposit in an eligible account holder's account and the proportion of his or her deposits to the total amount of deposits of all eligible account holders whose subscriptions remained unfilled. As a result of the over-subscription, certain first-tier account holders did not receive the full amount of Stock that they requested.

Associate # 1 was an eligible account holder and was issued first tier subscription rights. These rights were non-transferable and in connection with the purchase of Shares she was required

to sign a stock order forms affirming that she was purchasing the Shares for her own account and that there was no agreement or understanding regarding the sale or transfer of the Shares or the right to subscribe for the Shares.

The Plan to Obtain Shares

In or about January or February of 2004, Defendant Schleifer had a meeting with and discussions with Associate # 1 and others regarding a plan for Schleifer, who did not have first tier subscription rights, to participate in some way in the potential profit of buying and selling NABC shares. Based on these discussions, Schleifer and Associate #1 agreed to buy shares of NABC together. Schleifer and Associate #1 agreed that he would provide her funds and she who would use her subscription rights to buy shares of NABC; and they further agreed that the profit from the subsequent sale of the Shares of NABC would be shared.

Also in January or February of 2004 in the discussions with Associate # 1, Defendant Schleifer told her that in order to execute the sale of the Shares she should open up an account or accounts at Oppenheimer, through which she would sell the Shares of NABC and thereafter share the profits with him.

On or about March 3, 2004, Associate #1 wrote-out two checks to be drawn on her citizen's bank account, written out in the amounts of $645,000 and $700,000 respectively. Both checks were made payable to New Haven Savings Bank for the purchase of Shares of NABC. Also on March 3, 2004, Associate #1 executed two stock order forms, each requesting 700,000 shares of NABC and each attesting, falsely, that she was purchasing the Shares solely for her own account and that there was no agreement or understanding regarding the sale or transfer of the Shares. On or about March

4, 2004, Associate #1 sent, by commercial interstate carrier, the above referenced checks and the falsely executed stock order forms to Defendant Schleifer.

On or about March 9, 2004, Defendant Schleifer transferred approximately $1,170,000 by interstate wire from his account at Fleet Bank (now known as Bank of America) Hackensack, New Jersey to Associate #1's account at Citizen's Bank in Connecticut. The proceeds of the wire transfer were used to fund the above referenced checks and NABC stock purchase. Also on March 9, 2004, Defendant Schleifer sent and caused to be sent the checks and two stock order forms by commercial interstate carrier to the New Haven Saving Bank stock conversion center for the purchase of Shares to be issued to Associate #1. Together Schleifer and Associate #1 sought to purchase two full "units" or two blocks of 70,000 shares, with Defendant Schleifer providing $1.1 million of the $1.4 million needed to buy the sought after stock.

On or about April 1, 2004, based on the falsely executed stock order forms NABC issued 61,694 Shares to Associate #1 and 682 Shares to Associate #1 in the name of her corporate entity. NABC refunded $83,194 to her personally and refunded $693,314 to her in the name of her corporate entity, the refund being for the Shares requested but not allocated to her or her corporate entity in the IPO.

On or about April 6, 2004, Associate #1 deposited and caused to be deposited the stock certificates into her two accounts at Oppenheimer, the accounts in her name and in the name of her corporate entity that Defendant Schleifer had caused her to open. On or about April 8, 2004, Associate #1, acting at Defendant Schleifer's direction, wired $776,500 in funds from her account at Citizen's bank to Defendant Schleifer's account at Fleet Bank, the proceeds of the wire transfer

being the return of the portion of Defendant Schleifer's funds that were not utilized to purchase the Shares.

The Sale and Impeding the Functions of the IRS

Between on or about April 20, 2004 and May 3, 2004, Defendant SCHLEIFER's directed the sale of the Shares of NABC stock from the Oppenheimer account, which was sold on four different days and involved seven transactions with total proceeds of $137,911.73. The following chart summarizes these transactions:

Date	Shares	Price	Proceeds
4/20/2004	10,000	$13.85	$138,491.75
4/27/2004	5,000	$13.59	$ 67,943.41
4/29/2004	1,200	$13.25	$ 15,899.62
4/29/2004	5,000	$13.19	$ 65,943.45
5/03/2004	7,494	$13.40	$100,416.50
5/03/2004	10,000	$13.39	$133,891.86
5/03/2004	682	$13.44	$ 9,085.84

Thereafter Defendant Schleifer caused Associate #1 to retain a portion of the profits for acting as the straw buyer and to cover any potential tax liability reported to the Internal Revenue Service by virtue of the above listed sales and thus in so doing sought to conceal the fact that Defendant Schleifer was in reality the beneficial owner of the 39,376 Shares.

