

[Criminal Tax Manual](#)

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## **44.00 RESTITUTION IN CRIMINAL TAX CASES**

When seeking restitution in criminal tax cases, prosecutors should keep the following principles in mind (all of which are explained in greater detail later in this chapter):

- Restitution is statutory; district courts have no inherent power to order restitution absent statutory authorization.
- Restitution is limited to the actual loss caused by the count(s) of conviction, unless the defendant agrees to pay more.
- For Title 18 tax offenses, restitution as an independent part of the sentence is mandatory pursuant to 18 U.S.C. § 3663A.
- For Title 26 tax offenses, restitution may be ordered as an independent part of the sentence if the defendant agrees to pay restitution in a plea agreement (18 U.S.C. § 3663(a)(3)).
- For Title 26 cases in which the defendant has not agreed to pay restitution, restitution may be ordered as a condition of supervised release or probation (18 U.S.C. §§ 3563(b), 3583(d)).
- Prosecutors should seek prejudgment Title 26 interest in restitution in order to fully compensate the IRS.
- Use the Tax Division’s form plea language whenever possible (available at § 44.09, *infra*)

### **44.01 BACKGROUND**

Under the 1925 Federal Probation Act, courts rarely ordered restitution in criminal cases. *See* S. Rep. No. 97-532, at 30 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2515, 2536 (“As simple as the principle of restitution is, it lost its priority status in the sentencing procedures of our federal courts long ago”); Peggy M. Tobolowsky, *Restitution in the Federal Criminal Justice System*, 77 *Judicature* 90, 90-91 (1993). But more recent statutes encourage and sometimes require district courts to order restitution. *See Hughey v. United States*, 495 U.S. 411, 415-416 (1991) (listing examples).

In 1982, Congress, in an attempt to encourage courts to make broader use of restitution, enacted the Victim and Witness Protection Act of 1982 (VWPA), Pub. L. No. 97-291, 96 Stat. 1248 (codified as amended in scattered sections of 18 U.S.C., with restitution provisions at 18 U.S.C. § 3663). The VWPA provides for restitution in, among

other cases, Title 18 criminal cases and any criminal case (including Title 26 cases) in which a defendant agrees to pay restitution as a part of a plea agreement.

Fourteen years later, Congress enacted the Mandatory Victim Restitution Act of 1996 (MVRA), Pub. L. No. 104-132, § 204(a), 110 Stat. 1227 (1996) (codified as amended at 18 U.S.C. § 3663A), which generally requires full restitution for all Title 18 criminal cases, including cases involving non-Title 26 tax-related charges under 18 U.S.C. §§ 286, 287, 371, and 1001.

United States Sentencing Guidelines Section 5E1.1 provides for restitution in all criminal cases, either as a part of the sentence or as a condition of probation or supervised release, depending on the type of offense. Although the Guidelines are now advisory, *see United States v. Booker*, 543 U.S. 220, 246, 259-60 (2005); *United States v. Frith*, 461 F.3d 914, 919 n.2 (7th Cir. 2006), the change from mandatory to advisory sentencing guidelines generally did not affect the rules relating to restitution. *See, e.g., United States v. Bonner*, 522 F.3d 804, 806-08 (7th Cir. 2008); *United States v. Farrington*, 499 F.3d 854, 861 (5th Cir. 2007); *United States v. Gordon*, 393 F.3d 1044, 1051 n.2 (9th Cir. 2004).

Accordingly, in tax cases, the applicable statutes provide the following: (1) for tax offenses prosecuted under Title 18, restitution is mandatory and is ordered as an independent part of the sentence; and (2) for tax offenses prosecuted under Title 26, restitution is discretionary and is ordered as a condition of supervised release, but the defendant can agree to (and plea agreements should provide for) restitution ordered as an independent part of the sentence.

