



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

November 3, 2009

Andrew Lankler, Esq.
Lankler & Carragher, LLP
845 Third Avenue, 17th Floor
New York, New York 10022

Re: United States v. David G. Friehling
S1 09 Cr. 700 (AKH)

Dear Mr. Lankler:

This prosecution and the protection against prosecution set forth below have been approved by the Tax Division, Department of Justice.

On the understandings specified below, the Office of the United States Attorney for the Southern District of New York ("this Office") will accept a guilty plea from David G. Friehling (the "Defendant") to a criminal superseding information (the "Information") charging him with the following violations of federal law, in connection with the services he provided to Bernard L. Madoff and Bernard L. Madoff Investment Securities ("BLMIS") between in or about 1991 and on or about December 11, 2008.

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 under Title 18, United States Code, Section 3571(d) of the greatest of \$5 million or twice the gross pecuniary gain to any person derived from the offense, or twice the gross pecuniary loss to a person other than the Defendant, a mandatory \$100 special assessment, a maximum term of three years' supervised release and criminal forfeiture.

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 under Title 18, United States Code, Section 3571(d) of the greatest of \$250,000 or twice the gross pecuniary gain to any person derived from the offense, or twice the gross pecuniary loss to a person other than the Defendant, a mandatory \$100 special assessment, and a maximum term of three years' supervised release.

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Counts Three through Six charge the Defendant with making false filings with the U.S. Securities and Exchange Commission ("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. Counts Three through Six each carry a maximum sentence of twenty years' imprisonment, a maximum fine under Title 18, United States Code, Section 3571(d) of the greatest of \$5 million or twice the gross pecuniary gain to any person derived from the offense, or twice the gross pecuniary loss to a person other than the Defendant, a mandatory \$100 special assessment, a maximum term of three years' supervised release and criminal forfeiture.

Counts Seven through Nine each charge the Defendant with corruptly endeavoring to obstruct or impede the administration of the Internal Revenue laws, in violation of Title 26, United States Code, Section 7212(a). Counts Seven through Nine each carry a maximum sentence of three years' imprisonment, a maximum fine under Title 18, United States Code, Section 3571(d) of the greatest of \$250,000, twice the gross pecuniary gain to any person derived from the offense, or twice the gross pecuniary loss to the United States, a mandatory \$100 special assessment, and a maximum term of one year of supervised release.

The Defendant agrees to, and hereby does, waive any statute of limitations challenge with respect to Counts Seven and Eight of the Information. Count Seven charges the Defendant with corruptly endeavoring to obstruct or impede the administration of the Internal Revenue laws from at least 1991 through and including 1997. Count Eight charges him with corruptly endeavoring to obstruct or impede the administration of the Internal Revenue laws from at least 1998 through and including 2003.

The total maximum sentence of incarceration on Counts One through Nine is 114 years' imprisonment.

It is further understood that the Defendant shall make restitution in an amount to be specified by the Court in accordance with 18 U.S.C. §§ 3663, 3663A, and 3664. This amount shall be paid according to a plan established by the Court.

The Defendant further admits the forfeiture allegation of the Information and agrees to forfeit to the United States, pursuant to 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461, (1) a sum of money representing the total of the Defendant's compensation from BLMIS for his accounting and tax services, as well as the amount that he, his wife and his children withdrew from their BLMIS investment advisory accounts, and therefore represents the amount of proceeds traceable to the commission of the offenses constituting specified unlawful activity, as defined in 18 U.S.C. § 1956(c)(7), as alleged in Count One of the Information, to wit, a sum of money equal to \$3,183,000, and all property traceable to such property (the "Money Judgment"), and (2) all

