

**Analysis of the Fastow Plea Agreements**

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On January 14, 2004, Andrew and Lea Fastow<sup>1</sup> entered plea agreements with the Enron Task Force. Each then pled guilty before different judges in the U.S. District Court in Houston. Pursuant to the plea agreements, the United States Probation Office must prepare a Presentence Report (“PSR”) to assist the courts in determining an appropriate sentence. The courts will then have a sentencing hearing to accept the pleas and set the sentences.

This article deals with facets of the Fastows’ plea agreements. Although charged with tax and nontax crimes, Lea pled only to a tax crime. Although charged with tax and nontax crimes, Andrew pled only to nontax crimes. In both cases, the process is the same – financial crimes (including tax crimes) were charged, plea agreements were reached, and sentencing under the federal Sentencing Guidelines now must occur. I will first provide some background I feel important for context—particularly the crimes charged and the role of Sentencing Guidelines for financial crimes.<sup>2</sup> I will then analyze their plea agreements.

I deal principally with the incarceration which I find in my practice is most important to clients. I deal lightly with the monetary aspects – fines<sup>3</sup> and restitution.<sup>4</sup>

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<sup>1</sup> Hereafter, in order to differentiate the two, I refer to Andrew Fastow as Andrew and to Lea Fastow as Lea. I do that solely as a writing convention of convenience and not to indicate any personal familiarity with them or disrespect towards them.

<sup>2</sup> Some of this discussion is drawn from my book on Tax Crimes that I use in a course I teach at the University of Houston School of Law. Readers may download that book from my firm’s web site at [www.tjtaxlaw.com](http://www.tjtaxlaw.com) (choose the download link from the left column). I caution that the one available for download is a version as of May 16, 2003. I am in the process of making substantial revisions to the book, but don’t yet have a target date for completion of the new edition.

<sup>3</sup> For tax crimes, the Internal Revenue Code section states a maximum fine. Section 7206(1), the crime of tax perjury to which Lea pled, thus provides a \$100,000 maximum fine for an individual. Maximum fines are, however, actually determined under the Criminal Fine Enforcement Act 18 U.S.C. § 3571, which provides \$250,000 as the maximum fine for an individual convicted of a felony (including § 7206(1)). § 3571(b)(4). In setting the actual fine, the court uses the Sentencing Guidelines through a guideline range process similar to the one that is discussed below for setting incarceration periods. See Sentencing Guidelines § 5E1.2 (fines for individuals).

<sup>4</sup> Restitution is not generally available in criminal tax cases. The IRS has ample procedures to insure that any tax evaded is assessed and, to the extent the defendant has assets, paid.

## **I. Introduction.**

### **A. The Prosecution Environment.**

The Enron Task Force led the grand jury investigation that produced the Fastows' indictments. The Enron Task Force is a specially created task force with the Department of Justice ("DOJ") to deal with Enron related criminal investigations and prosecutions.

DOJ's Tax Division ("DOJ Tax") controls criminal tax prosecutions.<sup>5</sup> DOJ Tax determines whether an alleged tax crime or tax-related crime will be prosecuted. If DOJ Tax authorizes prosecution, DOJ Tax will authorize a local AUSA to present the case to the grand jury, conduct such further investigation as appropriate, and then try the criminal case upon indictment. A DOJ Tax attorney may be assigned to assist or become the principal prosecutor.<sup>6</sup> DOJ Tax controls the key decisions regarding which tax and related counts will be indicted and which counts must be included in any plea agreement.<sup>7</sup>

I presume that the Enron Task Force was subject to control of DOJ Tax as to the tax counts and that DOJ Tax's criminal tax enforcement priorities were applied to the tax counts in the indictments of the Fastows. However, given the importance of the overall investigation as a financial crime investigation rather than a tax investigation, I presume that DOJ Tax may have deferred its priorities to the larger law enforcement priorities presented in the Enron debacle.<sup>8</sup>

### **B. Relevant Crimes.**

#### **1. Introduction.**

In this section, I discuss the crimes that were charged in the Fastows' indictments either as offenses or as conspiracies to commit offenses. These crimes are: tax perjury (false return), mail and wire fraud, money laundering, securities fraud, conspiracy, obstruction of justice and aiding and abetting. There may have been other crimes that could have been charged but were not. If there are such crimes, those crimes could be considered in sentencing under the concept of relevant conduct which I discuss below, but for present purposes in this section of the article I focus on the crimes that were charged.

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<sup>5</sup> DOJ Tax is not involved in tax investigations by the IRS until the case is referred to DOJ Tax.

<sup>6</sup> U.S. Attorneys Manual ("USAM") §§ 6-1.110 & 6-4.010.

<sup>7</sup> I discuss below certain DOJ and DOJ Tax policies related to pleas.

<sup>8</sup> DOJ Tax did participate in the investigation and shaping of the charges. At the press conference on May 1, 2003 announcing the indictments, Larry Thompson, the Deputy Attorney General, gave thanks to both the Tax Division and the IRS for contributing to the tax counts. Federal Document Clearing House Political Transcripts dated May 1, 2003.

## **2. Tax Perjury.**

### **a. The Crime.**

In separate indictments, Andrew and Lea were charged with filing false income tax returns under § 7206(1).<sup>9</sup> Section 7206(1) requires the filing of the return under penalty of perjury, but is not coextensive with the actual crime of perjury.<sup>10</sup>

### **b. The Punishment.**

The maximum penalty is three years.

### **c. Discussion.**

Each false income tax return is a separate crime and appears in indictments as a separate count. DOJ Tax usually will not authorize prosecution in criminal tax cases unless multiple years are involved, so most tax cases involving § 7206(1) will have multiple counts (one per year for each income tax return) and, for purposes of determining the maximum sentence, counts of conviction may be stacked (i.e., run consecutively rather than concurrently).<sup>11</sup> For example, a conviction of three counts under § 7206(1) will have a maximum sentence of 9 years. This is a maximum, not a minimum. There is no required minimum sentence for any of the crimes discussed in this article, so it is possible to be convicted of one or more § 7206(1) counts and receive no actual incarceration or, more commonly, less than the maximum allowed.

The crime of tax evasion must be differentiated from the crime of tax perjury. The Supreme Court has defined tax evasion as the “climax” or “capstone” of criminal tax sanctions.<sup>12</sup> The maximum sentence for tax evasion is 5 years and may be stacked in the manner noted above, so that a conviction of three counts of tax evasion would permit a maximum sentence of 15 years. Tax evasion may be of two types – evasion of the ascertainment of the tax liability, usually involving a false return, and evasion of the payment of a tax liability, which includes, for example, hiding assets.

Tax perjury and tax evasion effected by a false return cover pretty much the same ground, except that tax evasion requires proof of a material understatement of tax whereas tax perjury does

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<sup>9</sup> Unless otherwise noted, section references are to the Internal Revenue Code of 1986.

<sup>10</sup> Corporations can be guilty of tax perjury, but not of perjury.

<sup>11</sup> Under the Sentencing Guidelines, discussed below, sentences on multiple counts generally run concurrently based on the major count of conviction. However, where the sentence indicated by the Guideline range or appropriate departures is above the major count of conviction in a multi-count conviction, the counts may run consecutively to achieve appropriate sentencing, provided that the sentence does not go above the sum of the maximum sentences for the counts of conviction. S.G. 5G1.2.

<sup>12</sup> Spies v. United States, 317 U.S. 492, 497 (1943).

not. In a case involving understated tax liability, the prosecutor will have a choice as to whether to charge tax evasion or tax perjury. Tax evasion is the sexier crime for prosecutors but it is the more difficult crime to prove because it requires proof beyond a reasonable doubt that the defendant understated his tax liability. Presenting the complexities of tax calculations to a jury in particular cases may pose problems for the prosecutor, in terms of wise use of resources and having the jury understand the subtleties. So, sometimes, tax prosecutors use the tax perjury charge rather than tax evasion, because it simplifies the proof at trial and the jury's consideration of the evidence. In many cases, because of the operation of the federal Sentencing Guidelines (discussed below), it will make no difference to the actual sentence whether the defendant is convicted of tax evasion or tax perjury.

In the Fastows' indictments, the Enron Task Force charged only tax perjury and did not charge tax evasion, despite the fact that over \$200,000 was allegedly omitted from the Fastows' joint returns. Lea's plea agreement admits the omission but states that there was no "tax loss" – meaning, as I interpret the statement in the context in which it is made, that the prosecutors and Lea are representing to the court that the omission of income – although willful<sup>13</sup> and certainly material<sup>14</sup> – did not decrease the Fastows' tax liability. I will get into the details of this in discussing Lea's plea, but suffice it to say for present purposes that, assuming that there was no material amount of tax actually evaded on the false tax returns or the prosecutor could not prove an amount evaded beyond a reasonable doubt, then the prosecutor could use only a tax perjury charge and not a tax evasion charge. My experience is that DOJ Tax does not usually pursue such a bare tax perjury charge – a false statement with no understatement of tax liability – unless it has other axes to grind (i.e., some law enforcement priority other than its criminal tax enforcement priorities). Allegedly, in Lea's case, the tax crimes and other crimes alleged in the indictment may have been pursued to influence the resolution of Andrew's case. (If indeed Lea were just a tool and not a target, that explains why the prosecutors were so accommodating to Lea in her plea agreement once Andrew's cooperation was secured (more later).)

### **3. Mail and Wire Fraud.**

#### **a. The Crime.**

In part here pertinent, mail and wire fraud criminalize the use of the mail and wire (defined to include radio or television) media in the commission of "any scheme or artifice to defraud, or for

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<sup>13</sup> Willful is the criminal tax analog to what lawyers call mens rea – an intent to do the act that the law declares to be illegal.

<sup>14</sup> I won't go on a distracting discussion of materiality here. Materiality as to a false statement is material "if it has a natural tendency to influence, or [is] capable of influencing, the decision of the decision-making body to which it was addressed." Neder v. United States, 527 U.S. 1, 16 (1999) (internal quotation marks omitted). It is at least possible, I think, that a false statement of omitted income on a return is material for purposes of tax perjury whereas the tax loss that results from the false statement is not material for purposes of a possible tax evasion charge. So, in the text, I mean material as it relates to the tax perjury charge.

obtaining money or property by means of false or fraudulent pretenses, representations, or promises.”<sup>15</sup>

One court has succinctly summarized the crime:

\* \* \* \*what is proscribed is use of the telecommunication systems of the United States in furtherance of a scheme whereby one intends to defraud another of property. Nothing more is required. The identity and location of the victim, and the success of the scheme, are irrelevant.<sup>16</sup>

**b. The Punishment.**

The maximum incarceration period is 5 years.<sup>17</sup>

**c. Discussion.**

**(1) The Crime for All Reasons.**

Most financial crimes involve the use of the mail or the wires (as broadly defined). For example, tax crimes involve the mail because tax returns are usually mailed to the IRS (and in these days of e-filing, the wires are used on some part of the e-journey). Because use of these media is ubiquitous, wire and mail fraud are powerful weapons in the federal criminal arsenal:

To federal prosecutors of white collar crime, the mail fraud statute is our Stradivarius, our Colt 45, our Louisville Slugger, our Cuisinart – and our true love. We may flirt with RICO, show off with 10b-5, and call the conspiracy law "darling," but we always come home to the virtues of 18 U.S.C. § 1341, with its simplicity, adaptability, and comfortable familiarity. It understands us and, like many a foolish spouse, we like to think we understand it.<sup>18</sup>

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<sup>15</sup> 18 U.S.C. §§ 1341, 1343. In a tilt to the modern world, the statute criminalizes similar use of commercial delivery services which, of course, have the required nexus to interstate commerce and thus within the federal government’s power to legislate. United States v. Photogrammetric Data Services, Inc., 259 F.3d 229 (4th Cir. 2001) cert. denied, 535 U.S. 926 (2002) (The nexus is present even if the specific item does not in fact cross a state line.)

<sup>16</sup> United States v. Trapilo, 130 F.3d 547, 552 (2d Cir. 1997).

<sup>17</sup> 18 U.S.C. § 1341 & 1343. However, if the violation “affects a financial institution,” the maximum incarceration period is 30 years. This exception was not involved in the Fastows cases.

<sup>18</sup> Jed S. Rakoff, The Federal Mail Fraud Statute (Part I), 18 DUQ. L. REV. 771, 771 (1980) (footnotes omitted).

Federal prosecutors have long followed the maxim, “When in doubt, charge mail fraud.”<sup>19</sup>

For many years, some courts were inclined to give a broad reading to the statutory language “scheme or artifice to defraud, or for obtaining money or property.” The Fifth Circuit, for example, said that the statute punished “any conduct which fails to match the reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society.”<sup>20</sup> Such broad statements were not limited to common law definitions of fraud.<sup>21</sup> The expansive interpretation has been summarized as follows:

In the 1980s, as Sections 1341 and 1343 swept more and more conduct within their reach, some panels and individual judges warned that the expansion had gone too far. In an opinion by Judge Richard Posner, a Seventh Circuit panel criticized the moral-uprightness/fundamental-honesty/fair-play/right-dealing formulation as “much too broad.” Judge Ralph Winter of the Second Circuit protested that the courts had brought about the “extension of mail fraud by judicial fiat,” and had left juries “free to apply a legal standard which amounts to little more than the rhetoric of sixth grade civics classes.” And in 1985, four Supreme Court Justices declared that the lower courts had permitted ““an extraordinary expansion”” of Sections 1341 and 1343 ““to permit federal prosecution for conduct that some had thought was subject only to state criminal and civil law.””<sup>22</sup>

In Neder v. United States, 527 U.S. 1 (1999), the Supreme Court held that materiality is an element of these crimes. The Court retreated from an expansive definition of fraud and anchored its analysis on the common law meaning of fraud.<sup>23</sup> Commentators conclude that the Court’s reasoning in reaching the result on materiality should curb the more expansive definitions of fraud.<sup>24</sup> From a criminal defense lawyer’s perspective, the nice thing about the Neder holding is that the defendant will get to the jury on the issue of materiality, which adds one more element that the prosecution must prove beyond a reasonable doubt and, correspondingly, gives the defense an opportunity to argue about something as imprecise as materiality.

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<sup>19</sup> Paul Mogin, Reining in the Mail Fraud Statute, 26 *Champion* 12 (2002), quoting John C. Coffee & Charles V. Whitehead, The Federalization of Fraud: Mail and Wire Fraud Statutes, in White Collar Crime: Business and Regulatory Offenses, § 9.01, at 9-2 (O. Obermaler & R. Morvillo eds., 1990).

<sup>20</sup> United States v. Curry, 681 F.2d 406, 410 (5th Cir. 1982) (internal quotes omitted, quoting Blachly v. United States, 380 F.2d 665, 671 (5th Cir. 1967)).

<sup>21</sup> Paul Mogin, Reining in the Mail Fraud Statute, 26 *Champion* 12 (2002).

<sup>22</sup> Paul Mogin, *supra*, p. 16 (footnotes omitted).

<sup>23</sup> Neder at p. 24.

<sup>24</sup> E.g., Paul Mogin, *supra*, p. 16.

**(2) Overlap with More Specific Tax Crimes.**

An act criminalized by a particular statute may often violate other more general or even more specific statutes. I noted above that the filing of a fraudulent tax return via mail understating tax liability involves tax evasion (or tax perjury) and mail fraud. Should the more particular criminal crime (in the example, tax evasion) be charged exclusively, or does the prosecutor have the option charge mail fraud in lieu of tax evasion or in addition to tax evasion? In many cases, this may not be a significant issue because the charges, however multiplied, will not result in different sentencing, but in some cases it could be critical.

DOJ Tax must approve all tax prosecutions and indictments. DOJ Tax's stated policy is not to approve mail fraud or wire fraud charges where the conduct was incidental to the commission of a tax crime. The tax crime is charged. Mail fraud and wire fraud are not charged, either directly or as a predicate for a money laundering or RICO charge.<sup>25</sup>

**4. Money Laundering.**

**a. Introduction.**

Money laundering is a process intended to conceal the existence, illegal source, or illegal application of income, and in some way disguise it so as to make it appear legitimate.<sup>26</sup> Money laundering is an important element of the crimes with the highest national criminal enforcement priorities -- such as organized crime and drug dealing. The notion is that substantial penalties for this conduct will not only punish but will deter the underlying criminal conduct.

The money laundering statutes are designed to attack the process by imposing very stiff penalties on the means employed to launder. As you will see, in most cases, the focus of the money laundering statutes is not concern about taxes. But, tax crimes frequently travel with money laundering, and, in some cases, laundering is necessary to the tax crime as implemented. Fortunately, Congress has not yet provided that tax crimes are predicates for money laundering.

The provisions are complex. So I just summarize those relevant to the Fastow cases.

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<sup>25</sup> DOJ Tax Criminal Tax Manual ("CTM") Directive No. 99.

<sup>26</sup> The general concept of money laundering sometimes refers to a process of placing "money derived from criminal activity \* \* \* into a legitimate business in an effort to cleanse the money of criminal taint," but the statutory crime of money laundering is broader. United States v. Bolden, 325 F.3d 471, 486 (4<sup>th</sup> Cir. 2003).

**b. The Crimes.**

**(1) § 1956 Money Laundering.**

Section § 1956(a)(1) is the crime of transaction money laundering. In summary, the elements are:

(1) The person must conduct or attempt to conduct a financial transaction. As you surely suspect, financial transaction is defined quite broadly.<sup>27</sup> Looking solely at this element, there is nothing sinister or wrong with a financial transaction. Most citizens undertake financial transactions routinely without concern about violating the law.

(2) The person must conduct the financial transaction with knowledge that the proceeds of unlawful activity is involved.<sup>28</sup> The knowledge must simply be that unlawful activity is involved; that knowledge need not be that "specified unlawful activity" (a term discussed below) is involved. So, this is the critical mens rea feature that ties the person's intent in conducting the financial transaction to the commission of a crime.

(3) The financial transaction must in fact involve the proceeds of specified unlawful activity ("SUA").<sup>29</sup> (The SUA is sometimes also referred to as a predicate offense.<sup>30</sup>) SUA is defined broadly to include the crimes that Congress thought particularly involved in organized crime, drug dealing and other national criminal enforcement priorities.<sup>31</sup> These include (a sampling for flavor): drug dealing, murder, kidnaping, extortion, and destruction of property by explosive or fire. A host of other crimes are included within the sweeping definition of specified unlawful activity. Most importantly for present purposes, mail fraud and wire fraud are among SUA.<sup>32</sup> Tax crimes are not among SUA. (However, if an SUA is

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<sup>27</sup> § 1956(c)(3) & (4).

