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## 5.00 PLEA AGREEMENTS AND DETENTION POLICIES

### 5.01 TAX DIVISION PLEA AGREEMENT POLICY

#### 5.01[1] Offense of Conviction — The Major Count Policy

The Tax Division designates at least one count in each authorized tax case as the “major count.” The prosecutor may enter into a plea agreement that includes a plea of guilty to that count without further approval of the Tax Division. However, the Tax Division must approve separately any plea agreement that does not include the major count. See [United States Attorneys’ Manual, § 6-4.310](#). The major count policy is consistent with policies applied by the Department of Justice in all criminal cases. See, e.g., [United States Attorneys’ Manual, § 9-27.430](#). The “major count” policy is intended to promote deterrence, ensure that a defendant will be held accountable at sentencing for the most serious readily provable offense, and eliminate the defendant’s ability to contest the criminal conduct in any subsequent civil tax proceeding.

The designation of the major count is based on the following considerations:

- a. felony counts take priority over misdemeanor counts;
- b. tax evasion counts (26 U.S.C. § 7201) take priority over other substantive tax counts;
- c. the count charged in the indictment or information that carries the longest prison sentence is the major count;
- d. as between counts under the same statute, the count involving the greatest financial harm to the United States (*i.e.*, the greatest additional tax due and owing) will be considered the major count; and
- e. when there is little difference in financial harm between counts under the same statute, the determining factor will be the severity of the conduct.

### ***5.01[2] Relevant Conduct and Tax Loss***

A plea agreement must hold the defendant accountable for all relevant conduct, including all known and provable tax loss for all years. Prosecutors should be wary of defense attorneys who seek to “bargain” over the tax loss, because such efforts may undermine uniformity and weaken the deterrent value of tax prosecutions. If there is a credible basis for reducing the tax loss, the prosecutor obviously should consider it. A prosecutor should not stipulate to a reduced tax loss, however, without first securing the concurrence of the IRS and consulting with the Tax Division. Tax Division approval is required prior to stipulation to a tax loss figure that is lower than the readily provable tax loss in the case.

When a defendant pleads guilty to the major count prior to being charged, the prosecutor must include in the factual basis for the plea the full extent of the defendant's tax violations on all of the counts in order to demonstrate the defendant's actual criminal intent. In most cases, all of the tax charges are related. Consequently, even if the defendant pleads to only a single count, the court should take into account the tax loss from all of the years when it determines the tax loss for the offense to which the defendant pleads. [\*United States Attorneys' Manual\*, § 6-4.310](#).

If all of the tax charges are not part of the same course of conduct or common scheme or plan, the Tax Division may designate more than one major count -- one count from each unrelated group of counts -- or the Division may designate one count as the major count and direct the prosecutor to obtain a stipulation from the defendant establishing the commission of the offenses in the other group or groups. The Tax Division also may designate more than one major count when the computed guideline sentencing range exceeds the maximum sentence that can be imposed for a single count. *See* [§ 43.00](#), *infra*, for a full discussion of the Sentencing Guidelines in criminal tax prosecutions.

### ***5.01[3] Waiver of Appeal of Sentence in Plea Agreements***

A defendant generally may appeal the sentence imposed by the court. 18 U.S.C. § 3742 (a). A defendant also can waive the statutory right to appeal a sentence. *See, e.g.*,

*United States v. Yemitan*, 70 F.3d 746, 748 (2d Cir. 1995); *United States v. Marin*, 961 F.2d 493, 496 (4th Cir. 1992).

A plea agreement generally should contain language waiving the defendant's appeal rights, particularly the right to appeal the sentence. A waiver-of-appeal provision is enforceable "so long as [the waiver] is 'the result of a knowing and intelligent decision to forgo the right to appeal.'" *United States v. Attar*, 38 F.3d 727, 731 (4th Cir. 1994) (quoting *United States v. Wessells*, 936 F.2d 165, 167 (4th Cir. 1991)); accord *United States v. Bond*, 414 F.3d 542, 544 (5th Cir. 2005); *United States v. Andis*, 333 F.3d 886, 889-891 (8th Cir. 2003) (*en banc*); *United States v. Teeter*, 257 F.3d 14, 25 (1st Cir. 2001); *United States v. Nguyen*, 235 F.3d 1179, 1182-84 (9th Cir. 2000); *United States v. Williams*, 184 F.3d 666, 668 (7th Cir. 1999); *United States v. Hernandez*, 134 F.3d 1435, 1437 (10th Cir. 1998); *United States v. Bushert*, 997 F.2d 1343, 1350 (11th Cir. 1993).

