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April 26, 2010

BY HAND DELIVERY

The Honorable Linda R. Reade
Chief Judge of the U.S. District Court
for the Northern District of Iowa
4200 C Street SW
Cedar Rapids, Iowa 52404

RE: Concerns about the Application of the Sentencing Guidelines in the Upcoming Sentencing of Sholom Rubashkin

Dear Chief Judge Reade:

I am one of the signatories to a letter dated April 21, 2010, signed by former members of the U.S. Department of Justice and submitted to Your Honor in connection with the case of *United States v. Sholom Rubashkin*.

The purpose of this letter is to submit for Your Honor's consideration the enclosed supplemental version of the April 21 letter. The enclosed letter is identical in content to the April 21 letter, but includes additional signatories.

We thank the Court for its consideration of our views.

Respectfully submitted,

Alan Vinegrad
United States Attorney
Eastern District of New York (2001-02)

cc (by facsimile, with enclosure):

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The Honorable Linda R. Reade
Chief Judge of the U.S. District Court
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4200 C Street SW
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RE: Concerns about the Application of the Sentencing Guidelines in the Upcoming Sentencing of Sholom Rubashkin

Dear Chief Judge Reade:

As Your Honor prepares for the upcoming sentencing hearing regarding Sholom Rubashkin, we respectfully write, as former members of the U.S. Department of Justice, to express concerns about the Government's sentencing contentions and about how the federal sentencing guidelines may be deployed in this unique case.[1] We appreciate the challenges Your Honor faces in determining what sentence for Mr. Rubashkin would be consistent with the parsimonious precepts of 18 U.S.C. §3553(a), and feel compelled to write to express our concerns with the problematic guidance that the guidelines (and the Government) are providing as this Court assesses what sentence for Mr. Rubashkin would be "sufficient, but not greater than necessary, to comply with" Congress's sentencing purposes.

As Your Honor is aware, the Supreme Court has repeatedly stressed that a district court cannot and must not presume that a sentence within the applicable guidelines range is reasonable. *See Nelson v. United States*, 129 S. Ct. 890, 892 (2009); *Rita v. United States*, 551 U.S. 338, 351 (2007); *Gall v. United States*, 552 U.S. 38, 50 (2007). Rather, as the Supreme Court has explained, the guidelines now just are "one factor among several courts must consider in determining an appropriate sentence" that is compliant

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[1] We have not undertaken any independent effort to investigate the accuracy of the factual statements made by the parties in their sentencing submissions to the Court. The Court is, of course, is the best position to determine the factual accuracy of these assertions. Our concern is with the application of the appropriate principles of sentencing which should be applied to those determinations.

with "§3553(a)'s overarching instruction to 'impose a sentence sufficient, but not greater than necessary' to accomplish the sentencing goals advanced in § 3553(a)(2)." *Kimbrough v. United States*, 552 U.S. 85, 90, 111 (2007).

In accord with these principles, the Eighth Circuit has recently emphasized that to "fashion[] a sentence 'sufficient, but not greater than necessary,' 18 U.S.C. § 3553(a), district courts are not only permitted, but required, to consider 'the history and characteristics of the defendant.'" *United States v. Chase*, 560 F.3d 828, 830-31 (8th Cir. 2009); *see also United States v. White*, 506 F.3d 635, 644 (8th Cir. 2007). Consequently, any sentencing determination in this case that were to place undue weight on the guidelines or that does not give sufficient attention to Mr. Rubashkin's unique personal circumstances and other mitigating factors would be unreasonable. *See United States v. Feemster*, 572 F.3d 455 (8th Cir. 2009) (en banc).

These fundamental post-*Booker* sentencing principles are especially important in the sentencing of white-collar offenders like Mr. Rubashkin. As a number of courts and commentators have noted, the fraud and money laundering guidelines, because they have numerous overlapping enhancements and give undue significance to the sometime-amorphous concept of loss, can often produce advisory sentencing ranges that are indisputably far "greater than necessary" and lack any common sentencing wisdom. *See United States v. Parris*, 573 F. Supp. 2d 744, 754 (E.D.N.Y. 2008) (noting that "the Sentencing Guidelines for white-collar crimes [can produce] a black stain on common sense"); *United States v. Adelson*, 441 F. Supp. 2d 506, 512 (S.D.N.Y. 2006) (lamenting "the utter travesty of justice that sometimes results from the guidelines' fetish with absolute arithmetic, as well as the harm that guideline calculations can visit on human beings if not cabined by common sense"), *aff'd* 237 Fed. Appx. 713 (2d Cir. 2008); *see also* Frank Bowman, *Sacrificial Felon*, AMERICAN LAWYER, Jan. 2007, at 63 (former federal prosecutor complaining that the "rules governing high-end federal white-collar sentences are now completely untethered from both criminal law theory and simple common sense"); Andrew Weissmann & Joshua Block, *White-Collar Defendants and White-Collar Crimes*, 116 YALE L.J. POCKET PART 286 (2007) (former federal prosecutors asserting that "the current Federal Sentencing Guidelines for fraud and other white-collar offences are too severe" and are greater than "necessary to satisfy the traditional sentencing goals of specific and general deterrence — or even retribution").