<sup>28</sup> § 1956(a)(1).

<sup>29</sup> § 1956(a)(1).

<sup>30</sup> See e.g., USAM Resource Manual, Title 9, Money Laundering instruction referring to SUA as the predicate offense. The money laundering statute uses the term "specified unlawful activity." The RICO statute has a similar concept that is frequently referred to as a predicate offense, but the statute does not use that term.

<sup>31</sup> See § 1956(c)(7).

<sup>32</sup> § 1956(c)(7)(A), incorporating § 1961(1) which includes mail and wire fraud. Hence, mail fraud and wire fraud can be subject of a money laundering charge and a money laundering conspiracy charge. See United States v. Trapilo, 130 F.3d 547 (2d cir. 1997), cert. denied sub nom Pierce v. United States, 525 U.S. 812 (1998).

involved, the fact that the transaction promotes a tax crime can satisfy another element of the offense.)

(4) The person must intend to (i) Promote an SUA,<sup>33</sup> or (ii) engage in conduct violating 26 U.S.C. § 7201 or § 7206.<sup>34</sup> This is another mens rea element tying the person's intent to knowledge of a criminal violation.

(5) The person must know that the transaction is designed (i) to conceal the location, nature, etc. of the proceeds of the SUA or (ii) avoid a transaction reporting requirement under state or federal law.<sup>35</sup> Of course, hiding assets is not per se a criminal violation; only when this element is combined with the others is there a basis for imposing criminal liability.

The financial transaction itself is the conduct punished. It does not matter that there is some bar to prosecution for the underlying SUA. The prosecutor will have to prove the SUA in order to prevail in the money laundering charge, but it need not prosecute the putative offender for the SUA.<sup>36</sup>

## (2) § 1957 Money Laundering.

Section 1957 criminalizes knowingly engaging, or attempting to engage, in a monetary transaction in criminally derived property, which has a value greater than \$10,000 and is derived from specified unlawful activity ("SUA").<sup>37</sup> There is no requirement that the person have intended to hide or disguise the transaction or the underlying proceeds. There is no requirement that the person know that the property is derived from an SUA. All that is required is that he knowingly engage or attempt to engage in the transaction with knowledge that it is criminally derived property and that, in fact, it is derived from an SUA.

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<sup>33</sup> § 1956(a)(1)(A)(ii).

<sup>34</sup> § 1956(a)(1)(A)(ii).

<sup>35</sup> § 1956(a)(1)(B).

<sup>36</sup> In Trapilo, the prosecution was for conspiracy to commit money laundering. As noted above, the prosecution is separate from the underlying offense. The offenders in the case were not prosecuted for either money laundering or the crime constituting the predicate requirement (mail or wire fraud).

<sup>37</sup> § 1957(a). SUA is defined the same as in § 1956. § 1957(h)(3).

**c. The Punishments.**

The penalty for § 1956 money laundering is 20 years.<sup>38</sup> The penalty for § 1957 money laundering is 10 years.<sup>39</sup>

**d. Overlap.**

Section 1957 is much simpler in its elements and considerably overlaps with § 1956. To take a simple example. Individual A has committed wire fraud, which of course is an SUA under either section. The fruits of the wire fraud are deposited in a tax haven bank account. A's purpose in committing the fraud was to enjoy the illegal proceeds; his use of a tax haven bank was only a means to that end. The bank account is simply a resting place until he enjoys the money. Then, some years later, A has the money wire transferred to his U.S. bank account so that he can buy a fancy residence. Is the wire transfer back into the U.S. prosecutable under either or both sections? The wire transfer is not prosecutable under § 1956 because the wire transfer is into individual A's personal bank account and easily on the radar screen of the IRS and anyone else with access to U.S. bank information. There is no intent to conceal in the transaction, a required element for § 1956. But, intent to conceal is not a required element under § 1957, so he is prosecutable under that section.

**5. Securities.**

**a. The Crime.**

Title 15 criminalizes various types of securities fraud. Andrew's indictment had multiple counts of conspiracy to commit securities fraud related to the various ways in which he and others allegedly overstated Enron's financial results.<sup>40</sup>

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<sup>38</sup> § 1956(a)(1).

<sup>39</sup> § 1957(b)(1).

<sup>40</sup> 15 U.S.C. §§ 78j and m. One of the interesting aspects of overstating financial income is that taxes usually follow. Enron, however, had large stock option deductions not recognized as hits to financial statement income that essentially wiped out its tax liability for most of its glory (or perceived glory) years. In truth, as we now know, Enron really did not even have financial statement net income for those years, so it really needed no tax shelter losses – it had real losses (albeit hidden from public view) until the house of cards fell.

**b. The Punishment.**

The incarceration period is 10 years.

**c. Comment.**

Obviously the securities aspects of Andrew's alleged conduct is the principal underlying aspect of the case. Andrew's alleged abuse of financial accounting principles – particularly through off-the-books entities known as “special purpose entities” (acronymed to SPEs) – is how he and others perpetrated the fraud to overstate the financial results of Enron and thereby cause financial losses to investors and others of a magnitude not previously contemplated in the federal criminal law.

**6. Obstruction of Justice.**

**a. The Crime.**

There are various acts criminalized as obstruction of justice in Title 18, Part 1, Ch. 73. The conduct charged in Andrew's indictment is tampering with a witness, specifically causing or inducing a person (1) to “withhold testimony, or withhold a record, document, or other object, from an official proceeding,”<sup>41</sup> and (2) “alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding.”<sup>42</sup>

**b. The Punishment.**

Incarceration for not more than 10 years.<sup>43</sup>

**7. Conspiracies.**

**a. The Crime.**

**(1) § 371 Conspiracy.**

The general conspiracy statute is 18 U.S.C. § 371. This statute criminalizes two types of conduct – (i) a conspiracy to commit a crime against the United States and (ii) a conspiracy “to defraud the United States, or any agency thereof in any manner or for any purpose.” Each requires

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<sup>41</sup> 18 U.S.C., § § 1512(b)(2)(A).

<sup>42</sup> 18 U.S.C., § § 1512(b)(2)(B).

<sup>43</sup> Id.

an agreement<sup>44</sup> and an overt act in further of the conspiracy. The first category is called an “offense conspiracy;” the second category is called a “defraud conspiracy.”

The offense conspiracy is straightforward. To use a simple example, tax evasion is a crime; when two or more persons conspire to commit tax evasion, they commit the crime of conspiracy to commit tax evasion that is separate from the commission of the offense of tax evasion. Since the conduct criminalized is different (one the substantive offense and the other the conspiracy to commit the offense), a defendant can be charged both with the conspiracy and the offense.<sup>45</sup>

The defraud conspiracy is equally straightforward. A conspiracy to defraud the United States is criminalized. Unlike the offense conspiracy, there is no requirement that the object of this conspiracy be a criminal offense. Conspiracy to defraud is an object to (1) cheat the government out of money or property; or (2) interfere with or obstruct one of its lawful governmental functions by deceit, craft, trickery, or at least by dishonest means.<sup>46</sup> Almost invariably, the object of the conspiracy will be a federal criminal offense, but that is not necessary as it is with the offense conspiracy.<sup>47</sup> In charging a conspiracy with respect to an object related to the internal revenue laws, the IRS has typically relied upon the defraud conspiracy. This type of conspiracy with respect to the internal revenue laws has its own name among practitioners and the courts – the Klein conspiracy, named after the leading case based United States v. Klein.<sup>48</sup> The Klein conspiracy was charged in Lea’s and Andrew’s indictments with respect to their tax offense.

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<sup>44</sup> “[T]he essence of a conspiracy is ‘an agreement to commit an unlawful act.’” United States v. Recio, 537 U.S. 270, 274 (2003).

<sup>45</sup> United States v. Recio, supra, 274-275 (2003) (“That agreement is ‘a distinct evil,’ which ‘may exist and be punished whether or not the substantive crime ensues. [citation omitted] The conspiracy poses a ‘threat to the public’ over and above the threat of the commission of the relevant substantive crime -- both because the ‘combination in crime makes more likely the commission of [other] crimes’ and because it “decreases the probability that the individuals involved will depart from their path of criminality.’”)

<sup>46</sup> Hammerschmidt v. United States, 265 U.S. 182, 188 (1924).

<sup>47</sup> DOJ’s CTM ¶ 23.07[1][b] provides:

This means the prosecutor is not burdened with having to establish all of the elements of an underlying offense (e.g., tax evasion) and each member's intent to commit that offense (e.g., willfulness). Rather, all the prosecutor must show is that the members agreed to interfere with or obstruct one of the government's lawful functions. \* \* \* \*

<sup>48</sup> 247 F.2d 908 (2d Cir. 1957), cert. denied, 355 U.S. 924 (1958). The Klein conspiracy is a term of art in the criminal tax area, although the underlying defraud concept is applicable in other areas of Government activity. The term is often used without explanation on the assumption that any educated listener would know what the speaker means. For good recent cases discussing some of the nuances of the Klein conspiracy, see United States v. Gricco, 277 F.3d 339, 348-350 (3d Cir. 2002) (look also at Judge McKee’s dissent at pp. 364-365); United States v. Adkinson, 158 F.3d 1147, 1154- (11th Cir. 1998); and United States v. Alston, 77 F.3d 713 (3d Cir. 1996)

**(2) Money Laundering Conspiracy.**

Money laundering conspiracies are criminalized in a separate statute, 18 U.S.C. § 1956(h). The money laundering conspiracy deviates from the general conspiracy statute in three respects. First, it is a crime-specific conspiracy statute, applying only to a conspiracy to commit an offense of money laundering. The general conspiracy statute, of course, covers conspiracies to commit any federal offense, so § 1956(h) is a specific application only to money laundering. This first difference is not of itself that important because the general conspiracy statute's offense branch would cover a conspiracy to commit this crime. Second, the money laundering conspiracy crime does not require an overt act, as does the general conspiracy statute.<sup>49</sup> This is also a critical difference between the money laundering conspiracy and the general conspiracy. Third, the money laundering conspiracy imposes a punishment consistent with the harsh punishment visited on the actual offense of money laundering.<sup>50</sup> This is also a critical difference between the money laundering conspiracy and the general conspiracy.

**b. The Punishment.**

**(1) § 371 Conspiracy.**

The general conspiracy statute imposes a maximum sentence of five years. The exception is that, if the object of the conspiracy is a misdemeanor, the punishment is the same as the misdemeanor. A misdemeanor is a crime that provides for incarceration of not more than one year, so the punishment for conspiracy to commit a misdemeanor is not more than one year incarceration.<sup>51</sup> At least in the tax arena, I have not seen the tax prosecutors pursue a conspiracy without there being some felony offense object of the conspiracy. Misdemeanors are just not a criminal tax enforcement priority, although it is true that in many cases the Sentencing Guidelines could provide the same actual incarceration period for a misdemeanor as for a felony.<sup>52</sup> So, at least in my practice, this exception has little consequence.

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<sup>49</sup> United States v. Tam, 240 F.3d 797, 802 (9th Cir. 2001) ("the language of 18 U.S.C. § 1956(h) is nearly identical to the language of 21 U.S.C. § 846 [(criminalizing conspiracy to commit drug offenses)], which the Supreme Court held in United States v. Shabani, 513 U.S. 10, 15, 130 L. Ed. 2d 225, 115 S. Ct. 382 (1994), does not require proof of an overt act"); accord United States v. Godwin, 272 F.3d 659, 669 n.9 (4th Cir. 2001), cert. denied, 535 U.S. 1069 (2002) and United States v. Bolden, 325 F.3d 471, 491 (4th Cir. 2003). As I note below, Lea's indictment for money laundering conspiracy does allege overt acts.

<sup>50</sup> I address this punishment immediately below.

<sup>51</sup> 18 U.S.C. § 3559(a)(6)-(8).

<sup>52</sup> I discuss below the concept of stacking the maximum periods for the sentencing, so that if the conviction is for five misdemeanor counts having a maximum incarceration period of one year each, the same sentence is possible as for a conviction for a tax evasion count having a five year maximum incarceration period.

Let's look at the general 5 year maximum sentence rule. If the conspiracy is to commit a tax crime (or any crime for that matter) that has a maximum sentence in excess of one year but less than five years, the conspiracy has a greater maximum incarceration than the actual offense. Thus, the tax perjury crimes charged in the Fastows indictments have a maximum sentence per count of 3 years, but the conspiracy has a maximum sentence per count of 5 years. So, at least in theory, if they were convicted of both the conspiracy and the offense for one year, their maximum sentence for that one year could be eight years.

With regard to these maximums, I again caution that the maximums are, in most cases (except for the Fastows' cases), pretty much irrelevant because the Sentencing Guidelines will set the sentencing range below the maximum allowed by the count(s) of conviction.

## **(2) Money Laundering Conspiracy.**

The penalty for money laundering conspiracy is the same as for the offense of money laundering.<sup>53</sup> That's the killer! As noted above, money laundering has penalties of 10 and 20 years, so the conspiracy to commit these crimes draws equivalent maximum sentences.

### **8. Aiding and Abetting.**

#### **a. The Crime.**

A person aiding and abetting the commission of a crime may be charged as a principal in the commission of the crime.<sup>54</sup> Aiding and abetting is not itself an offense statute; it merely says that he (or she) who aids and abets may be charged as a principal. By contrast, the conspiracy statute (addressed below) creates a crime that, although related to, is independent of the underlying crime.

#### **b. The Punishment.**

By making the person chargeable as a principal in the underlying offense, the maximum penalty is determined by the underlying offense.

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<sup>53</sup> 18 U.S.C. § 1956(h). One nuance of this provision is that the courts are split as to whether the money laundering conspiracy with the higher maximum sentence requires an overt act, as does the general conspiracy. Some hold not: United States v. Tam, 240 F.3d 797, 802 (9th Cir. 2001) ("the language of 18 U.S.C. § 1956(h) is nearly identical to the language of 21 U.S.C. § 846 [(criminalizing conspiracy to commit drug offenses)], which the Supreme Court held in United States v. Shabani, 513 U.S. 10 (1994), does not require proof of an overt act"); accord United States v. Godwin, 272 F.3d 659, 669 n.9 (4th Cir. 2001), cert. denied, 535 U.S. 1069 (2002). The Fifth Circuit has its head screwed on right on this one. United States v. Wilson, 249 F.3d 366 (5<sup>th</sup> Cir. 2001). Some courts just punt on the issue until they cannot avoid it. E.g., United States v. Laspina, 299 F.3d 165, 173 n. 2 (2d Cir. 2002).

<sup>54</sup> 18 U.S.C. § 2.

## C. The Sentencing Guidelines - Relevant Features.

### 1. Introduction.

Sentencing is where the rubber hits the road for the convicted defendant. And, for the defendant who has been indicted or expects to be indicted or is being investigated with the realistic possibility of indictment, the prospect of future sentencing must be front and center in his or her actions. Specifically, as we shall see, there are planning and structuring opportunities for sentencing, and consideration of these opportunities needs to start as early as possible.

As we shall see, the count(s) of conviction while setting the upper limit for incarceration may not be the principal determinant of the defendant's actual sentence. The Sentencing Guidelines introduce a number of factors into the sentencing equation. These factors offer the opportunity for planning and structuring. I will discuss those factors that are relevant to the Fastows' sentencing.<sup>55</sup>

First, it is helpful to summarize sentencing practice prior to the Sentencing Guidelines. Then, as now, the statutes usually set the maximum sentence for a defined crime.<sup>56</sup> The sentencing court had considerable discretion to set a sentence anywhere at or below the maximum sentences for the counts of conviction.<sup>57</sup> There were no standards to guide the court as to factors to consider and the weight they should be given. This resulted in great disparity in sentencing for similar counts of conviction. In the tax area, similarly situated defendants might draw no or lighter incarceration in certain districts than similarly situated defendants did in other districts. Indeed, the phenomenon even occurred with the same districts. The decision was influenced considerably by the judge's personal attitudes and convictions about the sentencing process, and these attitudes and convictions varied among the judges because there were no guides. This phenomenon was perceived as unfair.

Moreover, there was no standard for relating sentences for one type of crime to another type of crime. Thus, for example, although tax fraud and embezzlement might have a maximum five year sentence, some judges might perceive that taking money from a corporate employer as more serious than failing to report and pay tax otherwise due the Government and mete out sentencing accordingly. This too was perceived as unfair, because it too could vary from judge to judge (with some judges perhaps reversing the seriousness of the offenses in their sentencing practices) and

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<sup>55</sup> I should caution that I have no special inside knowledge of all of the sentencing factors that may be relevant. What I know I have learned from public sources, principally the news media and court filings. However, for reasons that may be apparent in the discussion, I believe that the principal factors in sentencing are known publicly and discussed here.

<sup>56</sup> Statutes sometimes also set minimum sentences, but for our present discussion we shall ignore minimum sentences because they are not relevant to the types of crimes upon which we focus.

<sup>57</sup> Koon v. United States, 518 U.S. 81, 96 (1996) ("Before the Guidelines system, a federal criminal sentence within statutory limits was, for all practical purposes, not reviewable on appeal.")

because there was no suggestion that Congress intended the crimes as being of differing seriousness in terms of sentencing.

The Sentencing Reform Act of 1984<sup>58</sup> (“the Act”) was enacted to address these and related issues. The Act grants the United States Sentencing Commission authority to establish Sentencing Guidelines broadly to rationalize the federal sentencing process. The Guidelines offer judges guidance on the effect of typical factors deemed relevant to sentencing, but still permit judges in appropriate cases to go outside those guidelines (in a process called departure) when they can articulate an acceptable basis for doing so.

In this section of the article, I develop the Sentencing Guidelines concepts of possible relevance to the Fastows’ plea agreements. Readers interested in seeing a simple example of the application of the Sentencing Guidelines in a tax case should refer to Exhibit 3.

## **2. Guideline Ranges and Departures.**

### **a. Sentencing Ranges and Sentencing Table.**

The Guidelines establish ranges for sentencing. The judge has virtually unfettered discretion to sentence within the guideline range. The judge may “depart” from the range, but must specify in writing why the case presents atypical features not considered by the Commission in setting the Guideline range. A party dissatisfied with a departure from the range may appeal, and the appellate court will review the departure de novo.<sup>59</sup>

The ranges – applicable in all except atypical cases – eliminate the excesses in the wide disparities in sentencing and set standards roughly relating the gravity of crimes. The ranges are set forth in a Sentencing Table which is a grid where the axes (or determinants) are the Offense Level and the Criminal History Category. I attach as Exhibit 1 a copy of the Sentencing Table that controls the sentencing of the Fastows.<sup>60</sup> Under the table, the higher the Offense Level and the higher the Criminal History Category the greater the sentencing range. My experience is that, in most financial crimes cases (and certainly in the Fastow cases), the defendant has no criminal history and hence sentencing is determined solely by the Offense Level unless the court decides to depart.

