

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

----- X

:

UNITED STATES OF AMERICA, :

- v. - : **11 Cr. 652 (HBP)**

JOHN J. O'BRIEN, :

Defendant. :

:

----- X

GOVERNMENT'S SENTENCING MEMORANDUM

PREET BHARARA
United States Attorney for the Southern
District of New York

STANLEY J. OKULA, JR.,
Assistant United States Attorney,

- Of Counsel -

TABLE OF CONTENTS

Introduction1

I. Relevant Facts..... 3

 A. The Defendants’ Educational Background and Work History. 3

 B. The Offense Conduct..... 3

 C. The Revelation of O’Brien’s Tax Crimes..... 5

 D. The PSR. 7

II. Sentencing Guidelines Discussion. 8

 A. Applicable Law..... 8

III. 3553(a) Analysis. 10

 A. The Nature and Circumstances of the Offense..... 10

 B. History and Characteristics of the Defendant..... 11

 C. The Need To Afford Adequate Deterrence. 12

 D. The Need To Avoid Unwarranted Sentence Disparities. 15

 E. The Appropriate Sentence. 16

 F. The Defendant’s Arguments Do Not Support a Variance. 16

IV. Restitution..... 18

Conclusion..... 20

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

----- X
:

UNITED STATES OF AMERICA, :

- v. - : **11 Cr. 652 (HBP)**

JOHN J. O'BRIEN, :

Defendant. :

:
----- X

GOVERNMENT'S SENTENCING MEMORANDUM

The United States respectfully submits this memorandum for the Court's consideration in connection with the sentencing of defendant John J. O'Brien ("O'Brien"), which is scheduled for January 11, 2012 at 9:30 a.m.

Introduction

On August 4, 2011, O'Brien pleaded guilty to all four counts in an Information that had been filed the preceding day, 11 Cr. 652 (HBP). Those four counts were willful failure to file tax returns for the 2004 and 2006 tax years (Counts One and Two, respectively), and willful failure to pay taxes for the 2005 and 2007 tax years, (Counts Three and Four, respectively). The allegations in the Information, and the admissions made by the defendant during his guilty plea, demonstrate that O'Brien — an attorney with degrees from Princeton, the London School of Economics, and New York University — engaged in a multi-year endeavor to flout numerous tax obligations. Indeed, O'Brien's tax crimes spanned several years and involved the willful failure to file tax returns with, and pay income taxes to, not only the Internal Revenue Service ("IRS"), but also the States of New York and California, and the City of New York.

With all of the advantages conferred by a comfortable upbringing, elite education, and partnership at one of the nation's most prestigious and profitable law firms, O'Brien could have pursued a rewarding and productive life as an elite-firm lawyer, with compensation in the top few percent of the general population. Instead, O'Brien decided to take the money that would otherwise have gone to satisfy his tax obligations and use that money to fund what he hoped would be another money-making operation — a rare books and manuscripts business operated by and co-owned with his partner, Michael Phelps. It is undisputed that O'Brien made capital contributions of over \$3,000,000 to fund that business partnership, Hudson Street Books, a partnership of which O'Brien was a limited partner. In addition, O'Brien used his unreported income to fund international travel for himself and Phelps; Phelps's education; and various renovations of his and Phelps's lakefront weekend home in the Adirondacks.

O'Brien took various steps to execute his tax defiance scheme. Each year he willfully refused to execute and return to his law firm a certification form that the firm sent to all partners in order to ensure that they complied with their tax obligations. He willfully ignored various notices sent to him by the IRS. He willfully ignored various notices sent to him by the State of California. He willfully ignored the advice of his tax preparer to file tax returns. And when he was first questioned about his tax crimes by partners from his law firm — which had been contacted by the State of California because O'Brien had ignored various notices sent by the California tax authorities to O'Brien's home — O'Brien initially attempted to blame his failures to file on his tax preparer. Through these efforts and his extensive failure to comply with his tax obligations, O'Brien willfully avoided reporting, and paying taxes on, in excess of \$10,000,000 in income over eight years — resulting in the failure to pay taxes to various taxing authorities of over \$3,000,000. This conduct,

and the resulting harm, is especially deserving of a meaningful prison sentence.