On or about May 6, 2004, at the instruction of Defendant Schleifer, Associate #1 wrote a check in the amount of $293,760.00, drawn on an account at Oppenheimer, to Defendant Schleifer and indicated on the check memo line that the funds were purportedly a "Repayment of loan" and shortly thereafter, Defendant Schleifer deposited this check into his Fleet Bank account.

On or before May 6, 2004, during their discussions regarding the allocation and distribution of the profits earned on the NABC stock purchase and sale, Defendant Schleifer told Associate #1 that she should "gift" the profits to him and that she should describe the profits as "gifts." Defendant

Schleifer told Associate #1 that gifts of $11,000 and under were not taxable and therefore, at a point in time after the stock was sold but before May 11, 2003, Defendant Schleifer provided Associate #1 with a list of individuals to whom the checks were to be written, as well as the dollar amounts that the checks should be made out for. The list that Defendant Schleifer provided contained the names of relatives, including the names of his children, for distribution of his profits.

On or about May 11, 2004, Associate #1 wrote nine (9) checks drawn on her Oppenheimer account that were made payable to Schleifer, his relatives and his children. The following summarizes these checks:

PAYEE	AMOUNT	CHECK #	MEMO
Steven Schleifer	605.76	1007	1% Int On Loan
Steven Schleifer	10,000.00	1008	"Gift"
"R.S"	10,000.00	1009	"Gift"
"D.S"	10,000.00	1010	"Gift"
"S.S."	10,000.00	1011	"Gift"
"A.S."	10,000.00	1012	"Gift"
"T.S."	10,000.00	1013	"Gift"
"J.S."	10,000.00	1014	"Gift"
"R.S."	3,000.00	1015	"Gift"

On or about May 13, 2004, Defendant Schleifer deposited the above listed nine (9) checks, together with other checks (unrelated to the scheme) into his Fleet Bank account for a total deposit of approximately $174,228 included in which were proceeds from the sale of the NABC Shares.

On or about May 14, 2004, Defendant Schleifer wrote out a check drawn against his Fleet Bank account in the total amount of $175,000 and made payable to an account at his employer. Thereafter he caused the check to be executed and transferred the funds to the account at his employer. Included in the $175,000 were proceeds from the sale of the NABC Shares.

On or about April 14, 2005, Defendant Schleifer prepared and caused to be prepared, and filed and caused to be filed his personal tax returns on Form 1040, U.S. Individual Income Tax

Return and failed to declare any of the $137,911.73 in profit made from the purchase and subsequent sale of NABC stock purchased with his funds through the use of a straw buyer.

III. The Need for Determining an Appropriate Sentence Post-*Booker*

In *United States v. Crosby*, 397 F.3d 103 (2d. Cir. 2005), the Second Circuit explained that, in light of *United States v. Booker*, 543 U.S. 220 (2005), district courts should engage in a three-step sentencing procedure. First, the district court must determine the applicable Guidelines range, and in so doing, "the sentencing judge will be entitled to find all of the facts that the Guidelines make relevant to the determination of a Guidelines sentence and all of the facts relevant to the determination of a non-Guidelines sentence." *Crosby*, 397 F.3d at 112. Second, the district court should consider whether a departure from that Guidelines range is appropriate. *Id.* at 112. Third, the Court must consider the Guidelines range, "along with all of the factors listed in section 3553(a)," and determine the sentence to impose. *Id.* at 112-13.

Section 3553(a) provides that the sentencing "court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection," and then sets forth seven specific considerations:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
> (2) the need for the sentence imposed—
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> (B) to afford adequate deterrence to criminal conduct;
> (C) to protect the public from further crimes of the defendant; and
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
> (3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established [in the Sentencing Guidelines];
(5) any pertinent policy statement [issued by the Sentencing Commission];
(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
(7) the need to provide restitution to any victims of the offense.