Section 209 of the Mandatory Victims Restitution Act mandates that when negotiating plea agreements, prosecutors must give consideration “to requesting that the defendant provide full restitution to all victims of all charges contained in the indictment or information, without regard to the counts to which the defendant actually plead[s].” Pub. L. No. 104-132 § 209; 18 U.S.C. § 3551 note; *see also* Attorney General Guidelines for Victim and Witness Assistance, Art. V(D) (May 2012); Principles of Federal Prosecution, USAM §§ 9-16.320. To assist prosecutors with this statutory and Department requirement, standard language for the restitution portion of plea agreements in tax cases is included in § 44.09, *infra*.

## 44.02 AUTHORITY TO ORDER RESTITUTION

### 44.02[1] *The Victim and Witness Protection Act (Title 18 Offenses (including criminal tax cases) and Plea Agreements)*

The Victim and Witness Protection Act of 1982 (VWPA), Pub. L. No. 97-291, 96 Stat. 1248, empowers courts, in certain instances, to impose restitution as a separate and independent part of a sentence rather than as a special condition of probation or supervised release. *See* 18 U.S.C. §§ 3663, 3664; *United States v. Minneman*, 143 F.3d 274, 284 (7th Cir. 1998); *United States v. Martin*, 128 F.3d 1188, 1190 (7th Cir. 1997); *United States v. Helmsley*, 941 F.2d 71, 101 (2d Cir. 1991). “The purpose of restitution under the VWPA is ‘to ensure that wrongdoers, to the degree possible, make their victims whole.’”<sup>1</sup> *United States v. Patty*, 992 F.2d 1045, 1050 (10th Cir. 1993) (quoting *United States v. Rochester*, 898 F.2d 971, 983 (5th Cir. 1990)); *see United States v. Louper-Morris*, 672 F.3d 539, 566 (8th Cir. 2012); *Hughey v. United States*, 495 U.S. 411, 416 (1990); *United States v. Innarelli*, 524 F.3d 286, 293-94 (1st Cir. 2008); *United States v. Serawop*, 505 F.3d 1112, 1123-24 (10th Cir. 2007); *United States v. Brock-Davis*, 504 F.3d 991, 998 (9th Cir. 2007); *United States v. Milstein*, 481 F.3d 132, 136 (2d Cir. 2007); *United States v. Gordon*, 393 F.3d 1044, 1052-53 (9th Cir. 2004); *United States v. Simmonds*, 235 F.3d 826, 831, 833 (3d Cir. 2000) (purpose of restitution is to make victims whole, to restore victims to their original state of well-being).

In enacting the VWPA, Congress “strove to encourage greater use of a restitutionary remedy.” *United States v. Vaknin*, 112 F.3d 579, 582-83, 587 (1st Cir. 1997) (discussing history of restitution back to the Code of Hammurabi and the Old Testament); *see Minneman*, 143 F.3d at 284-85; *Martin*, 128 F.3d at 1190 (VWPA designed to ensure that courts do not relegate victim restitution to “an occasional afterthought”) (citations omitted). The VWPA authorizes a district court to order that a defendant convicted of, among other offenses, offenses under Title 18 -- including 18

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<sup>1</sup> There is a split in the circuits concerning whether restitution inflicts a criminal punishment and is therefore punitive. *Compare United States v. Perez*, 514 F.3d 296, 298 (3d Cir. 2007) (restitution is a criminal penalty), and *United States v. Cohen*, 459 F.3d 490, 496 (4th Cir. 2006) (although restitution allows victims to recover losses that might be available in civil litigation, restitution is part of a criminal defendant’s sentence), *with United States v. Serawop*, 505 F.3d 1112, 1122-23 & n.4 (10th Cir. 2007) (MVRA does not inflict criminal punishment and is not punitive; collecting cases discussing circuit split).

U.S.C. §§ 286, 287, 371, and 1001 -- make restitution to victims of the offense. 18 U.S.C. § 3663; see *Helmsley*, 941 F.2d at 101.

