

U.S. Department of Justice



United States Attorney  
Southern District of New York

The Silvio J. Mollo Building  
One Saint Andrew's Plaza  
New York, New York 10007

March 10, 2009

Via E-Mail

Ira Lee Sorkin, Esq.  
Dickstein Shapiro LLP  
1177 Avenue of the Americas  
New York, New York 10036-6501

<b>USDC SDNY</b>
<b>DOCUMENT</b>
<b>ELECTRONICALLY FILED</b>
DOC #:
DATE FILED: 3/10/09

Re: United States v. Bernard L. Madoff  
09 Cr.

Dear Mr. Sorkin:

This document is not a plea agreement.

Rather, pursuant to the suggestion of the Court in United States v. Pimentel, 932 F.2d 1029, 1034 (2d Cir. 1991), this letter sets forth the present position of the Office of the United States Attorney for the Southern District of New York (the "Office") regarding the application of the U.S. Sentencing Guidelines ("U.S.S.G." or "Guidelines") to this case. This analysis is set forth for informational purposes only. There is no agreement between the Office and Bernard L. Madoff ("the defendant") with respect to the sentence that he will receive or the sentence that the Office will recommend upon defendant's conviction.

As described further below, the above-referenced Information charges the defendant in eleven counts:

Count One charges the defendant with securities fraud, in violation of Title 15, United States Code, Sections 78j(b) and 78ff; Title 17, Code of Federal Regulations, Section 240.10b-5; and Title 18, United States Code, Section 2. Count One carries a maximum sentence of twenty years' imprisonment; a maximum fine of the greatest of \$5 million or twice the gross pecuniary gain to a person other than the defendant or twice the pecuniary loss to a person other than the defendant; a mandatory \$100 special assessment; and a maximum term of three years' supervised release.

Ira Lee Sorkin, Esq.  
March 10, 2009  
Page 2

Count Two charges the defendant with investment adviser fraud, in violation of Title 15, United States Code, Sections 80b-6 and 80b-17, and Title 18 United States Code, Section 2. Count Two carries a maximum sentence of five years' imprisonment; a maximum fine of the greatest of \$10,000 or twice the gross pecuniary gain to any person or twice the pecuniary loss to a person other than the defendant; a mandatory \$100 special assessment; and a maximum term of three years' supervised release.

Count Three charges the defendant with mail fraud, in violation of Title 18, United States Code, Sections 1341 and 2. Count Three carries a maximum sentence of twenty years' imprisonment; a maximum fine of the greatest of \$250,000 or twice the gross pecuniary gain to any person or twice the pecuniary loss to a person other than the defendant; a mandatory \$100 special assessment; and a maximum term of three years' supervised release.

Count Four charges the defendant with wire fraud, in violation of Title 18, United States Code, Sections 1343 and 2. Count Four carries a maximum sentence of twenty years' imprisonment; a maximum fine of the greatest of \$250,000 or twice the gross pecuniary gain to any person or twice the pecuniary loss to a person other than the defendant; a mandatory \$100 special assessment; and a maximum term of three years' supervised release.

Count Five charges the defendant with international money laundering to promote fraud in the sale of securities, mail fraud, wire fraud, and theft from an employee benefit plan, in violation Title 18, United States Code, Sections 1956(a)(2)(A) and 2. Count Five carries a maximum sentence of twenty years' imprisonment; a maximum fine of the greatest of \$500,000, twice the value of the monetary instrument or funds involved, or twice the gross pecuniary gain to any person or twice the pecuniary loss to a person other than the defendant; a mandatory \$100 special assessment; and a maximum term of three years' supervised release.

Count Six charges the defendant with international money laundering to conceal the proceeds of fraud in the sale of securities, mail fraud, wire fraud, and theft from an employee benefit plan, in violation Title 18, United States Code, Sections 1956(a)(2)(B)(i) & (f) and 2. Count Six carries a maximum sentence of twenty years' imprisonment; a maximum fine of the

Ira Lee Sorkin, Esq.  
March 10, 2009  
Page 3

greatest of \$500,000, twice the value of the monetary instrument or funds involved, or twice the gross pecuniary gain to any person or twice the pecuniary loss to a person other than the defendant; a mandatory \$100 special assessment; and a maximum term of three years' supervised release.

Count Seven charges the defendant with money laundering, in violation of Title 18, United States Code, Sections 1957 and 2. Count Seven carries a maximum sentence of ten years' imprisonment; a maximum fine of the greatest of \$250,000 or twice the gross pecuniary gain to any person or twice the pecuniary loss to a person other than the defendant; a mandatory \$100 special assessment; and a maximum term of three years' supervised release.

Count Eight charges the defendant with making false statements, in violation of Title 18, United States Code, Section 1001. Count Eight carries a maximum sentence of five years' imprisonment; a maximum fine of the greatest of \$250,000 or twice the gross pecuniary gain to any person or twice the pecuniary loss to a person other than the defendant; a mandatory \$100 special assessment; and a maximum term of three years' supervised release.