The Second Circuit has instructed district judges to consider the Guidelines "faithfully" when sentencing. *Crosby*, 397 F.3d at 114. "*Booker* did not signal a return to wholly discretionary sentencing." *United States v. Rattoballi*, 452 F.3d 127, 132 (2d Cir. 2006) (citing *Crosby*, 397 F.3d at 113). The fact that the Sentencing Guidelines are no longer mandatory does not reduce them to "a body of casual advice, to be consulted or overlooked at the whim of a sentencing judge." *Crosby*, 397 F.3d at 113. Because the Guidelines are "the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions," *Gall v. United States*, 128 S. Ct. 586, 594 (2007), district courts must treat the Guidelines as the "starting point and the initial benchmark" in sentencing proceedings. *Id.* at 596; *see also Rattoballi*, 452 F.3d at 133 (the Guidelines "'cannot be called just 'another factor' in the statutory list, 18 U.S.C. § 3553(a), because they are the only integration of the multiple factors and, with important exceptions, their calculations were based upon the actual sentences of many judges.'") (quoting *United States v. Jiminez-Beltre*, 440 F.3d 514, 518 (1st Cir. 2006) (en banc); *Kimbrough v. United States*, 128 S. Ct. 558, 574 (2007). The Second Circuit has "recognize[d] that in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances." *United States v. Fernandez*, 443 F.3d 19, 27 (2d Cir. 2006); *see also Kimbrough*, 128 S. Ct. at 574 ("We have accordingly recognized that, in the ordinary case, the Commission's recommendation of a sentencing range will 'reflect a rough approximation of sentences that might

achieve § 3553(a)'s objectives.'") (quoting *Rita v. United States*, 127 S. Ct. 2456, 2465 (2007)); *Rattoballi*, 452 F.3d at 133 ("In calibrating our review for reasonableness, we will continue to seek guidance from the considered judgment of the Sentencing Commission as expressed in the Sentencing Guidelines and authorized by Congress.").

A. Sentencing Guidelines Range

The Government and the defendant stipulated to the fact that the defendant's applicable Sentencing Guidelines should be calculated to be the range of 18 to 24 months of imprisonment and a fine range of $4,000 to $40,000. That Guidelines ranges is reached as follows.

The Defendant entered a plea to a tax offense, and therefore Part "T" of the Sentencing Guidelines entitled "Offenses Involving Taxation," is the applicable Part for determining the base offense level and the specific offense characteristics. Pursuant to U.S.S.G. § 2T4.1 (*see* U.S.S.G. § 2T1.1), the defendant's base offense level is 14 for a tax loss of more than $30,000 but not more than $80,000. Two (2) levels are added under U.S.S.G. § 2T1.1(b)(1), because the Defendant failed to report or to correctly identify the source of income exceeding $10,000 in any year from criminal activity. *See* U.S.S.G. § 2T1.1(b)(1). Furthermore, two (2) additional levels are added under U.S.S.G. § 3B1.1(c), because defendant was an organizer, leader, manager, or supervisor in criminal activity, resulting in an adjusted offense level of 18.

Three (3) levels are subtracted under U.S.S.G. § 3E1.1 for acceptance of responsibility, resulting in a total adjusted offense level of 15. A total offense level of 15 with a criminal history category I, which the parties calculated the defendant's criminal history category to be, results in a range of 18 to 24 months of imprisonment (sentencing table) and a fine range of $4,000 to $40,000, U.S.S.G. § 5E1.2(c)(3).

B. No Departures From that Guidelines Range Are Appropriate

The parties further agreed that in calculating the Defendant's applicable guideline range pursuant to the United States Sentencing Guidelines, that neither a downward nor an upward departure from the sentencing guidelines range set forth above would be warranted and that a sentence within the agreed range would be reasonable. Additionally, the Government asserts that this calculation yields a Guideline range that is appropriate for this tax offense. *See Kimbrough*, 128 S. Ct. at 574 ("in the ordinary case, the Commission's recommendation of a sentencing range will 'reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives.'")

C. The Court Must Consider the Guidelines Along with the § 3553(a) Factors

For the reasons discussed above and the additional arguments set out below, Defendant's conduct, weighed in view of the factors set forth in Section 3553(a), calls for a sentence of imprisonment consistent with the terms recommended by application of the Sentencing Guidelines, a sentence in the range of 18 to 24 months. See 18 U.S.C. § 3553(a)(4) (Court shall consider the sentence applicable under the Guidelines). However, the Government would not object to a sentence at the bottom of the range.

1. <u>The Nature and Circumstances of the Offense</u>

This is a serious offense. Accordingly, it is the Government's position that the Court should sentence the Defendant to a term of imprisonment consistent with the Guidelines, as such a sentence would be consistent with the seriousness of the Defendant's conduct. This crime was not a momentary lapse of judgment but, to the contrary, was a carefully conceived plan that sought to take advantage of the New Haven Savings Bank mutual bank conversion and did so over a period of months, culminating with the false tax filing occurring over a year later. The plan involved

meetings at the Defendant's home, the opening up of new brokerage accounts to facilitate the eventual sale of Shares, the transferring of over a million dollars to Associate #1, false statements to the bank on two stock order forms, the selling of the Shares and the transferring of the proceeds in a clandestine manner using the names of his children to avoid detection and proper reporting to the Internal Revenue Service, and finally, obstructing the collection of taxes by lying to the IRS on his form 1040. Clearly the scheme was carefully thought out and cleverly executed. This is by all accounts a serious offense as the Second Circuit has said, "tax offenses, in and of themselves, are serious offenses." *United States v. Cutler*, 520 F.3d 136 (2d Cir 2008). Here even more so especially given the Defendant did it using the names and identities of his minor children.