I. RELEVANT FACTS¹

A. The Defendant's Educational Background and Work History

O'Brien received his AB degree from Princeton in 1985, after which he studied at the London School of Economics, resulting in his receipt in 1986 of a Master's Degree in Public Administration and Public Policy. PSR ¶¶ 54-55. O'Brien thereafter attended New York University School of Law, graduating in 1992. He was admitted to the New York Bar in 1995. PSR ¶¶ 56-57. O'Brien worked as an associate at the Sullivan & Cromwell ("S&C") law firm² from September 1992 until he was admitted to the partnership in early 2001, as a partner specializing in corporate work, such as mergers and acquisitions. O'Brien remained at S&C until March 30, 2009, when he was requested to resign his position at the firm. PSR ¶¶ 58. In his final year as an S&C partner, O'Brien was paid \$2,336,387. Id. ¶ 58.

B. The Offense Conduct

The facts concerning O'Brien's offense conduct will not be repeated herein at length, as those facts are set forth in the PSR and we are confident that the Court is thoroughly familiar with the record. Nonetheless, we highlight certain aspects of the offense conduct because those facts speak volumes about O'Brien's tax crimes, and both the direct and indirect harm caused by those crimes.

¹ The facts described in this section are based on the Probation Department's Presentence Report ("PSR"), documents that the Government gathered in its investigation, and Government interviews of various witnesses.

² The Sullivan & Cromwell name was omitted from our initial Information, consistent with the policy of the United States Attorney's Office to omit such names where such identification has not been the subject of a previous public court filing and is not essential to the disposition, or any aspect, of the case. Given that O'Brien's publicly-filed sentencing submission and exhibits make numerous references to the firm by name, we do so in this memo as well.

Prior to being made partner at S&C, O'Brien was an employee of the firm, meaning that he was paid wages by the firm, reported to the IRS on a Form W-2, on which S&C, as employer, was obligated to withhold certain taxes and remit those taxes to the IRS. Upon being made a partner, O'Brien no longer had taxes withheld from his pay; instead, his distributable share of partnership income was remitted to him in full and the amounts were memorialized on a Schedule K-1, which was provided to O'Brien by the accounting firm that prepared the partnership income tax return for S&C. See Exhibit A, attached hereto. Although K-1s are filed with the IRS as schedules to the underlying partnership income tax return (Form 1065), large partnerships (such as S&C) append hundreds of K-1s to their Forms 1065 and therefore the ability of the IRS to detect those K-1 recipients who do not file tax returns is not unfailing. Such was the case with O'Brien, who, upon being made partner at S&C, decided that he would not file tax returns and not pay all of his taxes.

The last return O'Brien filed on a timely basis was for the 2000 tax year (the last year he was an associate at S&C), which he filed in May 2001. Moreover, although O'Brien had tax returns prepared by a professional for the 2001 and 2002 tax years, see Exhibit B, attached hereto, O'Brien ignored the advice of his preparer and made the deliberate decision not to file those returns.³ For the 2003-08 tax years, O'Brien similarly failed to file tax returns and, in addition, willfully failed to make estimated payments of his taxes. O'Brien's tax crimes occurred notwithstanding the receipt of the following amounts of income for the following years:

³ O'Brien did make certain estimated payments for those tax years, but not in the full amount owed. Generally, taxpayers who make estimated payments are required to make four payments, three during the tax year at issue (on April 15, June 15, and September 15) and the fourth on January 15th of the following year. See 26 U.S.C. § 6654. Thus, the willful failure to make an estimated payment for a taxpayer who pays estimated taxes can occur earlier (January 15) than for a wage earner, whose liability for willful failure to pay usually occurs at the time the wage earner's tax return is due (that is, on April 15 or October 15).