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right, title and interest of the defendant in the following real property and the appurtenances thereto to the extent such property constitutes and is derived from proceeds obtained as a result of the offenses constituting specified unlawful activity, as alleged in Count One of the Information, and property traceable to such property, and which shall be applied to the Money Judgment in partial satisfaction thereof: (a) 4 High Tor Road, Clarkstown, New City, New York, 10956, and (b) Vacation Unit No. 23510, Vacation Period 41, in the St. Augustine Resort Condominium, also known as Sheraton Vistana Villages, Orange County, FL (together, the "Specific Property"). The Defendant agrees that he will not file a claim or a petition for remission or mitigation in any forfeiture proceeding involving the Specific Property and will not cause or assist anyone else in doing so. The Defendant also agrees to take all necessary steps to pass clear title to the Specific Property to the United States, including, but not limited to, the execution of all necessary documentation. It is further understood that any forfeiture of the Defendant's assets shall not be treated as satisfaction of any fine, restitution, cost of imprisonment, or any other penalty the Court may impose upon him in addition to forfeiture.

It is understood that the Defendant (a) shall truthfully and completely disclose all information with respect to the activities of himself and others concerning all matters about which this Office inquires of him, which information can be used for any purpose; (b) shall cooperate fully with this Office, the Federal Bureau of Investigation, the IRS, and any other law enforcement agency designated by this Office; (c) shall attend all meetings at which this Office requests his presence; (d) shall provide to this Office, upon request, any document, record, or other tangible evidence relating to matters about which this Office or any designated law enforcement agency inquires of him; (e) shall truthfully testify before the grand jury and at any trial and other court proceeding with respect to any matters about which this Office may request his testimony; (f) shall bring to this Office's attention all crimes which he has committed, and all administrative, civil, or criminal proceedings, investigations, or prosecutions in which he has been or is a subject, target, party, or witness; (g) shall commit no further crimes whatsoever; and (h) shall provide notice to this Office prior to discussing the conduct covered by Counts One through Nine of the Information with anyone other than this Office, law enforcement agencies designated by this Office, and the Defendant's attorney.

Moreover, any assistance the Defendant may provide to federal criminal investigators shall be pursuant to the specific instructions and control of this Office and designated investigators.

If the Defendant fully complies with the understandings specified in this Agreement, he will not be further prosecuted criminally by this Office, and, with respect to tax offenses, the Tax Division, Department of Justice, for any crimes related to his (i) participation in a scheme to deceive investors by creating false and fraudulent certified financial statements for BLMIS and causing those certified financial statements to be filed with the SEC, including those specified in

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the Information, and sent to BLMIS clients; (ii) causing false and misleading certified BLMIS audit reports to be filed with the SEC, including those identified in Counts Three through Six of the Information; (iii) corruptly obstructing and impeding the administration of the Internal Revenue laws through various means, including but not limited to, aiding and assisting in the preparation and presentation of false and fraudulent U.S. Individual Income Tax Returns, Forms 1040, and accompanying schedules, and false and fraudulent U.S. Income Tax Returns for Estates and Trusts, Forms 1041, and accompanying schedules, from in or about 1991 through in or about 2008, as set forth in Counts Seven through Nine of the Information, to the extent that he has disclosed such participation to this Office as of the date of this Agreement. This Agreement does not provide any protection against prosecution for any crimes except as set forth above.

It is understood that this Agreement does not bind any federal, state, or local prosecuting authority other than this Office and, to the extent set forth above, the Tax Division, Department of Justice. This Office will, however, bring the cooperation of the Defendant to the attention of other prosecuting offices, if requested by him.

It is understood that the sentence to be imposed upon the Defendant is within the sole discretion of the Court. This Office cannot, and does not, make any promise or representation as to what sentence the Defendant will receive, and will not recommend any specific sentence to the Court. However, this Office will inform the Probation Department and the Court of (a) this Agreement; (b) the nature and extent of the Defendant's activities with respect to this case and all other activities of the Defendant which this Office deems relevant to sentencing; and (c) the nature and extent of the Defendant's cooperation with this Office. In so doing, this Office may use any information it deems relevant, including information provided by the Defendant both prior to and subsequent to the signing of this Agreement. In addition, if this Office determines that the Defendant has provided substantial assistance in an investigation or prosecution, and if he has fully complied with the understandings specified in this Agreement, this Office will file a motion, pursuant to Section 5K1.1 of the Sentencing Guidelines, requesting the Court to sentence the Defendant in light of the factors set forth in Section 5K1.1(a)(1)-(5). It is understood that, even if such a motion is filed, the sentence to be imposed on the Defendant remains within the sole discretion of the Court. Moreover, nothing in this Agreement limits this Office's right to present any facts and make any arguments relevant to sentencing to the Probation Department and the Court, or to take any position on post-sentencing motions. The Defendant hereby consents to such adjournments of his sentence as may be requested by this Office.