In tax cases, prosecutors should draft waivers of appeal to be specific, unambiguous, and as broad as possible. Depending on the language of a particular agreement, a waiver of a defendant's right to appeal his or her sentence may not preclude the defendant from appealing an order of restitution. *United States v. Ready*, 82 F.3d 551, 560 (2d Cir. 1996); *United States v. Catherine*, 55 F.3d 1462, 1464-65 (9th Cir. 1995).<sup>1</sup>

Even in cases in which there is a valid waiver of appellate rights, the defendant can appeal his or her sentence if the district court considers an impermissible factor or if the sentence exceeds the statutory maximum. *United States v. Kratz*, 179 F.3d 1039, 1041 (7th Cir. 1999). A defendant also can challenge an illegal sentence under 28 U.S.C. § 2255. *United States v. Rutan*, 956 F.2d 827, 829 (8th Cir. 1992), modified in part by *United States v. Andis*, 333 F.3d 886, 889-891 (8th Cir. 2003) (*en banc*) (court will "refuse to enforce an otherwise valid waiver if [enforcing the waiver] would result in a miscarriage of justice").

### **5.01[4] Nolo Contendere Pleas**

Department of Justice policy requires all prosecutors to oppose the acceptance of a *nolo contendere* plea. Only in the most unusual circumstances and only after approval

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<sup>1</sup> See [§ 44.00](#), *infra*, for a complete discussion of restitution in tax cases.

by the Assistant Attorney General of the Tax Division, may a prosecutor consent to a *nolo* plea in a tax case. See *United States Attorneys' Manual*, §§ [9-16.010](#) and [9-27.500-.530](#). The Tax Division prefers a guilty plea because such a plea strengthens the government's position if the defendant contests the fraud penalty in a subsequent civil tax proceeding. A *nolo* plea does not entitle the government to use the doctrine of collateral estoppel. If the defendant persists in pleading *nolo* over the government's objections, the prosecutor should also oppose the dismissal of any charges to which the defendant does not plead *nolo contendere*. *United States Attorneys' Manual*, [§9-27.530](#).

### **5.01[5] Alford Pleas**

In *North Carolina v. Alford*, 400 U.S. 25, 38-39 (1970), the Supreme Court upheld the validity of accepting a plea of guilty notwithstanding the defendant's claim of innocence. As with *nolo contendere* pleas, prosecutors in a tax case may consent to a so-called "*Alford* plea" only in the most unusual circumstances and only with the approval of the Assistant Attorney General of the Tax Division. Whenever a defendant enters an *Alford* plea, the prosecutor should make an offer of proof of all known facts to support the conclusion that the defendant in fact is guilty. See *United States Attorneys' Manual*, §§ [9-16.015](#) and [9-27.440](#). In addition, prosecutors should discourage *Alford* pleas by refusing to agree to terminate the prosecution when such a plea is proffered to fewer than all of the charges pending. If, over the government's objection, the court accepts an *Alford* plea to fewer than all charges in a tax case, the prosecutor must proceed to trial on the remaining counts unless the Assistant Attorney General of the Tax Division approves the dismissal of the remaining charges.

### **5.01[6] Statements by Government Counsel at Sentencing; Agreeing to Probation**

Counsel for the government should make a full statement of facts to the court for use at sentencing, including the amount of tax loss in all of the years for which the defendant was indicted, the means utilized to perpetrate and conceal any fraud, the past criminal record of the taxpayer, and all other information that the court may consider important in imposing an appropriate sentence. See *United States Attorneys' Manual*, [§ 6-4.340](#).