TAX YEAR	PARTNERSHIP INCOME
2003	\$931,839
2004	\$1,227,272
2005	\$1,218,568
2006	\$1,663,636
2007	\$1,839,898
2008	\$2,336,387
TOTAL	\$9,217,600

C. The Revelation of O’Brien’s Tax Crimes

As a result of O’Brien’s failure to file returns and pay taxes, certain taxing authorities sent notices to O’Brien calling for payment and filing. For instance, the IRS sent certain notices even as late as December 2008, but O’Brien elected to ignore the notice.⁴ The California Franchise Tax Board (“CFTB”) also sent various notices to O’Brien, but these too failed to cause O’Brien to change his ways with respect to his California or other tax obligations.⁵ It was only after the CFTB began sending notices to S&C in March 2009 — resulting in the revelation to his partners at S&C of O’Brien’s flouting of his tax obligations and the subsequent commencement of a criminal investigation — did O’Brien file any tax returns for 2003-2008.

The first CFTB notice sent to S&C appears to have been received by the firm on or about March 5, 2009. In a telephone discussion shortly after S&C received the notice, a CFTB

⁴ The 2008 notice was sent by the IRS to O’Brien on or about December 22, 2008, requesting the filing of his 2007 tax return.

⁵ O’Brien’s California tax obligations came about as a result of S&C’s presence in California, through offices located there.

representative informed an S&C administrative staffer that the notice was sent to S&C because O'Brien had failed to respond to a series of previous notices sent to O'Brien's home. Shortly after learning this, the S&C staffer forwarded a copy of the CFTB notice to a senior tax partner at the law firm. That S&C tax partner scheduled a meeting with O'Brien for mid-day on March 27, 2009.

At the meeting, which occurred around noon, the tax partner asked O'Brien directly whether he had filed his California tax returns and paid his California taxes. O'Brien answered that he had not. The tax partner then inquired whether O'Brien had filed his federal and New York State tax returns and paid his estimated taxes. O'Brien answered, "No." After this exchange, and a "defense" articulated by O'Brien that he had never lied to the firm about his tax filings,⁶ the tax partner ended the meeting and scheduled a follow-up meeting for 3:00 p.m. that same afternoon.

The follow-up meeting was attended by the S&C tax partner and additional S&C partners, who inquired of O'Brien about his tax filing history. After admitting that he had not paid federal, California, or New York State taxes since he had been admitted to the S&C partnership, O'Brien initially told the S&C partners at the meeting that his failures were attributable to his tax preparer. O'Brien ultimately acknowledged, however, that he had given a significant amount of money to his partner for the antique book business, causing O'Brien to fall behind in his tax obligations.⁷

Following the meetings on March 27, 2009, O'Brien was escorted from the S&C premises.

⁶ This statement by O'Brien appears to represent his skewed rationalization that it was somehow less blameworthy for him to have willfully refused to fill out the S&C certification-of-filing form and not return it to the firm rather than falsely certify that he had filed his returns. Of course, both courses of action served to deceive his partners at the firm, because O'Brien deliberately chose not to provide his partners with the information they had requested — a form designed to make sure that partners are tax compliant.

⁷ At some point during one of these meetings, O'Brien left the meeting, consulted with an attorney, and returned and indicated that he did not wish to speak any more.

On March 31, 2009, O'Brien resigned from the S&C partnership.

In the immediate wake of his resignation from S&C, O'Brien retained Thomas Borders, a tax attorney at the McDermott Will & Emery law firm. On April 9, 2009, Borders sent a letter to the IRS in response to the December 22, 2008 notice that had been sent by the IRS to O'Brien. That letter was not accompanied by any payments or delinquent tax returns. Moreover, the letter made no reference to the IRS's "voluntary disclosure" policy. Instead, the letter stated that O'Brien intended to file returns and make payments in the future, for the 2002-08 tax years. In particular with respect to the 2008 tax year, the letter stated that O'Brien intended to file for an extension for the 2008 year and that he intended to file the 2008 return "within the time period provided for in the extension." See Exhibit C, attached hereto.