Count Nine charges the defendant with perjury, in violation of Title 18, United States Code, Section 1621. Count Nine carries a maximum sentence of five years' imprisonment; a maximum fine of the greatest of \$250,000 or twice the gross pecuniary gain to any person or twice the pecuniary loss to a person other than the defendant; a mandatory \$100 special assessment; and a maximum term of three years' supervised release.

Count Ten charges the defendant with making a false filing with the SEC, in violation of Title 15, Sections 78q and 78ff; Title 17, Code of Federal Regulations, Sections 240.17a-5, 240.17a-13 and 210.2-01; and Title 18, United States Code, Section 2. Count Ten carries a maximum sentence of twenty years' imprisonment; a maximum fine of the greatest of \$5 million or twice the gross pecuniary gain to any person or twice the pecuniary loss to a person other than the defendant; a mandatory \$100 special assessment; and a maximum term of three years' supervised release.

Count Eleven charges the defendant with theft from an employee benefit plan, in violation of Title 18, United States

Ira Lee Sorkin, Esq.  
March 10, 2009  
Page 4

Code, Section 664. Count Eleven carries a maximum sentence of five years' imprisonment; a maximum fine of the greatest of \$250,000 or twice the gross pecuniary gain to any person or twice the pecuniary loss to a person other than the defendant; a mandatory \$100 special assessment; and a maximum term of three years' supervised release.

The total maximum sentence of incarceration on Counts One through Eleven is 150 years' imprisonment. In addition to the foregoing, the Court must also impose an order of restitution in the amount of any loss suffered by persons other than the defendant resulting from the offenses, pursuant to Title 18, United States Code, Sections 3663, 3663A and 3664.

The Information also contains two forfeiture allegations. The first forfeiture allegation concerns the offenses charged in Counts One, Three, Four, and Eleven of the Information, which constitute "specified unlawful activity" as that term is defined in 18 U.S.C. § 1956(c)(7) (the "SUA Offenses"). The first forfeiture allegation seeks criminal forfeiture, pursuant to 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461, of all property, real or personal, which constitutes or is derived from proceeds traceable to the commission of the SUA Offenses, and all property traceable to such property. Pursuant to 28 U.S.C. § 2461(c), the Court is required to order the criminal forfeiture of such property in sentencing the defendant.

The second forfeiture allegation, concerning the money laundering offenses charged in Counts Five through Seven of the Information (the "Money Laundering Offenses"), seeks criminal forfeiture, pursuant to 18 U.S.C. § 982(a)(1), of all property, real and personal, involved in the Money Laundering Offenses, and all property traceable to such property. Pursuant to 18 U.S.C. § 982(a)(1), the court is required to order the criminal forfeiture of such property in sentencing the defendant.

Both the first and the second forfeiture allegations include a substitute asset provision, which provides notice to the defendant, pursuant to 21 U.S.C. § 853(p), that if any of the property described in the forfeiture allegations, as a result of any act or omission of the defendant: (a) cannot be located upon the exercise of due diligence; (b) has been transferred or sold to, or deposited with, a third person; (c) has been placed beyond the jurisdiction of the Court; (d) has been substantially diminished in value; or (e) has been commingled with other property that cannot be subdivided without difficulty, it is the

Ira Lee Sorkin, Esq.  
March 10, 2009  
Page 5

intent of the United States to seek forfeiture of any other property of the defendant up to the value of the forfeitable property.

The Government presently believes the Sentencing Guidelines apply to the charges as follows:

Offense Level

1. The guideline applicable to defendant's offense is U.S.S.G. § 2B1.1 (November 1, 2008 edition). Because several of the charged offenses have a statutory maximum of 20 years or more, the base offense level is 7. See U.S.S.G. § 2B1.1(a)(1). The offenses are grouped pursuant to U.S.S.G. § 3D1.2.

2. Because the offenses involved a loss amount of more than \$400,000,000, the base offense level is increased by 30 levels. See U.S.S.G. § 2B1.1(b)(1)(P).

3. Because the offenses involved 250 or more victims, the base offense level is increased by an additional 6 levels. See U.S.S.G. § 2B1.1(b)(2)(C).

4. Because a substantial part of the fraudulent scheme was committed from outside the United States and because the offenses otherwise involved sophisticated means, the base offense level is increased by an additional 2 levels. See U.S.S.G. § 2B1.1(b)(10).

5. Because the offenses substantially endangered the solvency or financial security of 100 or more victims, the base offense level is increased by an additional 4 levels. See U.S.S.G. § 2B1.1(b)(14)(B).

6. Because the offenses involved a violation of the securities law and, at the time of the offense, the defendant was a registered broker-dealer, a person associated with a broker or dealer, and/or an investment adviser, the base offense level is increased by an additional 4 levels. U.S.S.G. § 2B1.1(b)(16)(A).