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<sup>58</sup> Title II of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 217(a), 98 Stat. 1837, 2017-34 (codified as amended at 18 U.S.C. 3551-3568 (1994), 28 U.S.C. 991-998 (1994)).

<sup>59</sup> The standard for review was recently changed from abuse of discretion per Koon v. United States, 518 U.S. 81, 100 (1996) to de novo review pursuant to Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (often acronymed to the "PROTECT Act"), Pub. L. No. 108-21, 117 Stat. 650, 670 (2003).

<sup>60</sup> One commentator has said that the Sentencing Guidelines are “simply a long set of instructions for one chart--the Sentencing Table.” Frank O. Bowman, III, Fear of Law: Thoughts on Fear of Judging and the State of the Federal Sentencing Guidelines, 44 St. Louis L.J. 299, 305 (2000).

The ranges and factors considered in deriving the ranges are recalibrated by the United States Sentencing Commission from time to time. The adjustments may be minor fine-tuning to reflect actual experience with the Guidelines or more major changes as, for example, congressional mandated reconsideration of the Guidelines to make the indicated punishments fit the magnitude of the criminal conduct that has rocked the corporate community. Enron is, of course, the poster child for this type of criminal conduct. Prior to recent changes to the Guidelines, the Guidelines did not adequately address this type of major criminal conduct that caused major losses to shareholders and the financial markets. Those changes are now in place, but were not when the conduct underlying the Fastows' plea agreements occurred. Hence, as we shall note, the Fastows will be sentenced under the Guidelines in place when the last of the conduct occurred.

**b. Determining the Offense Level.**

**(1) Base Offense Level Determined by Loss.**

The key is how the Offense Level is determined under the Guidelines. The starting point in financial crimes cases is the financial loss that was the object of the crime(s).<sup>61</sup> In tax cases that loss is referred to as the tax loss. That loss determines a Base Offense Level ("BOL"). I attach as Exhibit 2 the tax loss table from applicable guidelines. As you can see from the table, there is a minimum BOL of 6, with incremental increases as the tax loss exceeds \$1,700. The higher the tax loss, the greater the BOL. Similar tables are provided for other financial crimes. Thus, wire fraud has a minimum BOL of 6, with incremental increases starting at a financial loss exceeding \$2,000.<sup>62</sup> And, money laundering has a minimum BOL of 20 or 23, with incremental increases as the laundered funds exceed \$100,000.<sup>63</sup> Thus, under the guidelines, the minimum BOLs for tax crimes and wire fraud are the same, although, under the tables, the level increases for fraud are steeper than the ones for tax loss. You will recall that the maximum statutory incarceration periods for tax perjury, wire fraud and money laundering were 3 years, 5 years and 10 or 20 years, respectively. That is why money laundering has the significantly greater BOL.

I focus on the tax loss and its affect on the BOL, since the process is illustrative for the other financial crimes involved in the Fastows cases, but with some unique variations. The tax loss is the amount of tax the taxpayer sought to evade. The tax loss is usually less than the tax that the taxpayer may owe for the year(s), because there may and often are civil tax adjustments that the prosecutor cannot or will not prove the taxpayer attempted to evade.<sup>64</sup>

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<sup>61</sup> DOJ's CTM 5.11[2] says that sentencing ranges in criminal tax cases "are primarily determined by the amount of 'tax loss.'"

<sup>62</sup> S.G. § 2F1.1.

<sup>63</sup> S.G. § 2S1.1.

<sup>64</sup> This distinction is recognized in DOJ's CTM 5.03[1]. As I shall note later, this differentiation of the civil tax and the Sentencing Guideline's tax loss (which I sometimes refer to as the tax loss number) is critical in plea bargaining to get the tax loss as low as possible.

Some tax crimes (tax perjury discussed above, being the quintessential and most relevant one) do not require as an element of the crime that the taxpayer has evaded any amount of tax. All that is required is that the defendant have misstated some material item on the return. In that case, the relevant table (the tax loss table) will establish a minimum BOL – in this case the minimum BOL is 6. (See Exhibit 2.)

**(2) Relevant Conduct Included in Loss.**

**(a) Introduction.**

The financial loss includes not only the loss for the offense of conviction but other loss resulting from “relevant conduct.”<sup>65</sup> Relevant conduct is a key, perhaps the key, concept in the Guidelines.<sup>66</sup> The concept of relevant conduct arises from the Sentencing Commission’s policy decision to adopt a modified “real offense” rather than a “charge offense” approach to sentencing. Under the concept of relevant conduct, the sentencing judge must apply the Guidelines by considering not only the offense of conviction but also any other offense(s) related to the offense of conviction whether or not the related offense was charged, was dismissed or the defendant was acquitted after trial. The other end of the spectrum – a charge offense approach – would look the offense(s) of conviction as the sole or principal determinant for sentencing factors.

The Commission illustrated the conceptual difference as follows:

A bank robber, for example, might have used a gun, frightened bystanders, taken \$50,000, injured a teller, refused to stop when ordered, and raced away damaging property during his escape. A pure real offense system would sentence on the basis of all identifiable conduct. A pure charge offense system would overlook some of the harms that did not constitute statutory elements of the offenses of which the defendant was convicted.<sup>67</sup>

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<sup>65</sup> S.G. § 1B1.3(a).

<sup>66</sup> Relevant conduct has been called the cornerstone of the Sentencing Guidelines. William W. Wilkins, Jr. and John R. Steer, Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines, 41 S.C.L. Rev. 495 (1990) (the authors are two of the persons principally involved in drafting the original guidelines and early revisions); Kate Stith & Jose A. Cabranes, The Federal Sentencing Guidelines Ten Years Later: Judging Under the Federal Sentencing Guidelines, 91 Nw. U.L. Rev. 1247, 1273 (1997) (“Perhaps the most extraordinary conceptual invention of the Commission”); Frank O. Bowman, III, Fear of Law: Thoughts on Fear of Judging and the State of the Federal Sentencing Guidelines, 44 St. Louis L.J. 299, 307 (2000) (relevant conduct is a “unique and controversial aspect of the Guidelines”).

<sup>67</sup> S.G. Ch. 1A4(a).

Another problem with a charge offense system “is the potential it affords prosecutors to influence sentences by increasing or decreasing the number of counts in an indictment.”<sup>68</sup> Thus, a pure tax crime (i.e., no other criminal object, such as fraud) often involves mail fraud. A charge system would permit the prosecutor to charge both crimes and have both affect the punishment. A real offense system, by contrast, treats both crimes as part of the same intended offense and bases sentencing principally on the factors other than the number of charges the prosecutor could squeeze out of the same pattern of conduct. Not only could the prosecutor load up charges to overpunish under a charge system, the prosecutor could also “load down” charges in order to underpunish under a charge system.<sup>69</sup> A real offense system requires the courts to consider the defendant’s real behavior without regard to the charges except the maximums imposed by the count(s) of conviction. The effect of this is to limit the prosecutor’s ability to shape the guideline sentencing range via charging and plea bargaining.<sup>70</sup> Since this article deals with plea agreements, we will focus upon the limits that relevant conduct place upon plea agreements.

The relevant conduct rules permit other criminal conduct to be considered in sentencing even (i) if the conduct was not charged, (ii) if the conduct was charged and dropped in a plea bargain, or (iii) if the defendant was acquitted of the conduct.<sup>71</sup> This means that, in the Fastows’ cases, criminal

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<sup>68</sup> Id.

<sup>69</sup> This type of prosecutorial leniency has been cited as “the main reason the Guidelines require judges to consider alleged-related offenses is to negate the effect of charging and bargaining decisions by the prosecutor.” David Yellen, Just Deserts and Lenient Prosecutors: The Flawed Case for Real-Offense Sentencing, 91 Nw.U.L.Rev. 1434, 1438 (1997).

<sup>70</sup> Wilkins and Steer, *supra*, pp. 499-500 and 399 n.27; Frank O. Bowman, III, Fear of Law: Thoughts on Fear of Judging and the State of the Federal Sentencing Guidelines, 44 St. Louis L.J. 299, 343-344 (2000) (“Alternatively, a defendant might be permitted to plead guilty to fewer counts than the government could actually prove, thus in theory subjecting him to liability for only a limited subset of all his criminal conduct. The Guidelines do not explicitly prohibit charge bargaining. However, the relevant conduct [\*344] feature of the Guidelines is designed to nullify the effect of such bargains.”)

<sup>71</sup> United States v. Watts, 117 U.S. 633, 635 (1997). Many people – particularly those with a defense bias – have difficulty with the notion that acquitted conduct can negatively affect sentencing (e.g., The American College of Trial Lawyers Proposed Modifications to the Relevant Conduct Provisions of the United States Sentencing Guidelines, 38 Am. Crim. L. Rev. 1463 (2001)), but it follows from the decision to permit sentencing factors to be determined by a preponderance of the evidence. The defendant could have been acquitted because the trier (judge or jury) could not find guilt beyond a reasonable doubt. If the defendant is convicted of one or more other counts, the conduct underlying acquitted count(s) may be proved at sentencing by a preponderance of the evidence – a less rigorous standard – and affect sentencing. Under pre-Guidelines sentencing, of course, judges could be influenced in sentencing by acquitted conduct where they believed that the defendant was in fact guilty of the acquitted conduct. But see *Id.*, pp. 1468-69, particularly at n. 28. Acquitted conduct is the outer extreme of the concept of relevant conduct, so if you can buy into the fact that related acquitted conduct may properly influence sentencing, then you should easily buy

conduct other than the counts of conviction may affect their sentencing, although in Andrew's case his sentence at the maximum permitted for the counts of conviction will make the affect of the relevant conduct more theoretical than real.

Relevant conduct includes (i) acts committed during, in furtherance of, or to hide the offense of conviction, (ii) in the case of jointly undertaken criminal activity, all reasonably foreseeable acts that occurred in preparation for or commission of the offense of conviction or that occurred to avoid detection or responsibility, and (iii) acts that were part of the same course of conduct or common scheme or plan as the offense of conviction that, if charged and convicted, would require "grouping" in determining sentencing.<sup>72</sup>

Let's take the simplest example, based on the charges in Lea's case. If four years of tax perjury are charged in the indictment and the defendant pleads to only one year in exchange for dismissal of the other three years, the tax loss for all four years can be included in the tax loss that determines the BOL.<sup>73</sup> For this reason, in tax cases, it is common that pleading to less than all the counts will produce no better sentence for the defendant than conviction on all counts.<sup>74</sup> It is relatively easy to treat tax counts as relevant conduct. As we shall see in Lea's case, although she plead guilty to tax perjury for only one of the four years for which tax perjury was charged, she could have the tax loss, if any, from the other years included in her BOL under the concept of relevant conduct.

The further issue is whether the nontax conduct charged – specifically, in Lea's case, the charged conspiracies to commit wire fraud and money laundering or even uncharged conduct. Can or should this conduct for which there is no conviction be considered relevant conduct so as to affect the calculation of the BOL and thus the sentencing on the count of conviction (the lone tax perjury count)? This will depend upon the definitional categories noted above which are all heavily fact dependent, the most important for present purposes being the conduct swept into relevant conduct by the concept of "grouping."

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into the notion that related noncharged or dismissed conduct may also affect sentencing.

<sup>72</sup> S.G. § 1B1.3(a).

<sup>73</sup> S.G. 2T1.1 cmt 2 ("In determining the total tax loss attributable to the offense (see §1B1.3(a)(2)), all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated.") In this regard, although not involved in Lea's case, state tax losses may be included in the concept of relevant conduct. United States v. Powell, 124 F.3d 655 (5th Cir. 1997); United States v. Fitzgerald, 232 F.3d 315, 318 (2d Cir. 2000); see DOJ CTM § 5.04.

<sup>74</sup> In such cases, the Probation Office's Presentence Report will advise the court that the dropping of the counts does not affect the sentence. This will often deflate the egos of inexperienced counsel who thought that he or she pulled a rabbit out of the hat by getting the prosecutor to drop a number of counts and, correspondingly, may create some issues in the relationship with the client who did not understand that phenomenon.

**(b) Grouping.**

The grouping concept, like the relevant conduct concept, is based upon the Commission's policy decision for real offense sentencing.<sup>75</sup> Grouping requires that a pattern of related conduct that may technically violate a number of laws be treated as the same crime for sentencing purposes, so that loading up the indictment with multiple counts may not ultimately affect the sentence. For example, assume that a defendant is convicted of one count of tax evasion with a tax loss of \$100,000. The Guidelines are easily applied in that case. The harm which was the object of the criminal conduct was \$100,000. Assume that another defendant is convicted of four counts of tax evasion with an aggregate tax loss of \$100,000. A good argument can be made that the harm or intended harm – the real offense – is the same because the tax loss is the same.<sup>76</sup> The Guidelines adopt that argument under the concept of relevant conduct which says, in effect, that the defendant in each case will have his or her sentencing calculations determined based on the \$100,000 tax loss, without distinction as to whether he or she is convicted of one count in the first example or four counts in the second. The multi-count conviction may still be relevant in the sentencing determination because the count(s) of conviction will determine the maximum sentence that can be imposed. But, the number of counts of conviction are not considered in making the determination of the appropriate sentencing range.

This simple example involving only loss attributable to tax evasion is the easy case under the grouping rules. The tougher cases involve the grouping of different types of crimes. For example, in Lea's case, the grand jury charged nontax counts (conspiracies to commit wire fraud and to commit money laundering) as well as tax counts. Let's first ask the obvious question regarding the relevance of wire fraud to a tax count. Assume that the defendant committed wire fraud in which he criminally derived \$100,000 and that he failed to report that criminally derived income, thus evading \$28,000 in tax. The defendant is indicted for one count of wire fraud and one count of tax evasion. The defendant is convicted of both counts. If the two counts are "grouped", the defendant will have his BOL determined under only one of the applicable guidelines (either wire fraud or tax), but the loss that will be considered will be the combined loss – \$128,000. (There will be no addition adjustment for an ungrouped count of conviction.) So, it matters to the defendant whether there is grouping. Grouping of multiple counts of conviction is generally good for the defendant.<sup>77</sup>

And, it may also matter to a prosecutor wanting to get a plea from this defendant. At the margin, the defendant might be willing to plead to multiple counts only if he is assured that the counts of conviction will qualify for grouping.

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<sup>75</sup> The grouping rules are contained in Chapter 3, Part D - Multiple Counts.

<sup>76</sup> I could make counter-arguments but that would unnecessarily distract from the focus of this paper.

<sup>77</sup> See Julie R. O'Sullivan, Symposium: The Federal Sentencing Guidelines: Ten Years Later: In Defense of the U.S. Sentencing Guidelines' Modified Real Offense System, 91 NW U. L. Rev. 1342, 1359-1360 (1997) (hereinafter referred to as O'Sullivan). Note that Sullivan's article pre-dates the applicable Guidelines here under the "One Book" rule (discussed in the article), the concept is the same as in the applicable Guidelines.

The Guidelines explain the grouping rules as relevant to financial crimes as follows:

(1) If the offense guidelines in Chapter Two base the offense level primarily on the amount of money \* \* \* involved (e.g., theft, fraud, \* \* \*), \* \* \* add [dollars involved] \* \* \* and apply the pertinent offense guideline, including any specific offense characteristics for the conduct taken as a whole. (2) When offenses are closely interrelated, group them together for purposes of the multiple-count rules, and use only the offense level for the most serious offense in that group. (3) As to other offenses (e.g., independent instances of assault or robbery), start with the offense level for the most serious count and use the number and severity of additional counts to determine the amount by which to increase that offense level.<sup>78</sup>

Let's look first at rule (1). Lea was indicted for 4 years of tax perjury. The harm alleged is a tax loss involving only dollars. If she had been convicted of all of these tax counts, they would have been grouped and her BOL would be based on the aggregate tax loss. As I noted above, even if she were only convicted of one tax count, the tax loss for all of the years could be considered as relevant conduct and thus be included in the sentencing calculation just as if she had been convicted of all counts.

Looking at rule (2), if Lea were also convicted of the Klein conspiracy, still the financial loss is the same and thus, in Guideline's theory, the harm is the same.<sup>79</sup> So her sentence is not affected by conviction of the additional Klein conspiracy count.

The more significant question, however, is whether nontax crimes can be grouped with tax crimes. This is important in Lea's case because, although her plea, if accepted by the court, will result in conviction for only a single tax crime, the indictment alleged other tax crimes and nontax crimes and, as we have seen in the relevant conduct rules discussed above, nontax crimes even if not convicted can still enter the sentencing calculation if that conduct would have been grouped in a multi-count conviction. So it is important to ask and answer, if possible, the question of whether and when nontax counts will be grouped with tax counts in a multi-count conviction.

If multi-conviction counts are grouped, that is generally good for the defendant, because it avoids an upward adjustment if the counts are not grouped. With grouping the defendant is sentenced based upon the sentencing factors related to the major offense, with no additional upward

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<sup>78</sup> S.G. Chapter Three, Part D, Introductory Comment.

<sup>79</sup> Okay, in criminal jurisprudence, there is a different harm caused by the conspiracy than by the offense that is the object of the conspiracy, which is why the conspiracy can be charged separately from and in addition to the object offense. The tax guidelines pay passing homage to that notion by providing a minimum BOL of 10 for conspiracies to impair, impede, obstruct or defeat tax. § 2T1.9(a)(2). However, for conspiracies involving relatively minor amounts of money, the regular tax loss table determines the BOL. § 2T1.9(a)(1). In Lea's case, if she had pled to the conspiracy count, this 10 minimum may have kicked in because, according to the plea agreement, there was no tax loss.

adjustment because of the lesser grouped counts of conviction. Without grouping, the defendant is still sentenced based upon the sentencing factors related to the major offense of conviction, but has an upward adjustment to impose increased incarceration to reflect that there are nongrouped counts of conviction. That is why in the reported cases, the defendant is usually the party arguing for grouping and the Government is usually the party arguing against grouping.<sup>80</sup>

Grouping under Rule (2) is required for related – “inter-related” in the quote – counts.<sup>81</sup> What counts are related? The courts have split, for example over whether mail fraud where the victims are individuals or corporations is related to tax evasion where the victim is the United States. The Fifth Circuit has held that the relationship may be present in such cases and grouping required in multiple count situations if there is an enhancement in the tax sentencing calculation for the income being from criminally derived property.<sup>82</sup> Thus, at least in the Fifth Circuit, if the defendant is convicted of a tax and nontax count and the counts of conviction are factually related (such as by the nontax count of conviction being a specific offense characteristic because the taxpayer failed to report or pay tax on criminally derived money), then the defendant gets the benefit of the grouping rules. As we will see in discussing Lea’s indictment and plea agreement, there is an enhancement for failing to report income from criminally derived property related to the nontax counts, suggesting that, had she been convicted on all counts, the tax counts and the nontax counts would have been grouped.