O'Brien did not file his returns within the time period provided for in the 2008 extension — which would have required filing by October 15, 2009. Moreover, O'Brien did not enter into any agreement or arrangement with the IRS to pay his outstanding tax debt. Instead, O'Brien filed tax returns for 2003 through 2008 years in or about March 2010, following the December 2009 commencement of a criminal tax investigation of O'Brien. O'Brien learned of the commencement of the USAO investigation prior to the March 2010 filing of his delinquent 2003-08 tax returns.

C. The PSR

In connection with the sentencing of O'Brien, the Probation Office has prepared a Presentence Investigation Report (the "PSR"), which calculates the defendant's Sentencing Guidelines offense levels. As calculated by Probation, O'Brien's final offense level is 21, calling for a Sentencing Guidelines sentence of 37-46 months. The breakdown of O'Brien's Guidelines calculation is as follows:

- A base offense level of 24, pursuant to U.S.S.G. § 2T4.1(J), based on an aggregate loss of more than \$2.8 million. PSR ¶ 20.
- A three-level reduction for acceptance of responsibility, pursuant to U.S.S.G. § 3E1.1(a) and (b). PSR ¶ 26.
- A resulting total offense level of 21. PSR ¶ 29.

O'Brien has no criminal history points. Thus, with a final offense level of 21, O'Brien's Guidelines analysis, according to the final PSR, yields a final advisory Guidelines range of 37-46 months.

II. SENTENCING GUIDELINES DISCUSSION

A. Applicable Law

We assume the Court's intimate familiarity and facility with the Sentencing Guidelines and the law of sentencing, particularly in this post-Booker age. We nonetheless think it helpful to review briefly the governing legal principles in this area.

While the Sentencing Guidelines are no longer mandatory, they nevertheless continue to play a critical role in trying to achieve the "basic aim" that Congress tried to meet in enacting the Sentencing Reform Act, namely, "ensuring similar sentences for those who have committed similar crimes in similar ways." United States v. Booker, 543 U.S. 220, 252 (2005); see United States v. Crosby, 397 F.3d 103, 113 (2d Cir. 2005) ("[I]t is important to bear in mind that Booker/Fanfan and section 3553(a) do more than render the Guidelines a body of casual advice, to be consulted or overlooked at the whim of a sentencing judge."). The applicable Sentencing Guidelines range "will be a benchmark or a point of reference or departure" when considering a particular sentence to impose. United States v. Rubenstein, 403 F.3d 93, 98-99 (2d Cir. 2005). In furtherance of that goal, a sentencing court is required to "consider the Guidelines 'sentencing range established for . . . the

applicable category of offense committed by the applicable category of defendant,’ the pertinent Sentencing Commission policy statements, the need to avoid unwarranted sentencing disparities, and the need to provide restitution to victims.” Booker, id. at 260 (citations omitted); see also id. at 264 (“The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing.”).

Apart from the Sentencing Guidelines, as the Court is well aware, the other factors set forth in Section 3553(a) must be considered. Section 3553(a) directs the Court to impose a sentence “sufficient, but not greater than necessary” to comply with the purposes set forth in paragraph two.

That sub-paragraph sets forth the purposes as:

- (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
- (B) to afford adequate deterrence to criminal conduct;
- (C) to protect the public from further crimes of the defendant; and
- (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner

Section 3553(a) further directs the Court – in determining the particular sentence to impose – to consider: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the statutory purposes noted above; (3) the kinds of sentences available; (4) the kinds of sentence and the sentencing range as set forth in the Sentencing Guidelines; (5) the Sentencing Guidelines policy statements; (6) the need to avoid unwarranted sentencing disparities; and (7) the need to provide restitution to any victims of the offense. See 18 U.S.C. § 3553(a).