It is the Tax Division's longstanding policy that probation, even when accompanied by payment of the civil tax liability, plus a fine and costs, generally does not constitute a satisfactory disposition of a criminal tax case. Nevertheless, a prosecutor

in a tax case may agree to a sentence of probation (preferably with alternative conditions of confinement) when the defendant pleads guilty, the sentencing guidelines range is 0-6 months (and the Criminal History Category is I), and the United States Attorney personally signs and approves a memorandum that identifies the unusual and exceptional circumstances that support the appropriateness of agreeing to probation. *Id.*

### ***5.01[7] Compromise of Criminal Liability/Civil Settlement***

After the IRS refers a case for prosecution, the Attorney General is authorized under 26 U.S.C. § 7122(a) to compromise the case without bringing charges. However, that authority is exercised very rarely. If there is a reasonable probability of conviction, and if prosecution would advance the administration of the internal revenue laws, then a decision to forego prosecution on the ground that the taxpayer is willing to pay a fixed sum to the United States would be susceptible to the inference that the taxpayer received preferential treatment because of his or her ability to pay whatever amount of money the government demanded.

Restitution is an important goal of all criminal enforcement, however, and a defendant's sincere willingness to account for criminal proceeds and return them to the victim(s) is an indicator of acceptance of responsibility. See [§ 44.00](#), *infra*, for a full discussion of restitution in criminal tax cases.

The Department generally prefers that full settlement of a defendant's civil tax liability be postponed until after sentence has been imposed in the criminal case, except when the court chooses to defer sentencing pending the outcome of such settlement. In that event, the prosecutor should notify the IRS of this fact so that it can begin civil tax negotiations with the defendant.

When contemplating a plea agreement that stipulates to a civil tax penalty, prosecutors must coordinate with IRS Counsel *before* a plea agreement offer is tendered. There are multiple of reasons for this, one of which is a statutory requirement of written pre-approval by an IRS supervisor with respect to certain civil fraud and civil tax penalties. See 26 U.S.C. § 6751(b)(1). For civil penalties within the purview of this statute, a failure to obtain the required written supervisory pre-approval may result in a court abating the agreed-upon penalty in a civil proceeding. Further, the IRS's internal procedures require the written supervisory approval to be obtained before asking a taxpayer to agree to the covered penalties, see I.R.M. 20.1.1.2.3.1, and some courts have

held that tardy supervisory approval is not sufficient. See *Belair Woods, LLC v. Comm’r*, 154 T.C. 1, 9-10 (2020) (supervisory approval must be obtained before a “formal written communication to the taxpayer, notifying him that the Examination Division has completed its work and has made a definite decision to assert penalties”); *Chai v. Comm’r*, 851 F.3d 190, 219-21 (2d Cir. 2017) (written supervisory approval required “no later than the date the IRS issues the notice of deficiency”; concluding otherwise would undermine statute’s purpose of “prevent[ing] IRS agents from threatening unjustified penalties to encourage taxpayers to settle”); but see *Laidlaw’s Harley Davidson Sales, Inc. v. Comm’r*, 29 F.4th 1066, 1070-74 (9th Cir. 2022) (declining to follow *Chai* and holding that supervisory approval need only be obtained before “the assessment of the penalty or, if earlier, before the relevant supervisor loses discretion whether to approve the penalty assessment”).

Except in the most extraordinary circumstances, the Tax Division will not approve a plea agreement that includes a global settlement of a defendant’s criminal and civil tax liabilities. Criminal tax investigations are usually narrow in focus and substantially more targeted than a civil tax audit. For example, a criminal investigation may focus on one or two large, easily-provable false items on a tax return, because of the need to prove willfulness with regard to the false items. The investigation may not discover more complex, but nevertheless appropriate, tax adjustments on the return. If the government agreed in a plea agreement to a settlement of the defendant’s civil tax liability, based solely on the false items discovered during the limited criminal investigation, then the defendant would receive an unwarranted windfall with regard to the more complex adjustments.