The United States and its agencies, including the Internal Revenue Service (IRS), may qualify as victims under the VWPA (and the MVRA). See, e.g., *United States v. Schmidt*, 675 F.3d 1164, 1167 (8th Cir. 2012); *United States v. Leahy*, 464 F.3d 773, 793 (7th Cir. 2006); *United States v. Senty-Haugen*, 449 F.3d 862, 865 (8th Cir. 2006) (MVRA definition of victim same as VWPA, IRS is eligible victim under MVRA); *United States v. Ekanem*, 383 F.3d 40, 42-44 (2d Cir. 2004); *United States v. Butler*, 297 F.3d 505, 518 (6th Cir. 2002) (approving order to pay restitution to the IRS); *United States v. Lincoln*, 277 F.3d 1112, 1114 (9th Cir. 2002); *United States v. Tucker*, 217 F.3d 960, 962 (8th Cir. 2000); *Minneman*, 143 F.3d at 284; *Vaknin*, 112 F.3d at 591; *Martin*, 128 F.3d at 1190-92; see also *United States v. Kirkland*, 853 F.2d 1243, 1246 (5th Cir. 1988) (upholding restitution order to the Farmers Home Administration); *United States v. Sunrhodes*, 831 F.2d 1537, 1545-46 (10th Cir. 1987) (quoting *United States v. Ruffen*, 780 F.2d 1493, 1496 (9th Cir. 1986)) (upholding restitution order to Indian Health Service); but see *United States v. Ubakanma*, 215 F.3d 421, 427-28 & n.6 (4th Cir. 2000) (reversing restitution ordered payable to the United States government where real victim was located in the United Arab Emirates; discussing necessity to identify victim).

Under the VWPA, prior to ordering restitution, the district court must consider a number of factors.<sup>2</sup> Those factors include the amount of loss, the defendant's financial resources, the financial needs and earning ability of the defendant and his or her dependents, and any such other factors the court deems appropriate. 18 U.S.C. § 3663(a)(1)(B)(i); see *United States v. Caldwell*, 302 F.3d 399, 420 (5th Cir. 2002); *Weinberger v. United States*, 268 F.3d 346, 356 (6th Cir. 2001) (vacating restitution order because district court did not consider all factors necessary under VWPA); *United States v. Ben Zvi*, 242 F.3d 89, 100 (2d Cir. 2001) (defendant's limited financial resources at time of imposition of sentence not dispositive, particularly where defendant has reasonable potential for future earnings; in absence of showing by defendant of restricted future earnings potential, district court may reasonably presume future

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<sup>2</sup> There is no constitutional requirement that a jury find beyond a reasonable doubt the facts needed by the district court in order to impose restitution. *United States v. Dupes*, 513 F.3d 338, 345-46 (2d Cir. 2008) (quoting *United States v. Reifler*, 446 F.3d 65, 116 (2d Cir. 2006)).

earnings); *United States v. Lawrence*, 189 F.3d 838, 848 (9th Cir. 1999) (while district court is not required to make express finding concerning ability to pay, the court must consider the information and “cannot completely defer to the monitoring capabilities of the probation officer”); *United States v. Wells*, 177 F.3d 603, 611 (7th Cir. 1999) (court can consider likelihood that defendant will acquire resources in future and defendant's entrepreneurial talents).

If the district court does not provide detailed findings, the court runs the risk that the court of appeals may remand the restitution order as based on “inadequate explanation and insufficient reasoning.” *United States v. Menza*, 137 F.3d 533, 538 (7th Cir. 1998); see *United States v. Butler*, 297 F.3d 505, 519 (6th Cir. 2002) (district court did not explain restitution order; court must consider factors set forth in 18 U.S.C. § 3664 and explain why they are or are not relevant).