In light of Booker, the Second Circuit has instructed that district courts should engage in a three-step sentencing procedure. See Crosby, 397 F.3d at 103. First, the Court must determine the

applicable Sentencing Guidelines range, and in so doing, “the sentencing judge will be entitled to find all of the facts that the Guidelines make relevant to the determination of a Guidelines sentence and all of the facts relevant to the determination of a non-Guidelines sentence.” Id. at 112. Second, the Court must consider whether a departure from that Guidelines range is appropriate. Id. Third, the Court must consider the Guidelines range, “along with all of the factors listed in section 3553(a),” and determine the sentence to impose. Id. at 113. In so doing, it is entirely proper for a judge to take into consideration his or her own sense of what is a fair and just sentence under all the circumstances. United States v. Jones, 460 F.3d 191, 195 (2d Cir. 2006).

III. 3553(a) Analysis

A. The Nature and Circumstances of the Offenses

The crimes O’Brien committed were significant in scope and duration. Simply put, O’Brien was not involved in a single-episode error of judgment. Rather, O’Brien’s crimes spanned eight years and caused over \$3,000,000 in aggregate financial harm.

It goes without saying that tax offenses are serious, costly, and damaging to our nation’s system of taxation. See United States v. Ture, 450 F.3d 352, 357 (8th Cir. 2006) (“[t]he criminal tax laws are designed to protect the public interest in preserving the integrity of the nation’s tax system.”). The Internal Revenue Code, § 6151(a), sets forth the general rule of our voluntary federal tax system: “Except as otherwise provided, when a return of tax is required under this title or regulation, the person required to make such return, shall, without assessment or notice and demand from the Secretary, pay such tax to the internal revenue officer with whom the return is filed, and shall pay such tax at the time and place fixed for filing the return.”

The defendant is an attorney who should be held to the same, if not higher, degree of

compliance with the law. As a result of his position and attendant salary at S&C, O'Brien always had the means to pay his taxes, but he chose instead to spend his income elsewhere — on the side business he owned with his partner, on his lakefront weekend home, and international travel. Undoubtedly many taxpayers might prefer to spend their income on things other than their tax obligations to the IRS and other tax authorities, but the fact remains that our system is based on voluntary compliance.

The seriousness of the defendant's conduct, the amount of taxes he chose not to pay, and his expenditure of money to support his side business and lifestyle, all support a prison sentence. The defendant acted without regard to his responsibilities as a citizen and lawyer to adhere to the laws of this country. Moreover, his repeated criminal conduct was not born of any economic necessity, deprived upbringing, or lack of formal education and opportunity; instead, it was the result of greed.

B. History and Characteristics of the Defendant

While it is certainly appropriate for the Court to consider the defendant's good works, the Government respectfully submits that any credit given them must be balanced against the fact that his ability to perform any such good works resulted directly from the position in society that he achieved and the unwarranted excess wealth that he accumulated as a result of the tax fraud for which he is responsible.

Likewise, the Government submits that any testimonials to the defendant's character and honesty by his family and friends ought to be given little, if any, weight. See United States v. McClatchey, 316 F.3d 1122, 1135 (10th Cir. 2003) (“excellent character references are not out of the ordinary for an executive who commits white-collar crime; one would be surprised to see a person rise to an elevated position in business if people did not think highly of him or her”). While

there are certainly cases where it can be said that a defendant's offense conduct was in some way aberrant or representative of so brief a lapse in judgment that it is appropriate to give significant weight to an otherwise blameless life, this is not such a case. For years of his professional life, the defendant deliberately chose to disregard the obligations he shared with every other income-earning American — to file accurate tax returns and pay all taxes that were due. Instead, the defendant decided to fund the business and leisure activities of his partner and himself.

Even crediting any testimonials he submits at sentencing, the defendant has shown that he is not someone who deserves any benefit of the doubt with respect to this Court's judgment of his character. In short, O'Brien's minimal good works are simply overwhelmed by the enormity of his criminal conduct, as described above.