Grouping is good for the defendant actually convicted of multiple counts, but grouping is bad for defendants, such as Lea, whose nonconviction conduct is grouped under the relevant conduct rules. What that means is that a prosecutor wanting to help a defendant by accepting a plea to a lesser count may have limited flexibility, short of not indicting or dropping all charges.<sup>83</sup>

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<sup>80</sup> E.g., United States v. Peterson, 312 F.3d 1300 (10<sup>th</sup> Cir. 2002) (defendant unsuccessful in grouping mail fraud and tax counts) and United States v. Haltom, 113 F.3d 43 (5<sup>th</sup> Cir. 1997) (defendant successful in grouping mail fraud and tax counts). Judge Posner in a recent dissent summarized this split. United States v. D'Ambrosia, 313 F.3d 987, 995-997 (7<sup>th</sup> Cir. 2002). S.G. § 3D1.2(d) seems to require grouping (mentioning S.G. §2S1.1 -3 (money laundering offenses) and S.G. §2T1.1 (certain tax offenses, including § 7206(1) charged in the indictment and plead to by Lea)), but most of the cases articulate that, because the crimes are so different, with different victims, they not be grouped.

<sup>81</sup> See United States v. Chavin, 316 F.3d 666, 673-676 (7<sup>th</sup> Cir. 2002) (holding consistent with the trend in the cases that crimes are not grouped simply because they are in S.G. § 3D1.2 but must be related).

<sup>82</sup> United States v. Haltom, 113 F.3d 43 (5<sup>th</sup> Cir. 1997). See also United States v. Fitzgerald, 232 F.3d 315 (2<sup>d</sup> Cir. 2000).

<sup>83</sup> See O’Sullivan, pp. 1359-60 (“Where the grouping rules ensure that a prosecutor cannot secure a more severe sentence by bringing a variety of related “aggregable” counts, the relevant conduct rules prevent a prosecutor from obtaining a more lenient sentence by failing to charge or dismissing related “aggregable” counts.”)

**c. Adjustments to the BOL.**

Once the BOL is determined, adjustments are provided for certain characteristics of the crime that the Sentencing Commission felt were normally to be considered in sentencing. Those adjustments can be significant. The BOL offers the starting point based on the loss involved (in tax cases, the tax loss involved), and then the adjustments serve to adjust for typical sentencing factors that the Sentencing Commission felt should be considered to increase or decrease the BOL.

Most of the adjustments are added to the BOL in reaching the final Offense Level, thus increasing the sentencing ranges. For example, in tax cases, there is an addition if the omitted income involves the proceeds of criminal activity, thus in effect giving some additional punishment even if there is no charge or conviction for the underlying criminal activity.<sup>84</sup> This addition applies in Lea's case where she is charged with tax perjury for omitting criminally derived income. There is also an addition adjustment for sophisticated concealment of the tax crime.<sup>85</sup> This may apply in Lea's case. There are other potential upward adjustments for role in the offense (such as victim related adjustments (which are not applicable in a pure tax case but may be applicable where victims other than the Government are involved), obstruction of justice,<sup>86</sup> and multiple counts under the grouping rules noted above (which are not material in this discussion except to the extent that includible relevant conduct is based on the grouping concepts).<sup>87</sup> These addition adjustments are not good for the defendant.

Some adjustments are subtracted in reaching the final Offense Level, thus decreasing the sentencing ranges. The usual subtraction adjustment is an adjustment for acceptance of responsibility.<sup>88</sup> Generally, pleading so as to foreclose the necessity of a trial will assure the defendant this acceptance of responsibility adjustment.

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<sup>84</sup> S.G. § 2T1.1(b)(1). I discussed this adjustment above in regard to its effect on the grouping rules.

<sup>85</sup> S.G. § 2T1.1(b)(2).

<sup>86</sup> In Andrew's superseding indictment there is a count for obstruction of justice. This adjustment would apply unless to do so would be prohibited "double counting." Thus, S.G. § 3C1.1, cmt 7, provides this addition adjustment is not applied if the defendant is convicted is for obstruction of justice and his offense level is determined for that offense of conviction unless it is a further obstruction during the investigation or prosecution of the investigation for which conviction was obtained. If the offense level is determined under other guidelines based upon the loss (e.g., a conviction under the money laundering, fraud or tax guidelines and the conviction for obstruction does not otherwise increase the offense level, then this addition adjustment may apply.

<sup>87</sup> S.G. Chapter Three, Parts A, B and D. The multiple count adjustments are under the grouping rules discussed above.

<sup>88</sup> S.G. § 3E1.1.

**d. Departures.**

After the foregoing calculations are made and a sentencing range determined under the Sentencing Table, the judge can either sentence within the range or depart from the range. If the judge sentences within the range, the sentence is unreviewable (unless the judge considered some prohibited factor such as race).<sup>89</sup> If the judge departs, the judge will specify the reason(s) for departing.<sup>90</sup> The party aggrieved by the departure (the Government for a downward departure and the defendant for an upward departure) may appeal and have the departure reviewed by the court of appeals.<sup>91</sup>

A special type of departure is the departure made at the request of the prosecutor because of substantial assistance the defendant renders in the investigation of other potential wrongdoers. This is called a Rule 5K1 departure, based upon the section of the Sentencing Guideline dealing with this type of departure. As I shall note, there is no 5K1 departure in the Fastow cases – as to Lea, the prosecutor apparently does not need Lea’s cooperation and, as to Andrew, the prosecutor achieves the practical effect of a Rule 5K1 departure.

You have undoubtedly seen some of the publicity that Congress (or at least some of its members) was concerned that courts were departing from the Guidelines ranges in too many cases. Congress passed the so-called Amber Alert Act.<sup>92</sup> The key revisions are:

- De novo review of departure determinations, thus legislatively reversing a Supreme Court decision approving an abuse of discretion standard.<sup>93</sup>
- Directing the Commission to revise the Guidelines to further constrict downward departures.
- Directing the Commission to report to Congress all downward departures and the judges granting them. Many judges and commentators view this as an inappropriate and perhaps unconstitutional encroachment on the judicial power.
- For 5K1 departures (substantial assistance departures), prosecutors must give and the court must make specific findings about the cooperation.

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<sup>89</sup> S.G. § 5H1.10 Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status (Policy Statement) - “These factors are not relevant in the determination of a sentence.”

<sup>90</sup> 18 U.S.C. § 3553(b).

<sup>91</sup> 18 U.S.C. § 3742.

<sup>92</sup> This act is called the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (often acronymed to the "PROTECT Act"), Pub. L. No. 108-21, 117 Stat. 650, 670 (2003).

<sup>93</sup> Koon v. United States, 518 U.S. 81 (1996).

### 3. Parole Abolished.

In order to promote honesty in sentencing, the Commission severely limited parole. The sentence imposed is the sentence served, less up to approximately 15% for good behavior. As we will see, this is important in Andrew's sentencing.

### 4. The PSR.

After conviction or plea, the Probation Office investigates the considerations that the sentencing judge should or may want to consider in sentencing and reports to the Court on its investigation in a Presentencing Report ("PSR").<sup>94</sup> The PSR will include the factors under the Sentencing Guidelines (such as, in the case of tax crimes, the tax loss involved, the defendant's role, criminal history, calculation of the Guidelines factors for sentencing), any other factors of which the Probation Office is aware that might affect sentencing, and a recommendation to the Court.<sup>95</sup> Before the Sentencing Hearing, the PSR is presented to the prosecutor and the defendant for any objections they desire to make to the Court.<sup>96</sup> Although the sentencing judge may deviate sua sponte from the PSR, the PSR is likely to form the basis for sentencing except as to objections made by the parties.

How does the Probation Office investigate and develop the factors relevant to sentencing? The Probation Officer interviews the defendant and others who might have relevant information. Defendant's counsel and the prosecutor may submit any information that they think is relevant.<sup>97</sup> The Probation Officer does any other work deemed appropriate to the process. The Probation Officer analyzes all the information and makes his or her PSR accordingly.

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<sup>94</sup> S.G. § 6A1.1; FRCrP Rule 32(d).

<sup>95</sup> FRCrP Rule 32(e) & (f).

<sup>96</sup> S.G. § 6A1.2.

<sup>97</sup> USAM 9-27.720 provides:

\*\*\* it is important that the attorney for the government respond promptly to Probation Service requests by providing the requested information whenever possible. The attorney for the government should also recognize the occasional desirability of volunteering information to the Probation Service especially in a district where the Probation Office is overburdened. Doing so may be the best way to ensure that important facts about the defendant come to its attention. In addition, the prosecutor should be particularly alert to the need to volunteer relevant information to the Probation Service in complex cases, since it cannot be expected that probation officers will obtain a full understanding of the facts of such cases simply by questioning the prosecutor or examining his/her files.

In practice, the question will arise whether the Probation Office will have all of the information that could be relevant to the sentencing.<sup>98</sup> Let's illustrate the issues by a simple example. In June of year 8, after the criminal statute of limitations on year 1 has expired, the taxpayer is charged for tax perjury for three years (years 2-4) and thereafter pleads to the count for year 4. The taxpayer and his counsel know that the same pattern affected (infected) the year 1 return which was outside the criminal statute of limitations). Relevant conduct can include years barred by the statute of limitations, so the taxpayer's counsel is aware that the tax loss number for year 1 could be considered in determining the Base Offense Level for the year of conviction (year 4). Is the taxpayer (or his counsel) required to advise the Probation Office of the year 1 tax loss which could negatively impact sentencing? What if the prosecutor is aware of this year 1 tax loss? Is he or she required to advise the Probation Office? May, in reaching an agreement that both sides believe is in the interests of justice, the prosecutor and defense counsel reach an understanding that they will not advise the Probation Office of the year 1 issue?

This is the extreme. Most cases present less extreme and more appropriate situations. For example, in tax cases, the prosecutor and the defendant will often have major negotiations about the tax loss number. In the foregoing example, they may simply fail to include the year 1 number for many good reasons. The IRS and the prosecutor may have been aware of the year 1 issue, but did not investigate it criminally because of statute of limitations issues. Knowing that there is or may be a tax loss in the year is different from quantifying the tax loss required for the BOL calculation. There is no requirement that the prosecutor do independent investigation to establish every factor that might affect sentencing. So there may be good reasons to omit year 1 in the information provided to the Probation Officer. Defense counsel's job as an advocate is to discover and persuasively present those good reasons to the prosecutor in order to contain the scope of the Probation Officer's consideration.

More usually, the drill will be drive down the tax loss number for the years that will be considered. As we will see, in Lea's case, this drill may have worked magnificently because the plea agreement says that there is no tax loss even though over \$200,000 income was omitted from their joint returns. Driving down the tax loss number can have two facets. First, the defendant can "discover" some previously unclaimed tax benefit that either wipes out the tax loss with respect to the item(s) giving rise to the charge or renders the resulting tax loss not material.<sup>99</sup> Second, and

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<sup>98</sup> It has been noted, for example, that "plea agreements frequently fail to reflect the 'real' facts of a case." David Yellen, Just Deserts and Lenient Prosecutors: The Flawed Case for Real-Offense Sentencing, 91 Nw.U.L.Rev. 1434, 1438 n. 19 (1997) (citing a survey of probation officers). Where the prosecutor and the defendant seek to manage the facts (e.g., in the plea agreement), they may also manage the flow of information to the Probation Officer outside the plea agreement.

<sup>99</sup> This defense is seen most dramatically in tax evasion cases where the Government must prove a tax due and owing. Thus, the infamous Leona Helmsley attempted this defense unsuccessfully in her trial. See United States v. Helmsley, 941 F.2d 71 (1991). Arguments have been made that this defense is not necessarily commanded by the statute, although consistent interpretation over the years makes it a solid defense. See Robert H. Jensen, Reflections on United

usually more importantly at the sentencing phase, the defendant will try to chip away at the items the Government includes in calculating the tax loss number so as to get it down to an acceptable level. The tax loss includes only the criminal loss that the prosecutor can prove by a preponderance of the evidence (the standard for consideration under the Guidelines). The tax loss does not include any other proper civil tax loss. Defense counsel attempts to lower the tax loss number by moving the components of the tax equation from the criminal category, either by arguing the component presents only a civil issue or, under the law, presents no tax loss at all.<sup>100</sup> Depending upon how aggressive and creative the defendant's counsel is in the pursuit of the low number, the prosecutor may agree, permitting the parties to go to the Probation Officer with a much lower number than alleged in the indictment or in the Revenue Agent's report prepared during the investigative phase.<sup>101</sup> Normally, sentencing will proceed based upon the parties' agreement as to the tax loss number.

This can at least present the prosecutor and the defendant's counsel the opportunity to manipulate the sentencing process.<sup>102</sup> The prosecutor and the defense counsel can determine between themselves what an appropriate sentence is, serve up to the Probation Office only information consistent with their agreement (here principally an appropriate agreed upon tax loss number). In most cases, this will limit the information and options the Probation Officer is able to present to the judge in the PSR, and thus limit the judge's options because the judge has no information as to an otherwise appropriate sentence.<sup>103</sup> For example, assume that the tax loss

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States v. Leona Helmsley: Should "Impossibility" Be a Defense to Attempted Income Tax Evasion, 12 Va. Tax Rev. 335 (1993). The author is principally concerned about the person with evil motive who misreports some item but is then "saved" by some offsetting but unknown other item in his or her favor. That ground is substantially covered by § 7206(1), the tax perjury statute that we cover below, so the problem posited by the author may not be as important as he thinks.

<sup>100</sup> This drill hearkens back to James v. United States, 366 U.S. 213 (1961) and its progeny. Basically, the rule is that excluding income (or erroneously treating some other component of the tax equation) as to which there was a legal uncertainty cannot give rise to a tax offense because, as a matter of law, willfulness cannot exist. So too, for example, even though a defendant mistreats 10 items on his return and thereby achieves a tax benefit from each, he can be convicted only with respect to the items as to which the legal duty was clear. By creating some type of doubt – either factual or legal – defense counsel may be able to knock out many, sometimes all, of the items. (If all of the items are knocked out, the BOL will be the minimum BOL for the offense.)

<sup>101</sup> The RAR will include a Guidelines calculation and thus will assert a tax loss number in making the initial BOL determination. In my practice, I find that it is not uncommon that the tax loss number is overstated. (Of course, there is the possibility also that it may be understated, but usually the prosecutor uses the IRS's tax loss and the upper possibility and may be willing to negotiate downward; defense counsel who has some potentially larger number out there must, however, tread gingerly on the subject.)

<sup>102</sup> This is just a variation of "fact" bargaining noted above.

<sup>103</sup> Some authors refer to this as "fact bargaining." Frank O. Bowman, III, Fear of Law: Thoughts on Fear of Judging and the State of the Federal Sentencing Guidelines, 44 St. Louis L.J. 299 (2000):

number is really \$200,000 and the prosecutor could really prove that by a preponderance of the evidence. But, that number produces an Offense Level (considered with the other factors) with a range requiring more incarceration than the defendant can or will accept. Plea is out of the question, unless the tax loss numbers drop. In this posture, the parties can look at what type of sentence would be acceptable to the prosecutor and the defendant and then see if they can justify getting to an appropriate tax loss number. Most prosecutors will not blatantly do that, but in a posture like this they may be willing to see more doubt in some of the tax loss than they would otherwise and thus agree to move sufficient items from the criminal category to produce an acceptable tax loss number. But, this process which is largely unregulated permits the parties to manipulate the Guidelines, albeit in a way that the prosecutor finds acceptable in terms of the resulting indicated sentence under the Guidelines.<sup>104</sup>

The danger that concerns some practitioners who engage in this process (even when creating legitimate reasons to drop sentencing factors served up to the Probation Officer) is that even if the prosecutor and defense agree as to the tax loss number (or any other factor in the sentencing equation), the Probation Officer may follow the leads to discover the real facts. For example, as to the tax loss number, the Probation Officer will have access to the indictment where he may see a higher alleged number and will often have access to the RAR and/or the Special Agent who prepared the RAR (thus giving her an investment in the higher numbers in the RAR) where the Special Agent perhaps made an aggressive calculation of the tax loss number. And, at least, theoretically, the Probation Officer could do his or her own audit of the return to see if the number should be larger. My experience and the anecdotal reports I have heard indicates that Probation Officers do not second guess the tax loss numbers served up by the prosecutor and the defense. But it is certainly within the Probation Officer's power and even charge to do so in appropriate cases. It is a risk, although it might be more theoretical than real at least in most cases. This is also a risk as to other sentencing factors that the parties may agree upon.

But, although not generally a real risk, it may be a risk in Lea's case. As I suggest in discussing Lea's plea agreement, her admission to omitting over \$200,000 in income might at least

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The most direct, if disingenuous, method of evading a fact-driven real offense sentencing system is for the parties to conceal (or for the court to turn a blind eye to) facts that would increase the sentence beyond the agreed upon level. No serious observer doubts that fact bargaining occurs. The debate has been between those who think it happens a lot and those who think it is a relatively rare occurrence. In 1996, writing in response to a survey of probation officers that suggested prosecutors across the country commonly withheld facts from the Probation Department (and thus from the sentencing judge) "to protect a plea agreement," I was skeptical that the phenomenon was a very common one. Four years on, although we have no more conclusive data now than we did then, I am beginning to think that I was unduly sanguine.

<sup>104</sup> I am not personally aware of any instance in which this process has led to any improper manipulation, but I certainly see that the potential for manipulation is inherent in the process.

require some explanation to the Probation Officer and even the court as to why there is no tax loss associated with the omission. And, beyond the tax loss number, the Probation Office should address the relevant conduct issue as to the nontax counts that are dismissed. As we discuss in Lea's case, there is a risk that other relevant conduct could substantially influence sentencing and thus upset the carefully negotiated plea agreement. In this regard, although the plea agreement in Lea's case does not address the issue of the nontax relevant conduct, the plea agreement does properly state that the prosecutor will advise the Probation Office of appropriate sentencing factors. That could be an issue for Lea.