2. History and Characteristics of the Defendant

The Defendant here does not have any prior convictions and appears to have a well developed support system and a strong family life. Furthermore, he has a solid successful career as a corporate controller and by any measure is well-off financially. These facts certain may weigh in the Court's consideration of what his ultimate sentence should be. On their face these facts would appear to warrant at a minimum a sentence at the low end of the Guidelines range.

Nevertheless, these facts can also be viewed in a much different light. Even while having a solid career, a strong community foundation, the support of friends and family, and over $1.1 million in available funds to invest, Defendant Schleifer still turned to criminal conduct in order to seek to increase his own personal wealth. Moreover, even as a person with substantial means he sought to avoid paying taxes and thus stands convicted of corruptly obstructing and impeding the due administration of the Internal Revenue laws. Accordingly, it can only be concluded that this was a crime driven not out of need but to the contrary was driven by greed. On the day of

sentencing, the Defendant will stand before the Court as a millionaire with the ability to forfeit the ill-gotten gains and having already paid the tax liability and interest.

Again, to his credit he has made the requisite tax payments and interest payments before sentencing and has agreed to disgorge the ill-gotten gains to the SEC. But these facts again cut both ways. He has now paid the taxes in full, but this fact underscores the fact that he is an individual with a significant net worth and the wherewithal to pay his fair share, yet he sought to avoid paying taxes on the ill-gotten profits from the stock sale. The Government asserts that this fact speaks volumes of the Defendant's character.

Second, the duration of his criminal conduct shows that his criminal conduct was not isolated, nor was it a momentary lapse of judgment. The Defendant knowingly engaged in fraudulent conduct seeking to obstruct the administration of the IRS for a period of over a year. His conduct began in early 2004 and continued through the false filing of his 2004 form 1040 that was filed in April of 2005.

Third, the Defendant used the names and identity of his family members, including his wife and minor children, either knowingly or in the case of his children presumably unknowingly, to corruptly obstruct and impede the due administration of the Internal Revenue laws.

3. The Sentence Must Promote Respect for the Law

The sentence in this case must reflect the seriousness of the offense committed by the Defendant. When someone who is well-to-do, who through what appears to have been years of hard work has reached the status in life that he has many of life's advantages including an education, friends, and family, and the ability to earn a significant income legally, chooses instead to ignore the nation's tax laws, such a person should be punished with a period of incarceration. A simple

"slap on the wrist" or home confinement will not suffice. A certain amount of prison time should be imposed in these types of cases in order to demonstrate that those individuals who commit financial crimes and in particular tax crimes, are punished with meaningful sentences. Thus, it is rather axiomatic that the sentence in this case must be stern enough to reflect the fact that Schleifer's offense is in fact a serious offense as the Second Circuit reminds tax cases clearly are.

4. The Court Should Consider General Deterrence

One of the factors the Court must consider in imposing sentence is the need for the sentence to "afford adequate deterrence to criminal conduct." 18 U.S.C. § 3553(a)(2)(B). A prison sentence for such conduct can serve as a powerful deterrent against the commission of financial fraud and tax evasion by persons who, like Defendant, seek to earn significant sums of money and avoid reporting it or paying any taxes on it. Thus, the Government requests that the Court consider general deterrence in fashioning an appropriate sentence for this Defendant. A sentence that does not include a significant period of imprisonment sends the wrong message. *See, e.g., United States v. Ture*, 450 F.3d 352, 358 (8th Cir. 2006) (in tax evasion cases, district courts are required "to consider the importance of a term of imprisonment to deter others from stealing from the national purse").

The sentence must also be significant enough to promote public respect for the law and to demonstrate that no one, not even a millionaire with a position as a corporate controller is above the law. The Court should reject any notion that the rich and educated (like Schleifer) should be sentenced more lightly than the poor and less-privileged.