The potential absurdity of the sentencing guidelines are on full display in this case because, at least according to the government's proposed calculations, the advisory sentencing guidelines here recommend a life sentence for Mr. Rubashkin. We cannot fathom how truly sound and sensible sentencing rules could call for a life sentence -- or anything close to it -- for Mr. Rubashkin, a 51-year-old, first-time, non-violent offender whose case involves many mitigating factors and whose personal history and extraordinary family circumstances suggest that a sentence of a modest number of years could and would be more than sufficient to serve any and all applicable sentencing purposes. To our knowledge, there is no empirical or other social science research to support the notion that life sentences or even long prison terms are necessary for, or even effective at, deterring white-collar offenses. In fact, there is research suggesting that even

a short term of incarceration may sufficient to achieve specific and general deterrence for white-collar offenses. *See* A. Mitchell Polinsky & Steven Shavell, *On the Disutility and Discounting of Imprisonment and the Theory of Deterrence*, 28 J. Leg. Stud. 1, 12 (1999); *see also* Peter J. Henning, *White Collar Crime Sentences After* Booker*: Was the Sentencing of Bernie Ebbers Too Harsh?*, 37 McGeorge L. Rev. 757 (2006). Even the Sentencing Commission itself has recognized that a "short but definite period of confinement" can achieve the twin goals and just punishment and deterrence. *See* U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform* (November 2004), *available at* www.ussc.gov/15_year/15year.htm.

Against this backdrop, we find it troubling that the Government's initial sentencing memorandum in this case not only suggests strongly that a guideline sentence is warranted for Mr. Rubashkin, but further claims that even if a downward variance were warranted, upward departures from the guidelines (which presumably would minimize if not nullify the effect of any variance) would be justified. In this context, we find it telling that the Government's massive sentencing submission barely mentions §3553(a) at all, erroneously suggests that a variance from the guideline sentence of life imprisonment would have to be supported by "compelling grounds," and never acknowledges this Court's fundamental obligation to make an "individualized assessment based on the facts presented" of all the §3553(a) factors, *Gall*, 552 U.S. at 50, and to independently assess what sentence in this unique case would be "sufficient, but not greater than necessary to accomplish the sentencing goals advanced in § 3553(a)(2)." *Kimbrough,* 552 U.S. at 111. Indeed, the Attorney General of the United States has personally emphasized that "[t]he desire to have an almost mechanical system of sentencing has led us away from individualized, fact-based determinations that I believe, within reason, should be our goal." *Remarks of the Honorable Eric H. Holder, Jr. for the Charles Hamilton Houston Institute for Race and Justice* (June 24, 2009), *available at* http://www.justice.gov/ag/speeches/2009/ag-speech-0906241.html.

The Government's position is especially disconcerting given that district and circuit courts around the country, recognizing that they are poorly served by the sentencing guidelines for high-loss white-collar offenses, consistently impose and approve below-guideline sentences in such cases. *See, e.g., United States v. Ferguson et al.* No. 3:06-cr-00137-CFD (D. Conn.) (imposing sentences ranging from one year and one day to four years on five defendants convicted of fraud leading to over $500 million in loss, and whose guideline ranges were life imprisonment); *United States v. Treacy*, No. 08 Cr. 366 (S.D.N.Y.) (imposing two-year sentence on former President of Monster Worldwide Inc. convicted of fraud, where government's initial guideline calculation was 27 to 34 years imprisonment); *Adelson, supra*, 441 F. Supp. 2d 506 (imposing 42-month sentence on former President of public company convicted of fraud leading to more than $50 million of loss, and whose guideline range was life imprisonment); *United States v. Bradley Stinn*, No. 07-CR-00113 (NG) (E.D.N.Y.) (imposing 12-year sentence on former CEO of public company convicted of fraud leading to more than $100 million in loss, and whose guideline range was life imprisonment); *United States v. John and Timothy Rigas*, No. 02-Cr.-1236 (S.D.N.Y.) (twelve-year and 17-year sentences for former CEO and CFO

convicted of fraud leading to the financial collapse of Adelphia Corporation). Indeed, as one leading commentator has noted, "since *Booker*, virtually every judge faced with a top-level corporate fraud defendant in a very large fraud has concluded that sentences called for by the Guidelines were too high. This near unanimity suggests that the judiciary sees a consistent disjunction between the sentences prescribed by the Guidelines [in fraud cases] and the fundamental requirement of Section 3553(a) that judges imposes sentences 'sufficient, but not greater than necessary' to comply with its objectives." Frank O. Bowman III, *Sentencing High-Loss Corporate Insider Frauds After* Booker, 20 FED. SENT'G REP. 167, 169 (Feb. 2008).

The statutory mandate that this Court consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," 18 U.S.C. §3553(a)(6), heightens the importance and significance of district and circuit courts around the nation consistently imposing and approving below-guideline sentences for defendants whose crimes and harms were far worse than Mr. Rubashkin. A guideline life-sentence or even a decades-long sentence for Mr. Rubashkin would not only be inconsistent with the traditional purposes of punishment set forth in §3553(a)(2), but also would produce a gross disparity in treatment that countermands the commands of §3553(a)(6) and undermines the congressional goal of fairness and proportionality in federal sentencing. Indeed, given that defendant Mark Turkcan, President of First Bank Mortgage of St. Louis, who misapplied $35 million in loans resulting in a loss of approximately $25 million, recently received a sentence of only one year and one day of imprisonment, this Court's statutory obligation to "avoid unwarranted sentence disparities" demands imposition of a sentence far closer to Mr. Turkcan's than what the Government appears to suggest.

In sum, we respectfully urge the Court to note and consider the peculiarity and potentially severe injustice of the applicable sentencing guidelines and of the Government's extreme sentencing position in this case. And we hope this letter is appreciated and understood in the context in which it is conveyed --- namely, as a genuine effort to aid this Court as it confronts the challenge of assessing all the factors set forth at 18 U.S.C. § 3553(a) to tailor a sentence for Mr. Rubashkin that complies with the statutory purposes of sentencing set forth by Congress.

Most respectfully yours,

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