## 5. The Sentencing Hearing.

At the sentencing hearing, the sentencing judge will determine that the parties have received and read the PSR and lodged such objections or other comments as they desire.<sup>105</sup> The judge may then accept the findings of the PSR except as to unresolved objections.<sup>106</sup> The judge is not required to accept even undisputed findings, but it would be an unusual case where the judge went behind undisputed findings.<sup>107</sup> As to any disputed findings, the judge will then hear such evidence as appropriate and make the findings necessary to determine sentencing.<sup>108</sup> Thus, for example, a judge may not accept a PSR's findings, including the tax loss number, if either party objects; rather the court must consider the objections and make specific findings independent of the PSR.<sup>109</sup>

The judge resolves factual issues relevant to sentencing under a preponderance of the evidence standard, not the beyond a reasonable doubt standard that applied in determining guilt at the trial (if there was at trial).<sup>110</sup> Further, the court may consider any evidence "without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy."<sup>111</sup> For example:

- "Reliable hearsay evidence may be considered."<sup>112</sup>

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<sup>105</sup> FRCrP Rule 32(i)(1). USAM 9-27.720 provides: "The attorney for the government should bring any significant inaccuracies or omissions to the Court's attention at the sentencing hearing, together with the correct or complete information."

<sup>106</sup> FRCrP Rule 32(i)(3)(A).

<sup>107</sup> This factor contributes to the potential for abuse noted above.

<sup>108</sup> S.G. § 6A1.3(a); FRCrP Rule 32(i)(3)(B). If there is controversy as to some matter that the court deems not to affect sentencing or the court will not consider for any reason, the court should specifically determine that resolving the matter is not necessary. *Id.*

<sup>109</sup> E.g. United States v. Gricco, 277 F.3d 339, 355 (3d Cir. 2002).

<sup>110</sup> S.G. § 6A1.3, Commentary.

<sup>111</sup> S.G. § 6A1.3(a).

<sup>112</sup> S.G. § 6A1.3, Commentary.

- “Out-of-court declarations by an unidentified informant may be considered where there is good cause for the non-disclosure of the informant’s identity and there is sufficient corroboration by other means.”<sup>113</sup>

## 6. The One Book Rule and Ex Post Facto Limitations.

The Guidelines are changed annually or bi-annually to reflect refinements and developments in the law and society that should bear upon sentencing. In part here relevant, as a result of the startling financial crimes of recent years (of which the Enron debacle is the poster child), the Sentencing Commission with nudges from Congress and the public has changed the Base Offense Level tables to impose greater sentencing ranges for financial crimes as compared to the ranges for comparable losses under the prior Guidelines for those crimes. Even before that, the Sentencing Commission had begun a similar, but less accentuated process, for tax crimes. Thus, a tax crime with the same characteristics in the year 2000 could produce a significantly reduced range than would the same crime committed in 2004.

The court applies the Guidelines version applicable on the date of sentencing unless to do so would result in a harsher sentence than under the Guidelines on the date of the offense.<sup>114</sup> The reason for this limitation is the Constitution’s guarantee against ex post facto laws.<sup>115</sup> The applicable Guidelines are applied in their entirety -- the taxpayer cannot pick and choose favorable components of different guidelines.<sup>116</sup> (This is referred to as the “One Book Rule.”)

In both of their plea agreements, the Fastows stipulated to earlier, more lenient, Guidelines.<sup>117</sup>

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<sup>113</sup> Id.

<sup>114</sup> S.G. § 1B1.11.

<sup>115</sup> U.S. Constitution, Article I, Section 9.

<sup>116</sup> S.G. § 1B1.11(b)(2).

<sup>117</sup> As with most of the discussion in the text, there are nuances that are beyond the scope of the article. One that should jump to your mind, however, is what happens when a pattern of criminal conduct spans years where different Guidelines applied and would produce materially different results. The Sentencing Guidelines provide that the later Guidelines apply (S.G. § 1B1.11(b)(3)), but it is not clear that this avoids the ex post facto issue for the crimes committed in earlier years having more lenient Guidelines. Compare S.G. § 1B1.11, Background, with United States v. Sullivan, 255 F.3d 1256, 1259-1263 (10th Cir. 2001) (discussing the split among the circuits and rejecting the application of the one-book rule in this type of case).

**D. Plea Bargains.**

**1. The Contractual Nature of the Plea Bargain.**

**a. General.**

A plea agreement looks and feels like a contract between the defendant and the prosecutor. Courts view plea agreements as contracts or sufficiently contract-like that they may be judicially interpreted and enforced like contracts. This is important in criminal tax cases because more than 90% of all tax indictments result in a guilty plea. It is also important in other federal criminal cases which generally have a very high level of criminal case disposition by plea.

**b. Good Faith?**

Normally, in contracts, each party is obligated to implement the contract in good faith.<sup>118</sup> Logically, the same principle applies to plea agreements which are, as noted, contracts or contract-like.<sup>119</sup>

This issue of a duty of good faith in plea agreements usually arises in the context of a 5K1 motion for downward departure. Under the Guidelines, the prosecutor may make a motion that the court depart downward (i.e., give a lesser sentence than it would otherwise give) as a reward to the defendant giving substantial assistance in investigating or prosecuting others. Where the prosecutor needs or may need the defendant's cooperation against others, the plea agreement will address the prosecutor's obligations with respect to a 5K1 motion. Depending upon the parties' bargaining positions, the plea agreement may (i) unconditionally commit the prosecutor to make the motion, (ii) commit the prosecutor to make the motion based on some objectively determined condition, (iii) grant the prosecutor sole and unreviewable discretion (or some similar formulation) as to whether to file the motion based on the prosecutor's perception of the level and/or value of the defendant's cooperation, or (iv) provide that the prosecutor will not file the motion. Andrew's agreement falls in category (iv), and Lea's agreement falls in category (ii). For present purposes we focus upon category (iii) – an agreement that states that the prosecutor has sole discretion as to whether to make the motion based on its assessment of the level and/or value of the defendant's cooperation.

There is no question that, in exercising its discretion, the prosecutor may not use a constitutionally prohibited factor (such as race or sex).<sup>120</sup> Setting aside constitutionally impermissible factors, the courts of appeal appear split as to whether the prosecutor has a duty of good faith in exercising the discretion allowed by the plea agreement. Courts viewing the plea agreement as contract or contract-like may apply the contract law principle of good faith, thus

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<sup>118</sup> E.g. Restatement (Second) of Contracts § 205.

<sup>119</sup> Unites States v. Isaac, 141 F.3d 477,483 (3d Cir. 1998) (“All that our decision requires of the district courts is that they apply settled principles of contract law to a particular type of contract.”)

<sup>120</sup> S.G. § 5H1.10.

permitting judicial review if the defendant can establish the prosecutor's bad faith in exercising discretion not to file a 5K1 motion;<sup>121</sup> other courts, including the Fifth Circuit, hold that courts will not review the prosecutor's exercise of its discretion.<sup>122</sup> Is this split real? (Split is litigator-speak to indicate that the courts of appeals differ in some respect, the question here is whether the difference is a real one.)

This split among the circuits may be more apparent than real; the cases may be resolved by the following analysis: they all have common ground in recognizing that plea agreements are contracts or sufficiently like contracts that contract interpretation principles apply; the difference in the cases may be explained as a difference in interpreting the language. Some courts read the language as contracting away any duty of good faith. Others, who do not believe that is the intended effect, simply apply the contract principle of good faith. In either case, it is a contract interpretation that drives the result.

Thus, although the 5K1 motion is not an issue in the Fastow agreements (for reasons I note later), I will assume that the prosecutor has a duty of good faith with regard to its other obligations except where the plea agreements give the prosecutor sole discretion. As to matters in the prosecutor's sole discretion, it would appear that, because the case is in the Fifth Circuit, the Fastows will be deemed to have contracted away their right to relief for the prosecutor's bad faith exercise of discretion. We will see below that the prosecutor did reserve such discretion with respect to the obligation in Andrew's plea agreement to dismiss the other charges, which operates like a Rule 5K1 departure.

## **2. The Court's Authority Over Plea Bargains.**

The Federal Rules provide that the plea may provide that the prosecutor will:

- (i) not bring, or will move to dismiss, other charges;
- (ii) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or
- (iii) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines,

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<sup>121</sup> Id.

<sup>122</sup> The Fifth Circuit case is United States v. Aderholt, 87 F.3d 740, 742-43 (5th Cir. 1996). Courts imposing the good faith requirement include: United States v. Alegria, 192 F.3d 179, 187 (1<sup>st</sup> Cir. 1999); United States v. Isaac, 141 F.3d 477, 482- 84 (3d Cir. 1998); United States v. Stockdall, 45 F.3d 1257, 1260 (8th Cir. 1995); United States v. Lee, 989 F.2d 377, 380 (10th Cir. 1993); United States v. Rexach, 896 F.2d 710, 714-15 (2d Cir. 1990), cert. denied 498 U.S. 969 (1990).

or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).<sup>123</sup>

For plea agreements with (i) or (iii) terms, the court may accept, reject or defer decision until the PSR is received.<sup>124</sup> The (ii) plea may not be withdrawn if the court fails to follow the recommendation or request.

The Court is not required to accept a plea agreement. The Sentencing Guidelines state that the Court may accept a plea agreement that includes the dismissal or agreement not to pursue counts:

if the court determines, for reasons stated on the record, that the remaining charges adequately reflect the seriousness of the actual offense behavior and that accepting the agreement will not undermine the statutory purposes of sentencing or the sentencing guidelines.<sup>125</sup>

And, even if such a plea is accepted, it shall not preclude the application of the relevant conduct concept that can increase the punishment for the count of conviction.<sup>126</sup>

The courts thus have overall responsibility in the Fastows' cases to ensure that the plea agreements, in the circumstances of the case, are consistent with the purposes of the Sentencing Guidelines. Presumably, therefore, either of the Fastow's sentencing courts could conclude that the plea before it was not so consistent and force the prosecutor to the option trying the case (at least some of the counts) or dropping all counts.

### **3. Terms.**

The plea bargain will usually contain a number of terms other than the bare agreement to plead guilty to one or more counts. For example, if there is a possibility of a 5K1 departure, the defendant will attempt to negotiate the best terms for the prosecutor's obligation. Similarly, the agreement will set forth any obligations the prosecutor desires to impose.

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<sup>123</sup> F.R.Cr.P. Rule 11©)(1).

<sup>124</sup> F.R.Cr.P. Rule 11(c)(3)(A).

<sup>125</sup> Sentencing Guidelines § 6B1.2(a). In the discussion of the Sentencing Guidelines, I use the 2000 Sentencing Guidelines applicable before November 1, 2001, because, in both cases, the parties stipulated that that was the controlling version of the Guidelines. When referring to specific sections of the Sentencing Guidelines, I refer to "S.G." followed by the section symbol and section number (e.g., S.G. § 1B3.1).

<sup>126</sup> Id.

The plea agreement may also address and attempt to resolve certain or all of the relevant factors under the Guidelines.<sup>127</sup> As we will see, Lea's agreement does this, perhaps only in part. The court is not bound by those stipulations.<sup>128</sup> The Court's duty to make an independent review and to determine the facts relevant to sentencing may be particularly important in Lea's sentencing given the impact of the concept of relevant conduct under the Sentencing Guidelines.

#### 4. DOJ Plea Policies.

DOJ's plea policy is that charges are bargained away only if the prosecutor has "a good faith doubt as to the government's ability readily to prove a charge for legal or evidentiary reasons."<sup>129</sup> There are two exceptions. First, charges that the prosecutor could otherwise prove can be bargained away "if the applicable guideline range from which a sentence may be imposed would be unaffected."<sup>130</sup> We saw in discussing relevant conduct that this phenomenon will often appear, thus permitting a DOJ prosecutor to drop counts. Second, if there are other federal criminal enforcement priorities present in the case that may suggest a result other than would be provided under the Sentencing Guidelines, charges may be dropped, provided that the prosecutor first obtains "the specific approval of the United States Attorney or designated supervisory level official for reasons set forth in the file of the case."

The policies also caution prosecutors that they are not to bargain away charges that inappropriately restrict the court's sentencing options under the Sentencing Guidelines. The USAM thus provides:

3. Basis for Sentencing. In order to guard against inappropriate restriction of the court's sentencing options, the plea agreement should provide adequate scope for sentencing under all the circumstances of the case. To the extent that the plea agreement requires the government to take a position with respect to the sentence to be imposed, there should be little danger since the court will not be bound by the government's position. When a "charge agreement" is involved, however, the court will be limited to imposing the maxim term authorized by statute as well as the Sentencing Guideline range for the offense, to which the guilty plea is entered. Thus, as noted in USAM 9-27.320 above the prosecutor should take care to avoid a "charge agreement" that would unduly restrict the court's sentencing authority. In this connection, as in the initial selection of charges, the prosecutor should take into account the purposes of sentencing, the penalties provided in the applicable statutes (including mandatory minimum penalties), the gravity of the

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<sup>127</sup> S.G. § 6B1.4.

<sup>128</sup> S.G. § 6B1.4(d).

<sup>129</sup> USAM 9-27.400.

<sup>130</sup> Id.

offense, any aggravating or mitigating factors, and any post conviction consequences to which the defendant may be subject.<sup>131</sup>

What does that mean? What is a “charge agreement” that unduly restricts the court’s sentencing authority? Let’s consider a simple example to illustrate the point. A files a false tax return for 3 years for which the maximum incarceration period is 3 years for each year (9 year total) and that the Guideline range after all factors are considered is 30-37 months of incarceration. Notwithstanding that indicated range, in their plea negotiations before an indictment is brought, the prosecution and defense agree that A should not be sentenced more than one year. If the prosecutor were to charge the most appropriate count (tax perjury) and A pled to one count of tax perjury, the maximum sentence will be 3 years, but the prosecution and defense will not control whether the court departs downward to achieve the 1 year incarceration that the prosecution and defense think is appropriate under the circumstances. In order to avoid the court’s independent review and determination on that issue, the prosecutor therefore only charges and A pleads to one count under Section 7207, submitting a false document.<sup>132</sup> That way the court cannot go above the 1 year the prosecutor and defense think is appropriate, but are not willing to take the risk that the court would agree to in a more appropriate charge and plea agreement. Can the prosecution and defense do that?

Technically, the prosecutor can control the charge that is made. The court cannot force the prosecutor to make a charge. But, DOJ policy is:

Department policy requires honesty in sentencing; Federal prosecutors are expected to identify for the court departures when they agree to support them. For example, it would be improper for a prosecutor to agree that a departure is in order, but to conceal the agreement in a charge bargain that is presented to a court as a fait accompli so that there is neither a record of nor judicial review of the departure.<sup>133</sup>

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<sup>131</sup> USAM 9-27.430B3. DOJ Tax is a component of DOJ and thus subject to its general plea policies. DOJ Tax’s policies are thus consistent with the DOJ plea policies. For example, in part here relevant, readily provable counts are not to be dropped unless the sentence is unaffected by dropping the counts. DOJ Tax CTM 5.11[2].

<sup>132</sup> In this particular example, DOJ Tax has a policy that limits the use of this technique to charge the § 7207 misdemeanor in lieu of the § 7206(1) felony. DOJ Tax CTM 3.00 Dir. No. 75 (“Modification of Policy re Use of 26 United States Code Section 7207 in False Return Filing Circumstances”) and 16.02 (“Policy Limiting Use of Section [7207]”). That policy, as relevant here, (1) recognizes that U.S. Attorneys investigating financial crimes may need a misdemeanor bargaining chip in order to obtain the cooperation of a minor target and that often tax misdemeanors such as § 7207 are the most convenient misdemeanor to use and (2) provides that authorization to agree to a § 7207 in lieu of a felony offense will not be given in cases where DOJ Tax has previously authorized charges under § 7206(1) or a Klein conspiracy, both of which I assume were authorized in both Andrew and Lea’s cases. I don’t develop this policy in the text because I want to develop the technique of charge bargaining by plea to a crime with a lesser maximum incarceration period than other crimes that were or could have been charged.

<sup>133</sup> USAM 92-7.400.

So, technically, DOJ attorneys are not supposed to give the effect of a departure in a manner which takes away the court's discretion to review the departure.

As we shall see in discussing the Fastows' agreements, that is precisely the effect and intent of Andrew's agreement and perhaps also of Lea's agreement. What standards do prosecutors use to determine whether a charge agreement duly or unduly restricts the court's sentencing authority? I do not have easy answers to that question, but a court that feels it is being snookered by the parties can refuse to accept the plea agreement. The ultimate check is thus a vigilant court, although a court may not be able to deal effectively with the situation discussed above where the single misdemeanor count is brought ab initio.

DOJ Tax is, of course, part of DOJ and subject to its overall plea policies. These policies are subject to particular nuances in coordinating with the goal of the Federal Criminal Tax Enforcement Program, which is:

to protect the public interest in preserving the integrity of this nation's self-assessment tax system through vigorous enforcement of the internal revenue laws. The purpose of a criminal tax prosecution is to expose the wrongdoer, thereby deterring other potential tax violators. Obviously, the most effective deterrent to would-be violators is successful prosecution coupled with a sentence commensurate with the gravity of the offense.<sup>134</sup>

As appropriate, I shall discuss some of these particular nuances below.

## **II. Lea Fastow Plea Agreement.**

### **A. The Indictment.**

#### **1. The Counts and Allegations.**

Lea's indictment charges the following counts:

(1) Count One - Conspiracy to Commit Wire Fraud and Defraud the United States. The indictment charges that Lea conspired to (i) use communication in furtherance of an attempt to defraud Enron, including depriving Enron of its right to the honest services of its employees and (ii) defraud the United States by impeding, impairing, obstructing, and defeating the lawful government functions of the IRS in the accurate ascertainment, computation, assessment, and collection of the revenue, to wit, federal income taxes. This latter count is the type normally encountered in tax prosecutions and is commonly referred to as a Klein conspiracy.