C. The Need To Afford Adequate Deterrence

One of the critical factors the Court must consider in imposing sentence under Section 3553(a) is the need for the sentence to “afford adequate deterrence to criminal conduct.” 18 U.S.C. § 3553(a)(2)(B). We respectfully submit that a substantial term of imprisonment is necessary to achieve the goals of general deterrence in this case.

This case is not about niceties or even aggressive interpretations of the tax law. Instead, it is about the defendant's decision, year after year, to disregard his simple obligations as a taxpayer. We cannot emphasize enough that meaningful criminal sanctions are essential to stop tax crimes like those perpetrated by O'Brien — a sophisticated professional who fully understood his legal obligations and chose to flout them. Put starkly, only the real fear of a prison sentence will deter tax cheats like O'Brien from carrying on their activities.

Such an approach would be entirely consistent with the Guidelines, which specifically

recognize that general deterrence is a vitally important — indeed, essential — goal in sentencing for criminal tax offenses, due to the relatively few criminal tax prosecutions that are brought. As the Sentencing Commission explained:

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.

U.S.S.G. ch 2, pt. T, introductory cmt. See also United States v. Burgos, 276 F.3d 1284, 1289 n.6 (11th Cir. 2001) (observing “[f]or a judge sentencing a defendant convicted of tax evasion, the chief concern may be general deterrence”).

Moreover, in tax prosecutions there is good reason to impose Guidelines sentences as opposed to the more lenient probationary sentences sought by tax cheats. As the Guidelines commentary further explains:

Under pre-guidelines practice, roughly half of all tax evaders were sentenced to probation without imprisonment, while the other half received sentences that required them to serve an average prison term of twelve months. This guideline is intended to reduce disparity in sentencing for tax offenses and to somewhat increase average sentence length. As a result, the number of purely probationary sentences will be reduced.

Guideline Commentary, Section 2T1.1.

Our Circuit has echoed the Commission's observations, noting that, “[o]nly a limited number of criminal tax prosecutions are brought relative to the number of alleged violations. See U.S. Sentencing Guidelines Manual ch. 2, pt. 2, introductory cmt.” United States v. Trupin, 475 F.3d 71, 76 n.6 (2d Cir. 2007) (seven- month prison sentence for multi-year tax evasion scheme with a tax

loss of \$1.2 million failed to reflect seriousness of offense). As the Trupin court aptly observed in an analogous context, a tax evader is “in effect [stealing] from his fellow taxpayers through his deceptions.” Id. at 76; see also United States v. Taylor, 499 F.3d 94, 102 (1st Cir. 2007) (vacating sentencing of probation with one year in a halfway house for tax fraud offense where tax loss was \$129,879 finding that “[w]hile tax fraud is not violent in nature, at its heart, it is theft, specifically theft of money to which the public is entitled”).

Similarly, the Fourth Circuit recently made essentially the same point in a tax evasion case:

Given the nature and number of tax evasion offenses as compared to the relatively infrequent prosecution of those offenses, we believe that the Commission's focus on incarceration as a means of third-party deterrence is wise. The vast majority of such crimes go unpunished, if not undetected. Without a real possibility of imprisonment, there would be little incentive for a wavering would-be evader to choose the straight-and-narrow over the wayward path.

United States v. Engle, 592 F.3d 495, 502 (4th Cir. 2010). And Judge Weinfeld had articulated the point in a pre-Guidelines setting:

This court has long had the view that income tax evasion cases where defendants are found guilty, whether upon their pleas of guilty or after jury verdict, require a term of imprisonment. The income tax laws of our country in effect reflect an honor system under which the citizens are required to cooperate with the government, to file true and accurate returns. I have been of the view that unless a citizen lives up to his responsibility there must follow, barring an extraordinary situation, a term of imprisonment as an example to other people in the community.