For this reason, the Tax Division also will not authorize any plea agreement that purports to bar the IRS from a further examination of the defendant’s civil tax liabilities. The Tax Division strongly encourages prosecutors, however, to include in plea agreements admissions by the defendant regarding civil tax issues, such as:

- (1) an admission of either the receipt of enumerated amounts of unreported income or enumerated amounts of claimed illegal deductions or improper credits for specified years in issue;

(2) a stipulation that the defendant is liable for the civil fraud penalty imposed by 26 U.S.C. § 6663 on the understatements of tax for the years involved;<sup>2</sup>

(3) an agreement by the defendant to file, prior to sentencing, complete and correct initial or amended tax returns for the years in issue and, if requested, to provide the IRS with information regarding these years and pay at sentencing all additional taxes, penalties, and interest due and owing;

(4) an agreement by the defendant not to file thereafter any claims for a refund of taxes, penalties, or interest for amounts attributable to the returns filed incident to the plea; and

(5) an agreement by the defendant to sign a closing agreement with the IRS contemporaneously with the signing of the plea agreement, allowing the IRS to assess and collect enumerated amounts of tax due and owing for specified years in issue.

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<sup>2</sup> This may be a crucial admission. Without it, the defendant may be able to avoid the payment of not only the civil fraud penalty, but the underlying tax liability, as well, if the Tax Court or U.S. District Court having jurisdiction over the civil trial ultimately determines that the statute of limitations for civil tax liability has lapsed.



## **5.01[8] Contract Terms, Breach, and Enforcement**

When interpreting the terms of a plea agreement, a court will resort to traditional principles of contract law. *See, e.g., United States v. Brumer*, 528 F.3d 157, 158 (2d Cir. 2008); *United States v. Williams*, 510 F.3d 416, 422 (3d Cir. 2007); *United States v. Jordan*, 509 F.3d 191, 195 (4th Cir. 2007); *United States v. Sanchez*, 508 F.3d 456, 460 (8th Cir. 2007) ; *United States v. Newbert*, 504 F.3d 180, 185 (1st Cir. 2007); *United States v. VanDam*, 493 F.3d 1194, 1199 (10th Cir. 2007), *cert. denied*, 128 S. Ct. 945 (2008); *United States v. Lewis*, 476 F.3d 369, 387 (5th Cir.), *cert. denied*, 127 S. Ct. 2893 (2007); *United States v. Morris*, 470 F.3d 596, 600 (6th Cir. 2006); *United States v. Speelman*, 431 F.3d 1226, 1229 (9th Cir. 2005); *United States v. Lockwood*, 416 F.3d 604, 607 (7th Cir. 2005); *United States v. Rubbo*, 396 F.3d 1330, 1334 (11th Cir. 2005); *United States v. Ahn*, 231 F.3d 26, 35-36 (D.C. Cir. 2000). Generally, the court will enforce the plain language adopted by the parties as used in its ordinary sense. *See, e.g., Ricketts v. Adamson*, 483 U.S. 1, 9-10 (1987); *Jordan*, 509 F.3d at 195; *United States v. Yah*, 500 F.3d 698, 704 (8th Cir. 2007); *United States v. Wilken*, 498 F.3d 1160, 1167 (10th Cir. 2007); *United States v. Sharp*, 436 F.3d 730, 735-36 (7th Cir. 2006); *Speelman*, 431 F.3d at 1229; *United States v. Hodge*, 412 F.3d 479, 486-87 (3d Cir. 2005); *United States v. McKinney*, 406 F.3d 744, 746 (5th Cir. 2005); *Williams v. United States*, 396 F.3d 1340, 1342 (11th Cir. 2005); *Smith v. Stegall*, 385 F.3d 993, 999 (6th Cir. 2004); *United States v. Garcia*, 166 F.3d 519, 521-22 (2d Cir. 1999); *United States v. Jones*, 58 F.3d 688, 691 (D.C. Cir. 1995). In addition, the court will imply a term that obligates the parties to the exercise of good faith and fair dealing. *See, e.g., Santobello v. New York*, 404 U.S. 257, 262 (1971); *United States v. Habbas*, 527 F.3d 266, 272 (2d Cir. 2008); *United States v. Drennon*, 516 F.3d 160, 162 & n.1 (3d Cir. 2008); *United States v. Norris*, 486 F.3d 1045, 1049 (8th Cir. 2007) (*en banc*); *United States v. McElhaney*, 469 F.3d 382, 385 (5th Cir. 2006); *United States v. Cruz-Mercado*, 360 F.3d 30, 41 (1st Cir. 2004); *United States v. Frazier*, 340 F.3d 5, 11 (1st Cir. 2003); *United States v. Hawkins*, 274 F.3d 420, 430-31 (6th Cir. 2001); *Ahn*, 231 F.3d at 35-36; *United States v. Krasn*, 614 F.2d 1229, 1234 (9th Cir. 1980).