The indictment alleges the following: Lea, Andrew and Michael Kopper, a former Enron officer, took advantage of the "investment" opportunities in SPEs which wrongfully gave the

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<sup>134</sup> DOJ CTM 6-4.010.

perception of qualifying for certain accounting benefits for Enron. By hiding their roles with the SPEs, thus misleading Enron (including its shareholders) and Enron's accountants, the co-conspirators reaped significant profits that should have belonged to Enron (the honest services theory), wrongfully described the arrangements and otherwise attempted to prevent the conduct from being discovered, and wrongfully described certain payments at the behest to the object of the Fastows bounty as gifts rather than properly treating those payments as the Fastows' income reportable on their joint income tax returns for the years involved. The co-conspirators undertook various actions (in conspiracy parlance, overt acts) that hid their profits both from Enron with regard to the wrongful profits and from the Government with regard to the reporting of their tax returns. False tax returns for the years 1997-2000 were filed and were among the overt acts of this conspiracy.

(2) Count Two - Money Laundering Conspiracy. The indictment charges that Lea conspired to commit money laundering by transactions involving proceeds of an SUA and wire fraud with an intent to (i) violate §7206(1) (tax perjury) and (ii) knowing that the transactions were designed to conceal with respect to the specified unlawful activity. The factual allegations (overt acts) are the same as alleged for Count Two.<sup>135</sup>

(3) Counts Three - Six - Tax Perjury - 1997 - 2000. The indictment charges that Lea filed a false tax return in violation of § 7206(1) with respect to income tax returns filed for these years. The critical allegation is that the payments disguised as gifts were really the Fastows' income which they omitted from their joint returns.

## **2. The Penalties.**

The statutory incarceration periods for the counts are:

(1) For Count One (Offense Conspiracy for Wire Fraud and Klein Conspiracy), five years under § 371.

(2) For Count Two (Offense Conspiracy for Money Laundering), twenty years under § 1956(h).

(3) For each tax perjury count, 3 years under § 7206(1).

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<sup>135</sup> As I noted above, the money laundering conspiracy statute has been construed not to require overt acts.

**B. The Plea Agreement.**

**1. The Deal.**

**a. 5 Months Incarceration.**

Lea's "business deal" was incarceration for no more than 5 months. This agreement was designed to insure, if possible, that Lea serves her sentence before Andrew serves his, for the sake of the children.<sup>136</sup> The prosecutor and Lea had earlier presented that deal to the Court for sentencing without further ado, and specifically without the PSR that would advise the court of the full range of sentencing factors. The court rejected that maneuver, feeling that it would improperly deprive the court of all of the information appropriate to determine a proper sentence.<sup>137</sup> Hence, the current plea agreement recommends a 5 month prison incarceration and gives Lea the right to withdraw the plea if the court sentences in excess of 5 months.<sup>138</sup> Through other provisions of the plea agreement, the parties attempt to limit the sentencing court's ability or willingness to impose a sentence in excess or significantly in excess of 5 months.

**b. Details on Getting to the Magic Number.**

The agreed upon incarceration period took some gerrymandering, particularly in light of the court's previously expressed unwillingness to be bound by the agreed-upon incarceration period without receiving the PSR. The defendant pled guilty to one § 7201 (tax perjury) count. Tax perjury has a maximum sentence of 3 years and no minimum sentence. Thus, based on the prior discussion, you can see that Lea's cap on incarceration is 3 years, but that is far in excess of what she and the prosecutor agreed to accept.

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<sup>136</sup> The Houston Chronicle reported that Lea's attorney stated that "the couple insisted on the five-month sentence to ensure that their two young sons have at least one parent at home." Mary Flood and Michael Hedges, Fastows Accept Prison Time in Plea Bargain, Houston Chronicle (1/15/04). Andrew's plea agreement provides that he will surrender to serve his incarceration period after Lea has served hers. As with the 5 month incarceration recommendation, this is not binding upon the courts. The Sentencing Guidelines provide: "Family ties and responsibilities and community ties are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range." S.G. 5H1.6 (Policy Statement). But, within the Guideline range, that factor may be considered. And, the Sentencing Guidelines do not speak to the issue of whether, in husband-wife sentencing, consideration of children is a factor in determining when the defendants serve their sentences. Rick Casey, a reporter for the Houston Chronicle reports that, in background interviews, two federal judges said they had done it and consider it good policy when it benefits the children. Rick Casey, Lea's Plea for Family Values, Houston Chronicle (1/15/04). (Mr. Casey also notes that prosecutors are influenced by such factors influence plea negotiations.) This is good.

<sup>137</sup> F.R.Cr.P. Rule 11(c)(5).

<sup>138</sup> F.R.Cr.P. Rule 11(c)(5)(B).

As previously noted, the Sentencing Guidelines in tax cases often produce a range where at least the lower end of the range is less than the statutory maximum. Lea's plea agreement attempts to exploit this phenomenon with the following provision in paragraph 2:

2. The Department and the Defendant agree that the Defendant falls within Criminal History Category I and that the following analysis applies under the 2000 edition of the Sentencing Guidelines manual, which applies to Count Six:

Base Offense Level (U.S.S.G. section 2T1.1(a)(2))/1/	6
Income from Criminal Activity (U.S.S.G. section 2T1.1(b)(1))	+6
Sophisticated Means (U.S.S.G. section 2T1-1(b)(2))	+2
Acceptance of Responsibility (U.S.S.G. section 3E1.1(a))	-2
Final Offense Level:	12

/1/ The parties agree that there is no tax loss in this case.

This Level carries a guideline range of imprisonment of 10 - 16 months within Zone C of the Sentencing Table. Pursuant to U.S.S.G. section 5C1.1(d)(2), the Court has discretion to impose a "split" sentence of five months incarceration followed by a term of supervised release which includes a term of five months home confinement. Pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure, the Department and the Defendant agree that the following specific sentence is the appropriate disposition of this count: five months of imprisonment to be followed by one year of supervised release, with the condition that five months of the supervised release term shall be served on home confinement. In the event the agreed-upon sentence is below the adjusted offense level under the Sentencing Guidelines calculated by the Court, the Defendant and the Department consent to such a departure and the Department will inform the Court at the time of sentencing why the departure is justified. Pursuant to Rule 11(c)(5), if the Court rejects this Agreement, the Defendant shall be afforded the opportunity to withdraw the plea. The Defendant's sentence, other than the agreed-upon term of incarceration, is governed by the United States Sentencing Guidelines. The Department will advise the Court and the Probation Department of information relevant to sentencing, including criminal activity engaged in by the Defendant, and such information may be used by the Court in determining the Defendant's sentence. The Defendant agrees that she will not move for a downward departure on any grounds.

Hence, if the court agrees that the parties' plea agreement calculation is proper so that the Offense Level is 12, it can sentence to 10 months, with 5 months prison incarceration and 5 months home confinement without a departure. (Home confinement is bad, but it is far better than prison for some freedom of movement beyond the home is allowed.)<sup>139</sup> Alternatively, if the court

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<sup>139</sup> For example, the convicted person may leave home in certain situations – for work, doctors appointments, church attendance and necessary shopping (e.g., groceries). The precise situations for necessary absence from the home must be negotiated with the Probation Officer. The

determines that a higher range is indicated by the Guidelines, the parties agree that the court may depart to the indicated sentencing.<sup>140</sup>

That the Court can give that sentence is not to mean that it will give that sentence. Why would it not give the sentence?

**c. Comments on the Details.**

**(1) The Tax Loss/BOL.**

If, indeed, the tax loss number is zero and there are no facts relevant to sentencing other than those addressed in the plea agreement, then the parties have certainly put Lea's sentencing court in the right range that he can honor their agreement. But let's look at some of the details, where the devil often may be found lurking.

Based on the information in the plea agreement, the parties' calculation of the tax loss at least invites questions. Lea admits that she and Andrew omitted \$208,444.34 taxable income from their income tax returns for 1997 through 2000. Although she pleads only to tax perjury for one year (2000), as we discussed above, the tax loss for all years can be considered under the concept of relevant conduct.

Assuming that the \$208,444.34 would have been taxed at a marginal rate of at least 28% (a rebuttable presumption under the guidelines),<sup>141</sup> there is an indicated tax loss exceeding \$58,000. That tax loss would comfortably produce a BOL of 13, resulting in the following calculations with the other admitted adjustments:

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key is that it is supposed to be punishment, so that the Probation Office will want some material restraints (i.e., will not approve every request the person makes), but so long as both sides are reasonable, it works pretty well. It is not fun, but it beats prison by a long shot. And, unsightly ankle bracelets to monitor movement may be required.

<sup>140</sup> DOJ Tax CTM 5.13[1] requires that Tax Division Attorneys see prior approval from a Section Chief of DOJ Tax prior to seeking upward or downward departures for factors other than as set forth in S.G. § 5K2.

<sup>141</sup> S.G. § 2T1.1(c)(1), Notes. This is a rebuttable presumption, and if in fact their marginal tax rate can be shown to be higher or lower, that actual marginal tax rate would apply. This would mean that, if their marginal rate were 35% rather than the 28% in the rebuttable presumption, the tax loss would exceed \$70,000, which would add one additional level under the tax table.

Base Offense Level (U.S.S.G. section 2T1.1(a)(2))	13
Income from Criminal Activity (U.S.S.G. section 2T1.1(b)(1))	+ 2 <sup>142</sup>
Sophisticated Means (U.S.S.G. section 2T1-1(b)(2))	+ 2
Acceptance of Responsibility (U.S.S.G. section 3E1.1(a))	- 2
Final Offense Level:	15

The resulting Offense Level produces (by my calculation) a range of 18-24 months with no possibility of home confinement for any portion of it.<sup>143</sup>

So, under these assumptions, in order to meet the parties' target of 5 months incarceration, the court will have to depart. True, the prosecutor has agreed in advance to accept departure, but the court may have some difficulty making that type of departure when day in and day out the court does not make comparable departures for other defendants. That's the risk Lea took, however, but, of course, Lea reserved the right to withdraw her plea.

Caveat to this Comment: This comment is based on the critical assumption that there was a tax loss based on the assumed indicated tax rate for the omitted income. The Fastows may really have a tax situation in each of the years that would result in no additional tax from the income Lea agrees she willfully omitted, in which case there would be no tax loss. That is not usually the case, particularly at the income levels the Fastows otherwise reported,<sup>144</sup> but still I don't have enough information to know whether the stipulation of no tax loss is true.<sup>145</sup> If indeed there were really no tax under reported from the scheme to show over \$200,000 as gifts rather than the Fastows' taxable income, then it is unclear why the Fastows would have gone to such lengths to avoid reporting the income. (Perhaps they failed to report the income not to avoid tax but to avoid discovery of the income should any third party obtain copies of their returns, but that is not evident from the plea agreement; and this might not bode well in avoiding treating her other conduct as relevant conduct, to which we now turn.)

## (2) What About Relevant Conduct?

We saw above that, under the real offense system reflected in the concept of relevant conduct, the court considers criminal conduct related to the count of conviction in determining

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<sup>142</sup> If the BOL exceeds 12, as it does with this tax loss number, the adjustment is 2.

<sup>143</sup> In Sentencing Guidelines jargon, it is in Zone D according to the table. S.G. § 5B1.1(a) does not allow probation for Zone D Offense Level.

<sup>144</sup> The indictments indicate substantial "total income" reported on the returns – \$1,287,543 for 1997, \$2,183,850 for 1998, \$9,129,602 for 1999, and \$48,583,318 for 2000.

<sup>145</sup> It is possible that the distinction between materiality for purposes of tax perjury and materiality for purposes of the tax due element of tax evasion may be present here so that, even if there is a tax due from the omission, the tax due was not material and thus may not be included in the number alternatively referred to as the criminal number or the tax loss number for sentencing purposes. This might explain why the Fastows were indicted for tax perjury rather than tax evasion.

sentencing. Lea pleads to one count, and the plea agreement seems to recognize that the tax counts to be dismissed may be considered in her sentencing. The Klein conspiracy count is closely related to the tax counts and all of the tax loss, if any, related to the false tax returns will be considered anyway. So, dropping the Klein conspiracy (part of Count One) and the other tax counts cannot affect sentencing. But, the plea agreement contemplates that counts for offense conspiracies for nontax conduct that will be dropped. Will/should those nontax counts affect Lea's sentencing under the concept of relevant conduct?

I repeat my summary of relevant conduct for this purpose:

Relevant conduct includes (i) acts committed during, in furtherance of or to hide the offense of conviction, (ii) in the case of jointly undertaken criminal activity, all reasonably foreseeable acts that occurred in preparation for or commission of the offense of conviction or that occurred to avoid detection or responsibility, and (iii) acts that were part of the same course of conduct or common scheme or plan as the offense of conviction that, if charged and convicted, would require "grouping" in determining sentencing.<sup>146</sup>

In my early drafts of this article, I attempted to extrapolate from the bare information in the indictment and plea agreement as to appropriate relevant conduct for nonconviction conduct that should be considered and how it might affect the sentencing range. I decided that more facts were needed in order to do a meaningful analysis. I think here the most meaningful comment I can make is that relevant conduct may, depending upon the facts developed in the PSR or the sentencing hearing, cause a dramatic increase in the sentencing range. The nontax conduct alleged in the indictment is related to the tax conduct (indeed, as I noted above, if the tax conduct resulted in no tax savings (so that tax savings was not the motivator for the conduct), then hiding the nontax conduct was perhaps the motivator). If that conduct is swept in, the loss increase to the BOL because of Enron's loss from the nontax conduct could be quite dramatic and easily push the final Offense Level to a range where the minimum is above the 3 year maximum incarceration period allowed by the count of conviction. That resulting Offense Level could cause the court to reject the plea altogether or sentence either at the maximum or significantly above the parties' plea agreement.

### **(3) What about Sophisticated Concealment?**

Assuming *arguendo* that the nontax counts do not enter the sentencing calculation, what about the potential addition adjustment for sophisticated concealment?<sup>147</sup> Sophisticated concealment

means especially complex or especially intricate offense conduct in which deliberate steps are taken to make the offense, or its extent, difficult to detect. Conduct such

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<sup>146</sup> S.G. § 1B1.3(a). The grouping rules are contained in Chapter III, Part D of the Guidelines.

<sup>147</sup> S.G. § 2T1.1(b). A later version of the Guidelines changed the terminology to "sophisticated means," so as to draw it in line with the fraud guidelines.

as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore bank accounts ordinarily indicates sophisticated concealment.<sup>148</sup>

Judge Posner offered the following discussion of the concept:

In light of its purpose and context, we think "sophistication" must refer not to the elegance, the "class," the "style" of the defrauder – the degree to which he approximates Cary Grant -- but to the presence of efforts at concealment that go beyond (not necessarily far beyond, for it is only a two-level enhancement that is at issue, which in this case added roughly six months to the defendants' sentences) the concealment inherent in tax fraud. It is true that the guideline commentary illustrates with examples suggesting a higher level of financial sophistication:"'sophisticated concealment' means especially complex or especially intricate offense conduct in which deliberate steps are taken to make the offense, or its extent, difficult to detect. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore bank accounts ordinarily indicates sophisticated concealment." U.S.S.G. § 2T1.4, Application Note 3. But these are offered as examples, as emphasized in United States v. Friend, 104 F.3d 127, 130 (7th Cir. 1997), and United States v. Clements, 73 F.3d 1330, 1340 (5th Cir. 1996); the essence of the definition is merely "deliberate steps taken to make the offense ... difficult to detect."<sup>149</sup>

In Lea's case, she and/or Andrew at the most basic level directed that the income be disguised as gifts and paid to entities(trusts) that would not create a direct paper trail to them, much in the way that directing income to an offshore bank account supposedly avoids a paper trail to the taxpayer. And, in order to completely understand the transaction, the IRS would have had to penetrate the fog of the SPEs in issue. Thus, this was not the type of simple tax fraud (e.g., an owner skimming cash from his business and putting it in the cookie jar in the tool shed) that clearly avoids the adjustment. This would seem to be the type of case that would be a rather routine application of the sophisticated concealment adjustment.<sup>150</sup>

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<sup>148</sup> S.G. § 2T1.1, Application Note 4.

<sup>149</sup> United States v. Kontny, 238 F.3d 815 (7th Cir. 2001), cert. denied 532 U.S. 1022 (2001).

<sup>150</sup> E.g., in United States v. Stone (4<sup>th</sup> Cir. 2004), unpublished decision reported at 2004 TNT 22-39 (2/3/04), the court routinely applied the "sophisticated means" standard in the 1997 Guidelines, the defendant received kickbacks disguised as gifts directly to him and through fictional entities. The court said that "This case does not present the situation where an individual taxpayer merely 'completed his individual 1040 tax form with false information to avoid paying some of his federal taxes.'" Thus, Lea and Andrew did not simply receive the income and fail to report it; they directed that it go to trust in the guise of gifts.

If this adjustment is imposed, the offense level goes to 14 (even accepting the other calculations served up by the prosecutor and the defense in the plea agreement), with an indicated range of 15-21 months and no home confinement option. The court would have to depart downward significantly to achieve the sentencing bargain proffered in the plea agreement.

**2. Monetary Consequences.**

**a. Maximum Fine.**

The maximum permissible fine for the count of conviction is \$250,000. The plea agreement makes no recommendation as to the amount of the fine. However, based on the sentencing factors agreed to in the plea agreement, the indicated fine range is \$3,000 to \$30,000. If the court were to determine an Offense Level in excess of that stipulated by the parties, the fine range could increase.

**b. Restitution.**

Not Applicable.

**c. Forfeiture.**

Forfeiture is not available in Lea's case and the plea agreement does not address forfeiture, except that Lea contractually agrees to the forfeitures in Andrews case.

**3. Lea's Commitments.**

**a. Cooperation.**

The prosecutor apparently did not need Lea's cooperation to nail other Enron related personnel. Hence, there is no cooperation agreement as there is in Andrew's plea. There is also no commitment to make a 5K departure.

**b. Other Compensation.**

Lea agrees not to accept compensation for books, articles, and other dissemination of information regarding her work at Enron or the transactions alleged in the indictment.

**4. DOJ's Other Commitments.**

**a. No Further Prosecution.**

The prosecutor agrees not to bring further criminal proceedings related to the income in issue, Enron related matters, or other matters in the original indictment and will move to dismiss the other counts in the indictment.

**b. Prosecutor Will Not Use Andrew Against Lea.**

The prosecutor agrees that, in the event Lea withdraws her plea (which she may do if the Court's incarceration period exceeds the amount agreed upon), the prosecutor will not call Andrew as a witness against her in the ensuing trial. In this regard, we note that there may have been a spousal privilege that either Lea or Andrew could invoke, but Andrew may not have been able to assert the privilege consistent with his agreement to cooperate. This contractual agreement solves the problem for Lea, without (apparently) any major damage to the prosecutor's case in the event the criminal trial of the matter picks up.