United States v. Tana, 85 Cr. 1119 (EJW) (June 17, 1986; Tr. at 12-13). See also United States v. Werdiger, 10 Cr. 325 (PGG) (Nov. 9, 2011; Tr. at 50) (“I believe in the views of Judge Weinfeld, for whom I have the greatest respect, and specifically his views as expressed in the case of United States versus Tana, that absent extraordinary circumstances, cases of significant tax evasion often

call for a sentence of imprisonment”).⁸

“Taxes,” wrote Oliver Wendell Holmes, “are what we pay for civilized society. . . .” Compañía General de Tabacos de Filipinas v. Collector of Internal Revenue, 275 U.S. 87, 100 (1927) (Holmes, J., dissenting). This country depends largely upon voluntary compliance with the internal revenue laws by all citizens, regardless of wealth or status. That system of voluntary compliance would crumble if those people owing taxes believed they could cheat with impunity or that the most severe sanctions that they would face when caught were merely the payment of back taxes, interest, and penalties, or a sentence the equivalent of a relative slap on the wrist.

This case involves a man who, like most Americans, enjoyed benefits from the taxes honestly and accurately paid by others, but who decided that he would, in effect, thumb his nose at the tax system and the IRS. Imprisonment is essential in a case like this, lest the fraud perpetrated by the defendant breed skepticism and bitterness among hard-working American taxpayers who fulfill their tax obligations by paying their taxes honestly.

In sum, general deterrence in cases like this can be accomplished only through a meaningful term of incarceration.

D. The Need To Avoid Unwarranted Sentence Disparities

The Sentencing Guidelines were promulgated, in part, to minimize disparities in federal sentences. Although those Guidelines are no longer mandatory, the importance of eliminating sentencing disparities remains an important factor which the Court must separately consider pursuant to 18 U.S.C. § 3553(a)(7). We attach for the Court’s consideration a chart of sentences in other tax

⁸ Judge Gardephe imposed a year-and-a-day sentence on defendant Richard Werdiger based on a tax loss between \$200,000 and \$400,000 stemming from the defendant use of, and failure to report, a secret Swiss bank account.

cases, including ones with comparable loss amounts. See Exhibit D.

Although we believe that there is utility in the Court considering what has happened in other cases, we hasten to note our acute awareness that, at best, such guidance can get the Court only so far. Every case is unique; every individual defendant is unique. We do not mean to suggest otherwise. The reasons for referencing the other sentences are straightforward: first, while we fully recognize that what we believe to be an appropriate application of the Sentencing Guidelines leads to an advisory Guidelines range calling for a sentence of incarceration, similar sentences have been meted out in cases involving comparable overall conduct and tax losses; and second, it is not uncommon for defendants who are less criminally culpable than O'Brien to receive and serve lengthy sentences of incarceration.

E. The Appropriate Sentence

The Government submits that a sentence of no less than the 24-month sentence recommended by Probation is appropriate for defendant John O'Brien. Although the sentence is below the prescribed Guidelines range, such a sentence will best serve the ends of justice pursuant to 18 U.S.C. § 3553(a). Stated simply, such a sentence is also commensurate with others charged with serious tax crimes.

F. The Defendant's Arguments Do Not Support a Variance

The defendant contends that he made a valid "voluntary disclosure" of his tax crimes, and suggests that he is being unfairly prosecuted because bona fide voluntary disclosure. O'Brien also maintains that his "voluntary disclosure" should be considered as a substantial mitigating factor in his sentencing, thus supporting a substantial variance. O'Brien Sentencing Letter at 3.

O'Brien's "voluntary disclosure" arguments should be rejected. First, his description of the

underlying events is misleading and suggests that the defendant complied with all of the requirements of the IRS's "voluntary disclosure" policy. That is simply not the case, as it is undisputed that O'Brien never paid his back taxes or entered into an arrangement to pay prior to the December 2009 commencement of the SDNY criminal investigation. See United States v. Tenzer, 127 F.3d 222, 227 (2d Cir. 1997) (taxpayer failed to comply with voluntary disclosure policy because he neither paid the taxes nor made arrangement to pay); Internal Revenue Manual § 9.5.11.9(3) (voluntary disclosure occurs when ... taxpayer makes "good faith arrangements with the IRS to pay in full, the tax, interest, and any penalties determined by the IRS to be applicable"). Here, the defendant's April 2009 letter to the IRS contained no payment and made no reference to any arrangement entered into with the IRS. Rather, it purported to set forth only the defendant's intention to pay his taxes — which remain largely unpaid to this date. As the Second Circuit noted in Tenzer, "[t]he [voluntary disclosure] policy does not provide for best intentions, but rather require that an arrangement be 'made.'" 127 F.3d at 227.