Plea agreements are more than mere contracts, though. Because they necessarily implicate a criminal defendant's fundamental constitutional rights, and in light of the investigative and prosecutorial power of the government, the interpretation of plea agreements is subject to due process constraints to ensure that the plea bargaining defendant receives all that is due from the government. *See Santobello*, 404 U.S. at 262.

Prosecutors must be precise in drafting plea agreements, because any ambiguities in the contract terms normally will be resolved against the government. *See, e.g., United States v. Cope*, 527 F.3d 944, 950 (9th Cir. 2008); *Williams*, 510 F.3d at 422; *United States v. Griffin*, 510 F.3d 354, 360 (2d Cir. 2007); *Jordan*, 509 F.3d at 195-96; *United States v. McCoy*, 508 F.3d 74, 78 (1st Cir. 2007); *United States v. Mosley*, 505 F.3d 804, 809 (8th Cir. 2007); *United States v. Moncivais*, 492 F.3d 652, 662-63 (6th Cir.), *cert. denied*, 128 S. Ct. 633 (2007); *United States v. Cachucha*, 484 F.3d 1266, 1270 (10th Cir. 2007); *United States v. Farias*, 469 F.3d 393, 397 (5th Cir. 2006); *United States v. Copeland*, 381 F.3d 1101, 1105-06 (11th Cir. 2004); *United States v. Atkinson*, 259 F.3d 648, 654 (7th Cir. 2001); *United States v. Pollard*, 959 F.2d 1011, 1027-28 (D.C. Cir. 1992).

The issue of a defendant's breach of the plea agreement is not a question to be resolved unilaterally by the government; the plea bargaining defendant has a due process right to a judicial determination of the issue. *See, e.g., United States v. Williams*, 510 F.3d at 424; *United States v. Miller*, 406 F.3d 323, 334-35 (5th Cir. 2005); *United States v. Guzman*, 318 F.3d 1191, 1196 (10th Cir. 2003); *United States v. Lezine*, 166 F.3d 895, 901 (7th Cir. 1999); *United States v. Cox*, 985 F.2d 427, 430 (8th Cir. 1993); *United States v. Simmons*, 537 F.2d 1260, 1261-62 (4th Cir. 1976). How early in the process this determination is to be made is unclear. The Seventh Circuit has suggested that when seeking to vitiate a nonprosecution agreement, the government should not even indict the defendant until a court has ruled on the issue of breach. *See, e.g., United States v. Ataya*, 864 F.2d 1324, 1330 n.9 (7th Cir. 1988); *United States v. Verrusio*, 803 F.2d 885, 889 (7th Cir. 1988); *cf. United States v. Castaneda*, 162 F.3d 832, 836 n.25 (5th Cir. 1998) (declining to address question of when, during progress of criminal investigation, judicial determination of breach is required). But a "prosecution" is "a proceeding instituted and carried on by due course of law, before a competent tribunal, for the purpose of determining the guilt or innocence of a person charged with a crime." *BLACK'S LAW DICTIONARY* 1385 (4th ed. 1977) (citing *Kirby v. Illinois*, 406 U.S. 682, 689 (1972); *United States v. Reisinger*, 128 U.S. 398, 403 (1888)). Thus, even those courts that recommend that the government obtain a "breach" ruling before indictment acknowledge that generally speaking, the defendant does not have a constitutional right to a pre-indictment hearing on breach. *See Ataya*, 864 F.2d at 1330 n.9; *Verrusio*, 803 F.2d at 888-89. Ordinarily, an indictment standing alone will not constitute a deprivation of a defendant's interest in the enforcement of a nonprosecution term in a plea agreement, because an indictment does not subject the defendant to the

risk of conviction without a prior judicial determination that the defendant breached the plea bargain. *See Verrusio*, 803 F.2d at 889.