**c. Contingent Upon Andrew Plea.**

The prosecutor is bound under this agreement only if Andrew pleads guilty and the court accepts the plea at the time of allocution.

**III. Andrew Fastow Plea Agreement.**

**A. Andrew's Indictment (the Superseding Indictment).**

Andrew's superseding indictment was a whopper – 109 counts. I don't think it is necessary to break down the counts as I did for Lea. Suffice it to summarize, Andrew was charged with multiple counts of conspiracy to commit wire fraud, of conspiracy to falsify books, records and accounts, of wire fraud, of money laundering conspiracy; of money laundering and, of course, the same tax perjury allegations that Lea was charged with. Suffice it also to say that the maximum sentences on an aggregated basis would be off the charts.

**B. Andrew's Agreement.**

**1. Restrictions on Freedom (Principally Incarceration).**

**a. Summary.**

Andrew's "business deal" was a 10 year sentence and, if possible, time his incarceration to commence after Lea served her incarceration. In the plea agreement, Andrew and the prosecutor gerrymandered<sup>151</sup> the sentencing rules to lock in the 10 year sentence for incarceration. Assuming he can qualify for good time credit, the actual period can be reduced up to approximately 15%, so that he actually will be incarcerated approximately 8 ½ years. Further, although the court and not the parties control whether Andrew's incarceration will commence after Lea's, the plea agreement allows a process that will likely insure that Andrew will commence his incarceration after Lea has completed hers (unless the court substantially increases the time Lea must serve over the time the parties requested (more on this later)).

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<sup>151</sup> I don't mean the term in a negative sense. The Sentencing Guidelines' mechanical approach, like that of the Internal Revenue Code, invites the players to stack the rules in their favor.

**b. Technical Details.**

**(1) Getting to the Magic Number.**

The first key term of the parties' "business deal" was that Andrew serve a sentence not to exceed 10 years. That was real easy to do – he simply pled to two fraud conspiracies which each had maximum sentences of 5 years, which are then aggregated to produce a maximum sentence of 10 years. For this reason, his plea agreement, unlike Lea's, does not provide a sentencing calculation; it would have produced an irrelevant number. I could attempt one here, but would have to make certain assumptions about how the loss is calculated for determining the BOL. However, I think I am fair in assuming that any calculation including the relevant conduct and appropriate adjustments would produce a sentencing range, the lower parameter of which is well above the 10 year period even under the 2000 Guidelines.

So, the parties were assured that Andrew could not be sentenced to in excess of 10 years.<sup>152</sup> But, the Sentencing Guidelines permit a court to sentence for less than the maximum. How could the prosecutor be assured that Andrew will not serve less than 10 years (subject to time off for good behavior)?

First, Andrew contracted away his right to move for a downward departure and contractually agreed that no grounds for downward departure existed. The latter agreement does not bind the court, but a court is likely to agree.

Second, the prosecutor expressly provided that it will not make a 5K1 motion for downward departure based on Andrew's cooperation as to Enron related matters required under the agreement. The plea agreement does contemplate Andrew's cooperation, but the reward for his cooperation is provided via a mechanism other than the 5K1 motion. I shall discuss this mechanism below.

Beyond these contractual terms, I doubt that the prosecutor was really concerned that the judge would provide a lesser sentence by downward departure (which would be required because the Guideline range will significantly exceed 10 years). The Government could appeal such a downward departure, but the practical risk of it occurring is nil.

**(2) The Condition Related to Lea's Incarceration.**

The defendant contractually committed that he "will voluntarily surrender to the institution designated by the United States Bureau of Prisons following the release from custody of Lea W. Fastow." Note that this is Defendant's commitment. The prosecutor desires this result because that was the bargain reached in order to obtain the plea, but the courts, not the parties, control when a convicted defendant serves time.

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<sup>152</sup> In the unlikely event a court would go above 10 years (which would be illegal), Andrew reserved the right to appeal that decision.

Assuming, after receiving Lea's PSR, her sentencing court sentences to 5 months incarceration or some longer time acceptable to Lea (i.e., which she accepts by not withdrawing her plea), the prosecutor through further action can likely gerrymander the timing of their incarcerations so that there is no overlap. The prosecutors thus may (i) expedite as much as possible Lea's final plea so that she commences her incarceration as soon as possible and (ii) delay Andrew's final sentencing (as is often the case where the prosecutor desires to fry larger fish through a cooperating witness such as Andrew). That timing is ultimately controlled by the courts, but it is likely that Andrew's sentencing court will cooperate because the prosecutor will likely be able to articulate good reasons wholly independent of the Fastows' desire to avoid overlapping incarceration. (Reasons frequently articulated for postponing sentencing as the prosecutor pursues other targets is the time it will take to develop further cases, the need to have the cooperating defendant available under conditions assuring the maximum benefit of his agreement to cooperate, and the possibility of a significant downward departure based on the cooperation, a possibility that does not exist in Andrew's case.)

**2. Monetary Consequences.**

**a. Fines.**

The maximum fine is \$500,000 (\$250,000 per count). The parties do not stipulate the Final Offense Level which determines the indicated fine range under the guidelines, but presumably the court will max the fine (\$500,000) based on the staggering amount of the loss.

**b. Restitution.**

The Court may order restitution. The prosecutor agrees not to request restitution if Andrew meets the other financial conditions.

**c. Forfeiture.**

Andrew and Lea (who also agrees to this provision) will forfeit assets of approximately \$23,800,000. The plea agreement does not offer sufficient detail to make any meaningful analysis of the propriety of the agreed upon forfeiture. We doubt, however, that the Enron Task Force would have any incentive to take less than it could get.

**3. Andrew's Commitments and Waivers.**

**a. Cooperation.**

Andrew agrees to cooperate by providing "truthful, complete and accurate" information. This is what the prosecutor sought in the plea bargain and why it was willing to bargain away a sentence in excess of 10 years. Andrew waives his attorney-client privilege as to communications with any lawyer or law firm as to Enron and related entities (including the partnerships).

**b. Bankruptcy Waiver.**

Andrew waives any right he might have in bankruptcy to avoid the forfeiture, fine or restitution imposed by the court. However, the parties agree that Andrew is not waiving his “state or federal exemptions with respect to property other than the Forfeiture Amount.”

**c. Other Compensation.**

Andrew agrees not to accept compensation for books, articles, and other dissemination of information regarding his work at Enron or the transactions alleged in the indictment.

**4. DOJ Commitments.**

**a. Immunity from Further Prosecution.**

If, in DOJ’s “sole and exclusive judgment” Andrew cooperates as required above, DOJ gives Andrew federal transactional immunity from further criminal prosecution for Enron related crimes and use immunity for testimony Andrew gives while acting pursuant to the agreement. As I noted above, the DOJ’s exercise of judgment under this standard is virtually unreviewable in the Fifth Circuit.

**b. Dismissal of Other Counts.**

If, in the prosecutor’s “sole and exclusive discretion,” Andrew has fully provided the prosecutor the benefits he contracted to give, the prosecutor will dismiss the remaining counts of the indictment. The parties further agree that if the prosecutor does not dismiss the remaining counts and he is prosecuted for them, the prosecutor may use any testimony he has given against him. As with immunity, the DOJ’s the DOJ’s exercise of judgment under this standard is virtually unreviewable in the Fifth Circuit.

The combination of a charge limiting sentence to 10 years and dismissal of the counts at the prosecutor’s discretion after Andrew provides the cooperation contemplated by the parties in the plea agreement effectively boxes in the judge in sentencing. At a minimum, it takes away the judge’s discretion as to whether to grant a similar benefit under Rule 5K1, which is the normal reward contemplated by the Guidelines for cooperation. So the mechanism chosen to reward Andrew for his cooperation does appear to gerrymander the rules and even violate DOJ’s general charging and plea bargaining policies. However, the policies are just policies and not straightjackets. Andrew may have had a sufficient bargaining position when considered on balance with the very substantial punishment he agreed to, that the balance struck in the plea agreement is justified.

## **5. Breach.**

Andrew's agreement contains two paragraphs related to breaches. The first relates to a breach by Andrew. The second relates to a breach, if that is the right word to use, resulting from Lea's failure to enter a guilty plea. I shall address these separately.

The paragraph relating to Andrew's breach is the usual provision for this type of plea agreement. Andrew must cooperate by providing "complete, truthful, and accurate information and testimony" and must not commit other crimes, including perjury (a bit redundant). If that determination is made, DOJ is released from its obligations under the agreement, although Andrew is specifically bound to his guilty plea. It is not stated in the agreement as to whether Andrew is bound by his other agreements (e.g., forfeiture), but from the wording of the breach provision, I think that would be the interpretation given.

A critical issue is who makes the determination as to whether Andrew has breached the agreement. For specific components of the agreement, DOJ is given discretion – unreviewable in the Fifth Circuit – to make determinations that will negatively impact Andrew. In the paragraph related to Andrew's breach, the language is silent as to who makes the determination and the standards. Hence, it would appear that, if DOJ wants to urge breach over Andrew's objection, it will have to convince a court reviewing de novo except in those cases where it specifically reserved discretion.

The plea agreement also conditions a paragraph related to Lea's plea agreement. The opening sentence in that paragraph states: "This Agreement is conditioned upon the following: the defendant Lea W. Fastow (the "covered defendant") entering a guilty plea to Count 6 of the Indictment in the case of United States v. Lea Fastow, H-03-150." The wording of this sentence would seem to mean that, if Lea's plea is not accepted, Andrew's agreement is not binding on either party. The paragraph goes on, however, to allow DOJ to avoid its obligations and specifically does not address whether Andrew is relieved of his obligations. It is unclear to me how a dispute as to the scope of this breach paragraph would be resolved.

This paragraph relating to Lea's plea agreement also provides: "In addition, if Defendant [Andrew] breaches this Agreement, the Department, in its sole and exclusive discretion, may void its agreement with the covered defendant [Lea] and proceed to trial." It is strange indeed that a provision as to voiding Lea's plea agreement would be in Andrew's plea agreement. In order to be binding on Lea, it would seem that the provision would have to be in Lea's agreement or Lea would have had to sign Andrew's plea agreement, and her agreement appears to only address requirements of Andrew's plea and sentencing and not any other breach of Andrew's agreement. Strange.

### **a. Financial Obligations.**

If Andrew meets his financial obligations (noted above) as well as any to the SEC, the prosecutor will recommend to the Court that no additional fine, forfeiture or restitution be imposed by the Court. The risk that the court will not agree and impose additional financial obligations is assigned to Andrew who agrees that that court action will not invalidate the plea agreement.

**b. Scope.**

The plea agreement binds only the DOJ and not any other prosecuting federal or state authority. Since all significant federal crimes are prosecuted by the DOJ, this nails it for the feds. Still, the agreement specifically leaves open prosecution by state authority and for civil or administrative proceedings by all authorities (including federal authorities).

**IV. Conclusion.**

In considering the Fastows' plea agreements, I have introduced many of the important facets of the Sentencing Guidelines, particularly as they relate to financial crimes. You have seen that, like the Internal Revenue Code, the Sentencing Guidelines are rules-based and formula driven. Like the Internal Revenue Code, they permit planning and even manipulation.<sup>153</sup> Unlike the Internal Revenue Code in its civil tax application where the parties can reach agreements that control, the parties' agreements in plea bargains are reviewed by the court with the assistance of the Probation Office under the Guidelines and, supposedly, tested to see whether the punishment fits the "real offense(s)." But busy courts and Probation Officers are unlikely to go beyond the facts to which the parties agree in developing their plea bargains and sentence recommendations, respectively.

The Fastows' plea agreements certainly do attempt to influence, even control, the application of the Sentencing Guidelines. There is no facial indication from the indictments and the plea agreements that the prosecutor and defense abused the process inherent in the structure of the Guidelines. The agreement to deny the court a right to sentence Andrew to incarceration for a period exceeding 10 years may not, under the facts, be improper. The prosecutor needs Andrew's cooperation in going up the Enron feeding chain, and the 10 year sentence will be significant. Lea's case is more problematic. The non-binding 5 month incarceration period the parties request or even a 3 year incarceration maximum based on the sole count of conviction may not adequately reflect the seriousness of all of her related criminal conduct which the court is supposed to consider. Still, it appears that the prosecutor's agreements to the terms of both pleas were essential to the agreements of both Fastows so that, on balance, overall, it is likely that the prosecutor acted in the best interests of all constituencies that should be served in the context of the Enron investigation and sentencing related to that investigation. That is not to mean that the court should accept Lea's plea deal as served up to him. It is simply to say that the plea was served up in good faith, but the court can and should make his own determination as to propriety under the Guidelines. If the court is

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<sup>153</sup> Kate Stith & Jose A. Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts 3 & 91 (1998); and cf. Kate Stith & Jose A. Cabranes, The Federal Sentencing Guidelines Ten Years Later: Judging Under the Federal Sentencing Guidelines, 91 Nw. U.L. Rev. 1247, 1248, 1266-1270 (1997) (as to complexity); but see Frank O. Bowman, III, Fear of Law: Thoughts on Fear of Judging and the State of the Federal Sentencing Guidelines, 44 St. Louis L.J. 299, 328-329, 334 (2000) (concluding that the comparison to the tax code is not appropriate because the Sentencing Guidelines are only moderately (and sometimes needlessly) complex) But, I would point out that the tax law started out with significantly less complexity than did the Sentencing Guidelines.

convinced by those considerations that motivated the prosecutor to agree to the plea, the judge will sentence accordingly. If he is not convinced, then Lea may face the very unpleasant choice of proceeding to trial where the punishment could far exceed the maximum 3 years that the judge could force on her for a plea to one count.

**Exhibit 1**  
**2000 Sentencing Guidelines Sentencing Table**

**Exhibit 2**  
**2000 Guidelines Tax Loss Table**

## Exhibit 3

### Simple Tax Case Sentencing Guideline Example<sup>154</sup>

#### I. Assumptions.

The defendant has been convicted on one count of tax evasion for one year (2000 tax year, with the return being filed on 4/15/2001).<sup>155</sup> In that return, the defendant fraudulently omitted an item of income of \$250,000 from a legal source, resulting in a tax underpayment of \$75,000. These are the “criminal numbers” -- and for present purposes also the "tax loss numbers" which means that they are the taxes on the components of income or deduction that result from evasion. The evasion was simple, garden-variety evasion, the defendant took no evasive or "sophisticated" measures to hide the omitted income or implement the evasion, such as using fictitious names, offshore accounts, etc.

The Guidelines in effect when the return was filed are applicable. These are the 2000 Guidelines, effective 11/1/00. (This assumption is critical, because later Guidelines will produce a worse result for the defendant.)

#### II. Applicable Offense Guideline.

Chapter 2 of the Guidelines is the starting point. Chapter 2 determines the offense conduct and lists the various federal offenses and statutory provisions. Tax crimes are addressed in Part T of Chapter 2. Tax crimes for this purpose may be divided analytically into two parts: (1) the crime itself and (2) the amount of tax that was the object of the crime. Both of these parts are addressed in Part T. The following are the relevant provisions of Part T to example:

§2T1.1. Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents

- (a) Base Offense Level:
  - (1) Level from §2T4.1 (Tax Table) corresponding to the tax loss;
  - or
  - (2) 6, if there is no tax loss.
- (b) Specific Offense Characteristics:
  - (1) If the defendant failed to report or to correctly identify the source of income exceeding \$10,000 in any year from criminal activity, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.
  - (2) If the offense involved sophisticated concealment, increase by 2 levels.

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<sup>154</sup> This is based on an example I use in my Tax Crimes book.

<sup>155</sup> I choose this year in order to use the 2000 Sentencing Guidelines, the ones stipulated in the Fastow cases. Subsequent Guidelines increased the ranges for tax offenses..

(c) Special Instructions:

For the purposes of this guideline --

(1) If the offense involved tax evasion or a fraudulent or false return, statement, or other document, the tax loss is the total amount of loss that was the object of the offense (i.e., the loss that would have resulted had the offense been successfully completed).

\* \* \* \*

Application Notes:

1. "Tax loss" is defined in subsection (c). The tax loss does not include interest or penalties. Although the definition of tax loss corresponds to what is commonly called the "criminal figures," its amount is to be determined by the same rules applicable in determining any other sentencing factor. In some instances, such as when indirect methods of proof are used, the amount of the tax loss may be uncertain; the guidelines contemplate that the court will simply make a reasonable estimate based on the available facts.

The starting point is thus the Base Offense Level ("BOL"), for which we are referred to the tax loss table in § 2T4.1 which is Exhibit 2. In our example (\$75,000 of tax loss), the tax loss table provides a Base Offense Level of 14.<sup>156</sup> This is 8 levels up from the BOL that would apply if there were no tax loss at all (e.g., as in the case of a false return conviction under § 7206(1) where the taxpayer had paid all of the tax but had misrepresented a source). (Note from the table that, if the defendant succeeds in dropping just \$5,000 from the tax loss, the BOL is dropped to 13; by contrast, the tax loss number would have to increase \$45,001 to \$120,001 to increase the base level from 14 to 15.)

We then go to the Specific Offense Characteristics in § 2T1.1(b). Since legal income is involved, the (b)(1) adjustment does not apply. The other adjustment (the (b)(2) adjustment) is for "sophisticated means." I assume that no sophisticated means was involved. The defendant just knowingly left the income off the return, but did no further evasive acts such as socking it into a foreign bank account.

### III. Adjustments.

Guidelines Chapter 3 next allows adjustments to the offense level. There are victim related adjustments (upward), role in the offense (leader, minimal participant) adjustments (upward or downward), obstruction of justice adjustments (upward), multiple counts adjustments (upward in some cases), and acceptance of responsibility adjustments (downward adjustment).

The pertinent adjustment relevant in our example is a 2 level reduction "If the defendant clearly demonstrates acceptance of responsibility for his offense" and timely notifies the prosecutor

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<sup>156</sup> For contrast, under the 2001 guidelines (effective November 1, 2001), the BOL would be 16.

of his intent to plea so that the prosecutor to burden of preparing for trial.<sup>157</sup> The Application Notes provide that acceptance of responsibility may include:

(a) truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a). A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection. However, a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility;

\* \* \* \*

(c) voluntary payment of restitution prior to adjudication of guilt;

You are comfortable that your client has accepted responsibility and will qualify for this benefit if he agrees to plead guilty. But he still wants to know what his sentencing range is. A plea qualifying for this adjustment would reduce the offense level by 2. Now your client is at level 12.