It seems well settled that the imposition of prison sentences in white-collar cases does work to provide general deterrence to others. The author of a survey of academic research regarding the efficacy of criminal sanctions for white collar crimes found the following:

> White-collar crime is believed to be particularly amenable to deterrence due to its rational and profit-oriented motivation. In a conceptual analysis of the topic, Braithwaite and Geis observed that white-collar offenders are not committed to a lifestyle of illegality, are risk aversive, and have more to lose as a result of a criminal conviction than street offenders. Elsewhere Geis noted that "[j]ail terms have a self-evident deterrent impact upon corporate officials, who belong to a social group that is exquisitely sensitive to status deprivation and censure." It is generally perceived that executives exhibit distress at the thought of being sentenced to incarceration: "It results in hypertension, it causes heart attacks, it is very serious."
>
> Most judges and prosecutors view general deterrence as the one of the goals, if not the major purpose, in sentencing white-collar offenders. Punishment should serve to discourage others from committing similar offenses and jail or prison sentences, judges and scholars alike tend to believe, are particularly effective as a general deterrent.

Elizabeth Szockyj, "Imprisoning White-Collar Criminals?," from "Symposium: A Fork in the Road: Build More Prisons or Develop New Strategies to Deal with Offenders," 23 S. Ill. U. L.J. 485, 492 (1999)(footnotes omitted).

Furthermore, the Second Circuit recently reiterated in *United States v. Cutler*, 520 F.3d 136 (2d Cir 2008) that "tax offenses, in and of themselves, are serious offenses" *Cutler*, 520 F.3d at 162-63. Further, the Second Circuit found that the relative length of the sentence does seem to be important in providing deterrence. *See Id*. at 163. The Second Circuit held in *Cutler*, a case

involving bank fraud and a related tax offense, that the sentencing court did not give sufficient justification for departing below the Guidelines range. Specifically, the *Cutler* Court stated "[t]he criminal tax laws are designed to protect the public interest in preserving the integrity of the nation's tax system. Criminal tax prosecutions serve to punish the violator and promote respect for the tax laws. *Because of the limited number of criminal tax prosecutions relative to the estimated incidence of such violations, deterring others from violating the tax laws is a primary consideration underlying these guidelines. Recognition that the sentence for a criminal tax case will be commensurate with the gravity of the offense should act as a deterrent to would-be violators*." *Cutler*, 520 F.3d at 163 (quoting Guidelines Ch. 2, Pt. T, 1, Introductory Commentary). In *Cutler*, the Second Circuit remanded the case for re-sentencing holding that prison term of 12 months and one day was not commensurate with the seriousness of the offense, would not act as a deterrent to would-be violators, did not promote respect for the tax laws, and was substantively unreasonable; and that the co-defendant's nonincarceratory sentence was not warranted. *Id*. While acknowledging that the tax loss in *Cutler* which was $5 million, is significantly greater than here, the rationale imposed by the second circuit as to the need for deterrence and the relative appropriateness of a Guideline sentence in a sentencing arising from a tax offense is nonetheless valid. *But see United States v. Cavera*, 550 F.3d 180 (2d. Cir. 2008). Accordingly, a sentence that is within the Guideline range is appropriate here.

5. The Need for Just Punishment, Specific Deterrence, and Protection of the Public

Finally, the goal of affording just punishment would not be served by an overly lenient sentence. As set forth above, a sentence that includes a period of incarceration is necessary. In that regard, the need to avoid unwarranted sentence disparities among defendants similarly situated is

controlled in part by using the Guidelines as a starting point. Here the Defendant has pleaded guilty to a serious crime. *See Cutler*, 520 F.3d at 162-63. As the Guideline range here is a fair and appropriate sentence, any potential disparity is avoided by imposing a Guideline sentence.

A prison sentence in the Guideline range – but at the low end of the range – is a just punishment that will: (a) promote respect for the law; (b) fairly punish the Defendant for his conduct; (c) send a message of general deterrence to prevent others from engaging in this type of conduct regarding mutual bank conversions; and (d) send a message of deterrence to taxpayers who would seek to engage in fraud when they file their tax returns – an important message needs to be sent that tax offenses are considered serious crimes by the Court and will be punished accordingly.

IV. Conclusion

For the foregoing reasons, the Government respectfully submits that, under the circumstances of this case, the Court should impose a sentence of imprisonment at the low end of the Guidelines range of 18 to 24 months and order the Defendant to disgorge the ill-gotten gains consistent with the plea agreement.

Respectfully submitted,

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CERTIFICATION

I hereby certify that on **November 12, 2009,** a copy of foregoing Government's Sentencing Memorandum was filed electronically and served by hand on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/Michael S. McGarry
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