The party asserting breach bears the burden of proof by a preponderance of the evidence. *See, e.g., Williams*, 510 F.3d at 424; *United States v. Byrd*, 413 F.3d 249, 251 (2d Cir. 2005); *Kelly*, 337 F.3d at 901; *United States v. Lukse*, 286 F.3d 906, 909 (6th Cir. 2002); *Allen v. Hadden*, 57 F.3d 1529, 1534 (10th Cir. 1995); *United States v. Wilder*, 15 F.3d 1292, 1295 (5th Cir. 1994); *United States v. Tilley*, 964 F.2d 66, 71 (1st Cir. 1992). A defendant who materially fails to fulfill his promises in a plea agreement forfeits any right to its enforcement. *See, e.g., Ricketts v. Adamson*, 483 U.S. 1, 11-12 (1987); *Byrd*, 413 F.3d at 251; *Kelly*, 337 F.3d at 901; *United States v. Wells*, 211 F.3d 988, 995 (6th Cir. 2000); *Tilley*, 964 F.2d at 70; *United States v. Britt*, 917 F.2d 353, 360-61 (8th Cir. 1990); *United States v. Reardon*, 787 F.2d 512, 516 (10th Cir. 1986). Similarly, if the government is found to have breached the plea agreement, the court ordinarily will afford the defendant alternative remedies of specific performance or withdrawal from the plea agreement. *See, e.g., Santobello*, 404 U.S. at 263; *United States v. Rivera*, 357 F.3d 290, 297 (3d Cir.2004); *United States v. Lawlor*, 168 F.3d 633, 638 (2d Cir.1999); *Allen*, 57 F.3d at 1534.

### **5.02 EXPEDITED PLEA PROGRAM**

When a person offers to enter into a plea agreement before an investigation is completed, the prosecutor should give the offer serious consideration. The prosecutor must be cautious, however, to ensure that a defendant does not use an early plea as an opportunity to evade responsibility for all relevant conduct or to prevent the IRS from detecting substantial additional tax fraud. Agents and prosecutors therefore should continue the criminal investigation while plea discussions are ongoing.

[Tax Division Directive No. 111](#) provides guidance regarding a taxpayer who offers to enter into a plea agreement during the course of an administrative investigation. In general, the taxpayer must be willing to “come clean” in order to be eligible for the expedited plea program. He or she must be represented by counsel, must be willing to plead to the most serious violation (consistent with the Division’s major count policy;

see [§ 5.01\[1\]](#), *supra*, must provide the IRS with all relevant financial records, and must submit to an interview with the IRS.<sup>3</sup>

When the target of an administrative case expresses a desire to enter a guilty plea, IRS agents or attorneys should contact the Tax Division immediately to discuss the matter. The IRS then may make a formal referral to the Tax Division for a proposed expedited plea after completing the investigative steps set forth in [Directive No. 111](#). The Tax Division will review the case expeditiously and either authorize a plea agreement, return the case to the IRS, or authorize a grand jury investigation. If the Tax Division approves the proposed plea, then it will refer the matter to the United States Attorney, with authorization to conduct formal plea negotiations and consummate a plea agreement consistent with the charges submitted by the IRS.

### ***5.03 TRANSFER FROM DISTRICT FOR PLEA AND SENTENCE***

Rule 20 of the Federal Rules of Criminal Procedure allows a defendant to waive trial and enter a guilty plea or a *nolo* plea in the district in which he or she is arrested, held, or present, although it is a district other than the district in which the case is pending. The United States Attorney for each district must approve a transfer.

Some defendants seek to abuse Rule 20 to forum shop and have a case transferred to a more lenient court. United States Attorneys therefore should secure authorization from the Tax Division, before consenting to a transfer under Rule 20 in a criminal tax case.

In connection with the matter of prisoner transfers, prosecutors should be aware of the Interstate Agreement on Detainers, 18 U.S.C. App.2. See [United States Attorneys' Manual, Criminal Resource Manual § 534](#).

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<sup>3</sup> It is noted that this interview with the IRS will not be deemed a formal plea negotiation. Only a Department prosecutor can engage in plea negotiations. Statements made by the target to an IRS agent prior to formal plea discussions with the Department of Justice will not be foreclosed from future use under the restrictions of Fed. R. Evid. 410 and Fed. R. Crim. P. 11(f) in the event that plea negotiations fail.