#### **IV. Criminal History or Livelihood.**

Chapter Four then provides for upward adjustments on the sentencing table for significant criminal history. In this case, the defendant has none, so we shall move on.

#### **V. Application of the Sentencing Table.**

The final step is to apply the adjusted offense level, which is now 12, to the sentencing table contained in Chapter 5, Part A. Go to the Sentencing Table in Exhibit 1 of this article. You should easily derive a sentencing range of 10-16 months.<sup>158</sup>

Notice how key the starting point – the BOL – is to the process. In tax cases, the BOL is driven by the tax loss number. In this example, the tax loss number is \$75,000 which drives the offense level (prior to adjustments) to 14 and the sole adjustment is for acceptance of responsibility reducing the offense level to 12. But, for example, if you can drive the tax loss number down a mere \$5,000 to \$70,000, the BOL is 13, and, after the 2 level reduction for acceptance, the final Offense Level is 11 and the resulting sentencing range of 8-14 months. Note correspondingly, however, that if the tax loss number were \$120,000 rather than \$75,000, you would still be in the same Guideline range and you would have a long way to go to get to the magic number of \$70,000.

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<sup>157</sup> S.G. 3E1.1. The level reduction is 2 unless the BOL after the Section 2 adjustments is 16 or higher, in which case the reduction is 3.

<sup>158</sup> Under the 2001 Guidelines, the same calculation would produce a range of 12-18 months.

(But to turn that thought, the prosecutor would only have a short way to go at \$120,000 to ratchet the defendant into the next higher level, producing a sentencing range of 12-18 months.)

## **VI. Probation.**

In each zone from the sentencing table, the judge can order actual imprisonment. However, some zones permit something less than imprisonment, as follows (§5B1.1 and 5C1.1):

Zone A - No imprisonment required; probation is authorized.

Zone B - In discretion of judge, minimum term may be served by imprisonment, imprisonment for at least one month along with community confinement or home detention; or a sentence of probation with condition of intermittent confinement, community confinement, or home detention.

Zone C - At least one-half indicated time must be by actual imprisonment and balance may, in discretion of judge, include supervised release with community confinement or home detention.

In this case, we have an offense level of 12 which is in Zone C (see the Sentencing Table), thus permitting one half the time to be spent in home detention or community confinement.

Note that, in order to get to Zone B, which permits home confinement and probation (no incarceration in jail or prison), the tax loss number cannot exceed \$40,000. In this case, if the defendant can drive the tax loss down just \$35,000, he can get to Zone B. In some cases, with skillful advocacy (or just plain luck), that can happen.

## **VII. Sentencing Within or Without the Range.**

The guidelines produce a "heartland" range in which the judge has discretion to sentence. The next step for a court in the process is to determine whether to depart from the "heartland" or guidelines range produced by the foregoing steps and, if not, where to sentence within the guidelines. Exercise of discretion to depart is a fail safe mechanism to allow the judge to consider extraordinary factors that bear on sentencing and that have not been adequately taken into consideration during the earlier steps. Only highly unusual cases justify a departure.

If the judge decides not to depart, the judge still must determine where, within the guideline range, the judge will impose sentence. Generally, the judge has absolute discretion where to sentence within the range, provided that he or she does not consider some prohibited factor (such as race) or indicate that he or she was operating under a material misunderstanding of the Guidelines.

In this example, based on the limited facts we know, there appear to be no grounds for a departure.

### **VIII. Fines and Restitution.**

The Guidelines also provide a table for a heartland fine range. In the example, that table puts the fine range at \$3,000 through \$30,000.<sup>159</sup>

Fines are mandatory unless “the defendant establishes that he is unable to pay and is not likely to become able to pay.”<sup>160</sup> Fines also are subject to downward and upward departures.<sup>161</sup>

The Guidelines also address restitution where restitution is otherwise provided by statute, but there is no provision for restitution in tax cases. Of course, after the criminal case is wrapped up, the defendant will have a form of "restitution" via the civil tax assessments (including penalties and interest) that the IRS will make.

### **IX. Conclusion.**

This is a very simple example as applied to a relatively straightforward tax case. The adjustments and considerations that can influence where on the table the defendant fits are many and must be specially considered in the context of specific cases.

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<sup>159</sup> § 5E1.2.

<sup>160</sup> § 5E1.2(a).

<sup>161</sup> See, e.g., United States v. Hunerlach, 258 F.3d 1282 (11th cir. 2001) (upward departure)



## SENTENCING TABLE (in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points)					
		I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
Zone A	4	0-6	0-6	0-6	2-8	4-10	6-12
	5	0-6	0-6	1-7	4-10	6-12	9-15
	6	0-6	1-7	2-8	6-12	9-15	12-18
	7	0-6	2-8	4-10	8-14	12-18	15-21
	8	0-6	4-10	6-12	10-16	15-21	18-24
Zone B	9	4-10	6-12	8-14	12-18	18-24	21-27
	10	6-12	8-14	10-16	15-21	21-27	24-30
Zone C	11	8-14	10-16	12-18	18-24	24-30	27-33
	12	10-16	12-18	15-21	21-27	27-33	30-37
	13	12-18	15-21	18-24	24-30	30-37	33-41
	14	15-21	18-24	21-27	27-33	33-41	37-46
	15	18-24	21-27	24-30	30-37	37-46	41-51
	16	21-27	24-30	27-33	33-41	41-51	46-57
	17	24-30	27-33	30-37	37-46	46-57	51-63
	18	27-33	30-37	33-41	41-51	51-63	57-71
	19	30-37	33-41	37-46	46-57	57-71	63-78
	20	33-41	37-46	41-51	51-63	63-78	70-87
	21	37-46	41-51	46-57	57-71	70-87	77-96
	22	41-51	46-57	51-63	63-78	77-96	84-105
	23	46-57	51-63	57-71	70-87	84-105	92-115
	24	51-63	57-71	63-78	77-96	92-115	100-125
Zone D	25	57-71	63-78	70-87	84-105	100-125	110-137
	26	63-78	70-87	78-97	92-115	110-137	120-150
	27	70-87	78-97	87-108	100-125	120-150	130-162
	28	78-97	87-108	97-121	110-137	130-162	140-175
	29	87-108	97-121	108-135	121-151	140-175	151-188
	30	97-121	108-135	121-151	135-168	151-188	168-210
	31	108-135	121-151	135-168	151-188	168-210	188-235
	32	121-151	135-168	151-188	168-210	188-235	210-262
	33	135-168	151-188	168-210	188-235	210-262	235-293
	34	151-188	168-210	188-235	210-262	235-293	262-327
	35	168-210	188-235	210-262	235-293	262-327	292-365
	36	188-235	210-262	235-293	262-327	292-365	324-405
	37	210-262	235-293	262-327	292-365	324-405	360-life
	38	235-293	262-327	292-365	324-405	360-life	360-life
	39	262-327	292-365	324-405	360-life	360-life	360-life
	40	292-365	324-405	360-life	360-life	360-life	360-life
	41	324-405	360-life	360-life	360-life	360-life	360-life
	42	360-life	360-life	360-life	360-life	360-life	360-life
	43	life	life	life	life	life	life



\* \* \* \* \*

**4. TAX TABLE**

**§2T4.1. Tax Table**

	<u>Tax Loss (Apply the Greatest)</u>	<u>Offense Level</u>
(A)	\$1,700 or less	<b>6</b>
(B)	More than \$1,700	<b>7</b>
(C)	More than \$3,000	<b>8</b>
(D)	More than \$5,000	<b>9</b>
(E)	More than \$8,000	<b>10</b>
(F)	More than \$13,500	<b>11</b>
(G)	More than \$23,500	<b>12</b>
(H)	More than \$40,000	<b>13</b>
(I)	More than \$70,000	<b>14</b>
(J)	More than \$120,000	<b>15</b>
(K)	More than \$200,000	<b>16</b>
(L)	More than \$325,000	<b>17</b>
(M)	More than \$550,000	<b>18</b>
(N)	More than \$950,000	<b>19</b>
(O)	More than \$1,500,000	<b>20</b>
(P)	More than \$2,500,000	<b>21</b>
(Q)	More than \$5,000,000	<b>22</b>
(R)	More than \$10,000,000	<b>23</b>
(S)	More than \$20,000,000	<b>24</b>
(T)	More than \$40,000,000	<b>25</b>
(U)	More than \$80,000,000	<b>26.</b>

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 237); November 1, 1993 (see Appendix C, amendment 491).



## **C. Guidelines in Tax Cases - A Simple Example.**

### **1. Introduction.**

I present a simple example, following the format for the Guidelines to show you how they work. I use a tax example, although the same general methodology applies for other economic crimes.

I assume that the taxpayer has been convicted on one count of tax evasion for one year (2001 tax year, with the return being filed on 4/15/2002).<sup>237</sup> In that return, the taxpayer fraudulently omitted an item of income of \$250,000 from a legal source, resulting in a tax underpayment of \$85,000. I assume that these are the “criminal numbers” -- and for present purposes also the "tax loss numbers" which means that they are the taxes on the components of income or deduction that result from evasion. Assume that this was simple, garden-variety evasion, the taxpayer took no evasive or "sophisticated" measures to hide the omitted income or implement the evasion, such as using fictitious names, offshore accounts, etc.

The first step in the application of the Sentencing Guidelines is to determine the offense conduct and the Base Offense Level that is determined by the offense conduct.

### **2. Applicable Offense Guideline.**

Chapter 2 of the Guidelines is the starting point. Chapter 2 determines the offense conduct and lists the various federal offenses and statutory provisions. Tax crimes are addressed in Part T of Chapter 2. Tax crimes for this purpose may be divided analytically into two parts: (1) the crime itself and (2) the amount of tax that was the object of the crime. Both of these parts are addressed in Part T. The following are the relevant provisions of Part T to example:

#### Introductory Commentary

The 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.

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<sup>237</sup> I choose this year in order to use the 2001 Sentencing Guidelines which generally establish higher Base Offense Levels for tax loss numbers than under the prior Guidelines.

§2T1.1. Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents

(a) Base Offense Level:

- (1) Level from §2T4.1 (Tax Table) corresponding to the tax loss; or
- (2) 6, if there is no tax loss.

(b) Specific Offense Characteristics

(1) If the defendant failed to report or to correctly identify the source of income exceeding \$10,000 in any year from criminal activity, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

(2) If the offense involved sophisticated means, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

(c) Special Instructions. For the purposes of this guideline --

(1) If the offense involved tax evasion or a fraudulent or false return, statement, or other document, the tax loss is the total amount of loss that was the object of the offense (i.e., the loss that would have resulted had the offense been successfully completed).

\* \* \* \*

(5) The tax loss is not reduced by any payment of the tax subsequent to the commission of the offense.

\* \* \* \*

Application Notes

1. "Tax loss" is defined in subsection (c). The tax loss does not include interest or penalties, except in willful evasion of payment cases under 26 U.S.C. § 7201 and willful failure to pay cases under 26 U.S.C. § 7203. Although the definition of tax loss corresponds to what is commonly called the "criminal figures," its amount is to be determined by the same rules applicable in determining any other sentencing factor. In some instances, such as when indirect methods of proof are used, the amount of the tax loss may be uncertain; the guidelines contemplate that the court will simply make a reasonable estimate based on the available facts.

\* \* \* \*

3. "Criminal activity" means any conduct constituting a criminal offense under federal, state, local, or foreign law.

4. Sophisticated Means Enhancement.— For purposes of subsection (b)(2), "sophisticated means" means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts ordinarily indicates sophisticated means.

\* \* \* \*

Background:

This guideline relies most heavily on the amount of loss that was the object of the offense. Tax offenses, in and of themselves, are serious offenses; however, a greater tax loss is obviously more harmful to the treasury and more serious than a smaller one with otherwise similar characteristics. Furthermore, as the potential benefit from the offense increases, the sanction necessary to deter also increases.

The starting point is thus the Base Offense Level, for which we are referred to the tax loss table in § 2T4.1, which is in Appendix C, at p. 492. In our example (\$85,000 of tax loss), the tax loss table provides a Base Offense Level of 16. This is 10 levels up from the Base Offense Level that would apply if there were no tax loss at all (e.g., as in the case of a false return conviction under § 7206(1) where the taxpayer had paid all of the tax but had misrepresented a source).

We then go to the Specific Offense Characteristics in § 2T1.1(b). Since legal income is involved, the (b)(1) adjustment does not apply. The other adjustment (the (b)(2) adjustment) is for “sophisticated means.” I assume that no sophisticated means was involved. The taxpayer just knowingly left the income off the return, but did no further evasive acts such as socking it into a foreign bank account.

I shall assume for further analysis that your client would elect the Guidelines in effect at the date of filing the fraudulent return.

### 3. Adjustments.

Guidelines Chapter 3 next allows adjustments to the offense level. There are victim related adjustments (upward), role in the offense (leader, minimal participant) adjustments (upward or downward), obstruction of justice adjustments (upward), multiple counts adjustments (upward in some cases), and acceptance of responsibility adjustments (downward adjustment).

The pertinent adjustment relevant in our example is a 3 level reduction “If the defendant clearly demonstrates acceptance of responsibility for his offense” and timely notifies the Government of his intent to plea so that the Government to burden of preparing for trial.<sup>238</sup> The Application Notes provide that acceptance of responsibility may include:

(a) truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct). Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a). A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection. However, a defendant who falsely denies, or frivolously contests, relevant conduct that the court

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<sup>238</sup> S.G. 3E1.1.

determines to be true has acted in a manner inconsistent with acceptance of responsibility;

\* \* \* \*

(c) voluntary payment of restitution prior to adjudication of guilt;

You are comfortable that your client has accepted responsibility and will qualify for this benefit if he agrees to plead guilty. But he still wants to know what his sentencing range is. A plea qualifying for this adjustment would reduce the offense level by 3. Now your client is at level 13.

#### **4. Criminal History or Livelihood.**

Chapter Four then provides for upward adjustments on the sentencing table for significant criminal history. In this case, the defendant has none, so we shall move on.

#### **5. Application of the Sentencing Table.**

The final step is to apply the adjusted offense level, which is now 13, to the sentencing table contained in Chapter 5, Part A. Go to the Sentencing Table (in Appendix D at p. ?). You should easily derive a sentencing range of 12-18 months.

Notice how key the starting point – the Base Offense Level – is to the process. In tax cases, the Base Offense Level is driven by the tax loss number. In this example, the tax loss number is \$85,000 which drives the offense level (prior to adjustments) to 16 and the sole adjustment is for acceptance of responsibility driving the offense level to 13. But, for example, if you can drive the tax loss number down a mere \$5,000 to \$80,000, the process produces a sentencing range of 10-16 months and the same fine range.<sup>239</sup> Note correspondingly, however, that if the tax loss number were \$200,000, you would still be in the same Guideline range and you would have a long way to go to get to the magic number of \$80,000. (But to turn that thought, the Government would only have a short way to go to ratchet your client into the next higher level, producing a sentencing range of 18-24 months.)

#### **6. Probation.**

In each zone from the sentencing table, the judge can order actual imprisonment. However, some zones permit something less than imprisonment, as follows (§5B1.1 and 5C1.1):

Zone A - No imprisonment required; probation is authorized.

Zone B - In discretion of judge, minimum term may be served by imprisonment, imprisonment for at least one month along with community confinement or home detention; or a sentence of probation with condition of intermittent confinement, community confinement, or home detention.

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<sup>239</sup> The Base Offense Level is 14, but the adjustment for acceptance of responsibility is 2 rather than three

Zone C - At least one-half indicated time must be by actual imprisonment and balance may, in discretion of judge, include supervised release with community confinement or home detention.

## 7. Sentencing Within or Without the Range.

As I noted above, the guidelines produce a “heartland” in which the judge has discretion to sentence. The next step for a court in the process is to determine whether to depart from the “heartland” or guidelines range produced by the foregoing steps and, if not, where to sentence within the guidelines. I shall deal with departures in more detail below. Suffice it to say here that the exercise of discretion to depart is a fail safe mechanism to allow the judge to consider extraordinary factors that bear on sentencing and that have not been adequately taken into consideration during the earlier steps. Only highly unusual cases justify a departure.

If the judge decides not to depart, the judge still must determine where, within the guideline range, he or she will impose sentence. Generally, the judge has absolute discretion where to sentence within the range, provided that he or she does not consider some prohibited factor (such as race) or indicate that he or she was operating under a material misunderstanding of the Guidelines.

In this example, based on the limited facts we know, there appear to be no grounds for a departure.

## 8. Fines and Restitution.

The Guidelines also provide a table for a heartland fine range. In the example, that table puts the fine range at \$3,000 through \$30,000.

Fines are mandatory unless “the defendant establishes that he is unable to pay and is not likely to become able to pay.”<sup>240</sup> Fines also are subject to downward and upward departures.<sup>241</sup>

The Guidelines also address restitution where restitution is otherwise provided by statute, but there is no provision for restitution in tax cases. Of course, after the criminal case is wrapped up, the taxpayer will have a form of “restitution” via the civil tax assessments (including penalties and interest) that the IRS will make. I shall defer further consideration of fines until later.<sup>242</sup>

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<sup>240</sup> § 5E1.2(a).

<sup>241</sup> See, e.g., United States v. Hunerlach, 258 F.3d 1282 (11th cir. 2001) (upward departure)

<sup>242</sup> See discussion beginning at p. 191.

## 9. Conclusion.

This is a very simple example as applied to a relatively straightforward tax case. The adjustments and considerations that can influence where on the table the taxpayer fits are many and must be specially considered in the context of specific cases. I shall deal with some of the more frequently encountered considerations in the next portion of these materials.

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<sup>243</sup> S.G. §6A1.1. A good detailed discussion of the role of the probation officer may be found in Catharine M. Goodwin, The Independent Role of the Probation Officer at Sentencing, and in Applying Koon v. United States which may be downloaded from the Sentencing Commission web site.

<sup>244</sup> F.R.Cr.P. Rule 32(b)(4)(B) requires that the PSR include the information applicable to sentencing “as the probation officer believes to be applicable to the defendant’s case”, the sentence and sentencing range suggested by the Guidelines, and the probation officer’s explanation of any factors that might justify a departure. Further pursuant to congressional authority, the Sentencing Commission has promulgated six policy statements that reinforce the independent role of the probation office in advising the Court as to sentencing factors and recommendations.

<sup>245</sup> S.G. §6A.1., cmt.