It is understood that, should this Office determine that the Defendant has not provided substantial assistance in an investigation or prosecution, or has violated any provision of this Agreement, such a determination will release this Office from any obligation to file a motion pursuant to Section 5K1.1 of the Sentencing Guidelines, but will not entitle the Defendant to withdraw his guilty plea once it has been entered.

It is understood that, should this Office determine, subsequent to the filing of a motion pursuant to Section 5K1.1 of the Sentencing Guidelines and/or 18 U.S.C. § 3553(e), that the Defendant has violated any provision of this Agreement, this office shall have the right to withdraw such motion.

It is understood that, should the Defendant commit any further crimes or should it be determined that he has given false, incomplete, or misleading testimony or information, or should he otherwise violate any provision of this Agreement, the Defendant shall thereafter be subject to prosecution for any federal criminal violation of which this Office has knowledge, including perjury and obstruction of justice. Any such prosecution that is not time-barred by the applicable statute of limitations on the date of the signing of this Agreement may be commenced against the Defendant, notwithstanding the expiration of the statute of limitations between the signing of this Agreement and the commencement of such prosecution. It is the intent of this Agreement to waive all defenses based on the statute of limitations with respect to any prosecution that is not time-barred on the date that this Agreement is signed.

It is understood that in the event that it is determined that the Defendant has committed any further crimes, given false, incomplete, or misleading testimony or information, or otherwise violated any provision of this Agreement, (a) all statements made by the Defendant to this Office or other designated law enforcement agents, and any testimony given by the Defendant before a grand jury or other tribunal, whether prior to or subsequent to the signing of this Agreement, and any leads from such statements or testimony shall be admissible in evidence in any criminal proceeding brought against the Defendant; and (b) the Defendant shall assert no claim under the United States Constitution, any statute, Rule 410 of the Federal Rules of Evidence, or any other federal rule that such statements or any leads therefrom should be suppressed. It is the intent of this Agreement to waive all rights in the foregoing respects.

The defendant hereby acknowledges that he has accepted this Agreement and decided to plead guilty because he is in fact guilty. By entering this plea of guilty, the Defendant waives any and all right to withdraw his plea or to attack his conviction, either on direct appeal or collaterally, on the ground that the Government has failed to produce any discovery material, *Jencks* Act material, exculpatory material pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), other than information establishing the factual innocence of the defendant, and impeachment material pursuant to *Giglio v. United States*, 405 U.S. 150 (1972), that has not already been produced as of the date of the signing of this Agreement.

By entering this plea of guilty, the Defendant also waives any and all right the Defendant may have, pursuant to 18 U.S.C. §3600, to require DNA testing of any physical evidence in the possession of the Government. The Defendant fully understands that, as a result of this waiver, any physical evidence in this case will not be preserved by the Government and will therefore not

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be available for DNA testing in the future.

This Agreement supersedes any prior understandings, promises, or conditions between this Office, the Tax Division, Department of Justice, and the Defendant. No additional understandings, promises, or conditions have been entered into other than those set forth in this Agreement, and none will be entered into unless in writing and signed by all parties.

Very truly yours,

PREET BHARARA
United States Attorney

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

APPROVED:

Boyd M. Johnson III
BOYD M. JOHNSON III
Deputy United States Attorney

AGREED AND CONSENTED TO:

David G. Friehling
David G. Friehling

11/2/09
DATE

APPROVED:

Andrew Lankler, Esq.
Andrew Lankler, Esq.
Attorney for David G. Friehling

11/2/09
DATE