7. Because the defendant was an organizer or leader of a criminal activity that was otherwise extensive, the base offense level is increased by an additional 4 levels. U.S.S.G. § 3B1.1(a).

8. Assuming the defendant clearly demonstrates

Ira Lee Sorokin, Esq.  
March 10, 2009  
Page 6

acceptance of responsibility through his guilty plea and subsequent conduct prior to the imposition of sentence, a two-level reduction will be warranted, pursuant to U.S.S.G. § 3E1.1(a). Furthermore, assuming the defendant has accepted responsibility as described in the previous sentence, an additional one-level reduction will be warranted pursuant to U.S.S.G. § 3E1.1(b), because the defendant gave timely notice of his intention to enter a plea of guilty, thereby permitting the Government to avoid preparing for trial and permitting the Court to allocate its resources efficiently.

In accordance with the above, the applicable offense level is 54.

#### Criminal History

Based upon the information now available to this Office, the defendant has no Criminal History points and, accordingly, the defendant's Criminal History Category is I.

#### Sentencing Range

An offense level of 54 and a Criminal History Category of I yields a sentencing range of life imprisonment.

Because the defendant is not charged with any offense that carries a maximum term of life imprisonment, the Guideline sentence is computed by adding the applicable statutory maximum sentences on all counts of conviction, which results in a Guideline sentence of 150 years' imprisonment. See U.S.S.G. § 5G1.2. In addition, after determining the defendant's ability to pay, the Court must impose a fine pursuant to U.S.S.G. § 5E1.2. At Guidelines level 54, the applicable fine range is \$25,000 to \$250,000. Under the Guidelines, because one or more of the charged offenses authorize maximum fines greater than \$250,000, the Court may impose a fine up to the maximum authorized by the statute. See U.S.S.G. § 5E1.2(c)(4).

The Court must also impose an order of restitution to any victims of his offense, pursuant to Title 18, United States Code, Sections 3663, 3663A, and 3664.

The Office intends to seek criminal forfeiture, pursuant to 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461, of all property constituting or derived from proceeds traceable to the commission of the SUA Offenses, including but not limited to:

Ira Lee Sorkin, Esq.  
March 10, 2009  
Page 7

(i) a sum of money representing the amount of proceeds traceable to the commission of the SUA offenses, and all property traceable to such property, including but not limited to an amount exceeding \$170,000,000,000; (ii) all specific property constituting or derived from proceeds traceable to the commission of the said offenses, and all property traceable to such property; and (iii) substitute assets, pursuant to 21 U.S.C. § 853(p).

In addition, the Office intends to seek criminal forfeiture, pursuant to 18 U.S.C. § 982(a)(1), of all property, real and personal, involved in the Money Laundering Offenses, and all property traceable to such property, including but not limited to: (i) a sum of money representing all property, real and personal, involved in the money laundering offense, and all property traceable to such property, including but not limited to an amount exceeding \$799,000,000; (ii) all specific property, real and personal, involved in the Money Laundering Offenses, and all property traceable to such property; and (iii) substitute assets, pursuant to 18 U.S.C. § 982(b)(1) and 21 U.S.C. § 853(p).

The forfeiture numbers set forth above are approximate figures and are being provided to you for informational purposes only. The Office's investigation of the fraud is ongoing and, prior to sentencing, the Office will submit an application for a money judgment as to the SUA Offenses and the Money Laundering Offenses that may contain dollar amounts substantially in excess of the approximations set forth in the two preceding paragraphs. The Office may also apply for preliminary orders of forfeiture seeking forfeiture of the defendant's interest in specific property based on a showing that such property is subject to forfeiture as proceeds of the SUA Offenses, and/or property involved in the Money Laundering Offenses, and/or property traceable to such property. The Government may also seek forfeiture of the defendant's interest in specific property as substitute assets.

The foregoing Guidelines calculation is based on facts and information presently known to the Office. Nothing in this letter limits the right of this Office to change its position at any time as to the appropriate Guidelines calculation in this case, and to present to the sentencing Judge and/or Probation Office, either orally or in writing, any and all facts and arguments relevant to sentencing, to the defendant's sentencing range and/or offense level, and to the defendant's Criminal History Category, that are available to the Office at the time of

Ira Lee Sorkin, Esq.  
March 10, 2009  
Page 8


sentencing. Nor does anything in this letter limit the right of this Office to take a position on any departure that may be suggested by the sentencing Judge, the Probation Office, or the defendant.

Further, this letter does not and cannot bind either the Court or the Probation Office, either as to questions of fact or as to determination of the correct Guidelines to apply in this case. Instead, the sentence to be imposed upon the defendant is determined solely by the sentencing Judge. This Office cannot and does not make any promise or representation as to what sentence the defendant will receive.

Very truly yours,

LEV L. DASSIN  
Acting United States Attorney

By:

  
\_\_\_\_\_  
Marc Litt/Lisa A. Baroni  
Assistant United States Attorneys  
Telephone: (212) 637-2295 /-2405