More fundamentally, the rules of the voluntary disclosure program make clear that a "voluntary disclosure will not automatically guarantee immunity from prosecution; however, a voluntary disclosure may result in prosecution not being recommended." See Internal Revenue Manual § 9.5.11.9(1-2).

Finally, the defendant had ample time between 2002 and 2008 to attempt to make a valid voluntary disclosure. He could have done so after receiving the various IRS notices, CFTB notices, or the yearly certification form from his law firm — each of which starkly reminded the defendant of his looming tax obligations. He chose instead to attempt to fly under the radars of the various tax authorities so he could hold on to, and invest, the monies that would otherwise go to satisfy his

tax obligations. The defendant should therefore not be allowed to shift blame to the Government for the criminal choices he made.

None of the other arguments advanced by the defendant mitigates his otherwise egregious conduct.

The fact that a period of incarceration may delay O'Brien's ability to make restitution does not significantly militate in favor of a downward variance. Stated simply, a non-jail sentence like the one sought by the defendant sends utterly the wrong message to the public about tax crimes and crime in general. It sends the message that highly educated white-collar criminals who engage in tax chiseling for an eight year period will not be significantly deprived of their liberty.

Finally, the defendant's claim that he was operating under significant mental impairment is unconvincing. O'Brien was a partner at one of the nation's premier law firms, working on highly complex and sophisticated matters. It is difficult to believe that, at the same time he was carrying out this work, he could not come to terms with the legal obligation faced by every working American on April 15th.

IV. Restitution

The Government submits that the Court should order restitution in total amount of \$557,942.32, calculated as follows. The amounts represent tax loss for restitution purposes and interest on the tax loss, as calculated by a Revenue Agent of the IRS:

Tax Year	Tax Loss	Interest	Total
2002	\$100,151	\$ 74,336	
2003	\$277,062	\$146,775	
2004	\$357,463	\$163,846	
2005	\$351,128	\$128,528	
2006	\$469,296	\$123,733	
2007	\$463,010	\$ 78,800	
2008	\$119,712	\$ 12,999	
Total	\$2,137,822	\$729,010	\$2,866,832

Prejudgment interest on actual losses sustained by a victim is appropriately included in a restitution order. See United States v. Qurashi, 634 F.3d 699, 704 (2d Cir. 2011) (“We hold that the MVRA [Mandatory Victims Restitution Act] allows a sentencing court to award prejudgment interest in a criminal restitution order to ensure compensation ‘in the full amount of each victim’s losses.’”) (citing 18 U.S.C. § 3664(f)(1)(A)); see also United States v. Fumo, Nos. 09-3388, 09-3389, 09-3390, 2011 WL 3672774, *27-29 (3d Cir. Aug. 23, 2011) (holding that “prejudgment interest is available on orders of restitution under the [Victim and Witness Protection Act] and MVRA” and noting like decisions in Second, Fourth, Fifth, Ninth, Tenth, and Eleventh Circuits). The amounts set forth above do not include penalties.

Conclusion

The Government submits that, on the facts of this case, a sentence consistent with Probation's recommendation — 24 months — is appropriate because such a sentence adequately balances all of the factors that the Court is required to consider under Section 3553(a). And the Court should impose a restitution amount of \$2,866,832.

Dated: New York, New York
January 9, 2012

Respectfully submitted,

PREET BHARARA
United States Attorney
Southern District of New York

By: s/Stanley J. Okula, Jr.
STANLEY J. OKULA, JR.
Assistant United States Attorney
(212) 637-1585
stan.okula@usdoj.gov