#### **5.04 DETENTION AND BAIL DURING THE COURSE OF PROCEEDINGS**

There are no special rules governing pretrial release in criminal tax cases. Prosecutors should be cautious about defendants who have overseas ties and/or assets. Judges often treat such defendants as if they were ordinary, white-collar criminal defendants who have substantial ties to the community and pose no risk of flight. Occasionally, a defendant does flee before trial or sentencing.<sup>4</sup> Release pending trial and release post-trial awaiting sentencing or pending appeal are governed by the Bail Reform Act of 1984. 18 U.S.C. §§ 3141 - 3156.

Generally, the Bail Reform Act mandates the release of a defendant awaiting trial under the least restrictive condition or combination of conditions unless the conditions “will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.” 18 U.S.C. § 3142(b). If the court determines that neither release on personal recognizance nor release on an unsecured bond is sufficient to ensure the defendant’s appearance at trial or meet the statutory safety concerns, then it may impose pretrial release conditions. 18 U.S.C. § 3142(c).

After a defendant is convicted, the detention calculus shifts to a presumption against bail. A person who has been found guilty of an offense and is waiting to be sentenced generally should be detained, unless the court finds by clear and convincing evidence that the defendant is not likely to flee or to pose a danger to the safety of any other person or the community if he or she is released. 18 U.S.C. § 3143(a). The defendant bears the burden of showing by clear and convincing evidence that he or she is not likely to flee if released. *See* Fed. R. Crim. P. 46(c).

Under 18 U.S.C. § 3143(b), a court is required to order detention pending appeal of any person who has been convicted and sentenced to a term of imprisonment. A

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<sup>4</sup> There have been several noteworthy tax cases in which a defendant or target of an investigation fled. William Pollen fled three times: prior to his arraignment on tax evasion charges, while on bail pending sentencing after his guilty plea, and after being indicted twelve years later on new evasion of payment charges. *United States v. Pollen*, 978 F.2d 78, 80-82 (3rd Cir. 1992). Marc Rich and Pincus Green fled the country while under investigation and were fugitives for seventeen years, until President Clinton pardoned them in 2001. *See In Re Grand Jury Subpoenas Dated March 9, 2001*, 179 F. Supp. 2d 270, 274 (S.D.N.Y. 2001). *See also Wall Street Journal*, July 3, 2001, *Tax Fugitive Joseph Ross Lives Life On the Lam in a Belizean Paradise*. Prosecutors should be alert to the possibility of flight when prosecuting defendants who own or maintain bank accounts and other assets offshore or who make numerous trips outside the country. In cases in which the defendant is believed to be a flight risk, prosecutors should strenuously oppose bail requests, seek to revoke bail where appropriate, and appeal judicial refusals to deny or revoke bail, where appropriate.

defendant may be released only if the defendant (1) establishes by clear and convincing evidence that he or she is neither a danger to the community nor a flight risk, 18 U.S.C. § 3143(b)(1)(A); (2) demonstrates that the appeal raises a substantial question of law or fact, and that the appeal is not for the purpose of delay, 18 U.S.C. § 3143(b)(1)(B); and (3) shows that the substantial question presented, if decided in the defendant's favor, will likely lead to (a) reversal or an order for new trial with respect to all the counts for which imprisonment was imposed, (b) a sentence that does not include a term of imprisonment, or (c) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal. 18 U.S.C. § 3143(b)(1)(B); *see Morrison v. United States*, 486 U.S. 1306, 1306-07 (Rehnquist, Circuit Justice) (1988); *United States v. Thompson*, 787 F.2d 1084, 1085 (7th Cir. 1986) (excise tax evasion). Under Section 3143, the defendant bears the burden of showing that his or her case fits within the statutory exception. *United States v. Miller*, 753 F.2d 19, 24 (3d Cir. 1985) (*Klein* conspiracy and false returns); *United States v. Affleck*, 765 F.2d 944, 946 (10th Cir. 1985); Fed. R. Crim. P. 46(c).