#### ***44.02[2] The VWPA and Plea Agreements***

The VWPA also provides that district courts may order restitution “in any criminal case to the extent agreed to by the parties in a plea agreement.” 18 U.S.C. § 3663(a) (3). Thus, as part of a plea agreement in *any* criminal case (including pure Title 26 criminal tax cases), a defendant may agree to pay restitution. 18 U.S.C. § 3663(a)(3); see *United States v. Anderson*, 545 F.3d 1072, 1077-78 (D.C. Cir. 2008); *United States v. Firth*, 461 F.3d 914, 920 (7th Cir. 2006). In order for the district court to order restitution agreed to in a plea agreement, however, the plea agreement must clearly contemplate such an order. See *United States v. Gottesman*, 122 F.3d 150, 151-52 (2d Cir. 1997). As the Second Circuit put it in *Gottesman*, “[n]ot to put too fine a point on it (as Snagsby was wont to say in *Bleak House*), it would seem self-evident that for a court to order restitution under § 3663(a)(3), the plea agreement might be expected to mention the word ‘restitution.’” 122 F.3d at 151-52.

#### ***44.02[3] The Mandatory Victim Restitution Act (Title 18 Offenses, including certain criminal tax cases)***

The Mandatory Victim Restitution Act of 1996 (“MVRA”), Pub. L. No. 104-132, § 204(a), 110 Stat. 1227 (1996) (codified as amended at 18 U.S.C. § 3663A), discards the discretionary balancing system of the VWPA and makes restitution for certain crimes, including certain tax crimes under Title 18, mandatory. See *United States v. Turner*, 718 F.3d 226, 235-36 (3d Cir. 2013); *United States v. Lessner*, 498 F.3d 185, 201 (3d Cir.

2007); *United States v. Newman*, 144 F.3d 531, 537-38 (7th Cir. 1998); *United States v. Williams*, 128 F.3d 1239, 1241 (8th Cir. 1997). As 18 U.S.C. 3663A(a)(1) states, “the court *shall order*, in addition to . . . any other penalty authorized by law, that the defendant make restitution to the victim of the offense . . . .” (emphasis added). See *United States v. Serawop*, 505 F.3d 1112, 1118 (10th Cir. 2007); *United States v. Gordon*, 393 F.3d 1044, 1048 (9th Cir. 2004). Under the MVRA, the court may not consider the defendant’s economic circumstances or ability to pay when ordering mandatory restitution. See *Serawop*, 505 F.3d at 1118; *United States v. Corley*, 500 F.3d 210, 224-25 (3d Cir. 2007), *reversed on other grounds* at 553 U.S. 303 (2009).

The offenses to which the MVRA applies include (1) crimes of violence, as defined in Section 16; (2) offenses against property, including any offense committed by fraud or deceit; and (3) offenses as described in Section 1365. The offense must also be one in which an identifiable victim (or victims) has suffered a physical injury or pecuniary loss. 18 U.S.C. § 3663A(c)(1)(B). The MVRA and the VWPA are identical in all important respects, and, when interpreting the MVRA, one may look to and rely on cases interpreting the VWPA as precedent. See *Serawop*, 505 F.3d at 1118; *United States v. Brock-Davis*, 504 F.3d 991, 996 (9th Cir. 2007); *Gordon*, 393 F.3d at 1048; *United States v. Dickerson*, 370 F.3d 1330, 1338 (11th Cir. 2004); *United States v. Randle*, 324 F.3d 550, 555-56 & nn.2-3 (7th Cir. 2003).<sup>3</sup>

Although the MVRA does not apply to criminal violations of Title 26, the MVRA does apply to criminal tax cases involving violations of Title 18, when the offenses are committed by fraud or deceit and are offenses against property, such as conspiracy to defraud the United States or to commit tax fraud, in violation of 18 U.S.C. § 371, or mail fraud, in violation of 18 U.S.C. § 1341. See *United States v. Turner*, 718 F.3d 226, 235-36 (3d Cir. 2013) (holding that MVRA required sentencing court to order restitution in case involving *Klein* conspiracy); *United States v. Senty-Haugen*, 449 F.3d 862, 865 (8th Cir. 2006) (district court properly ordered defendant convicted of conspiracy to defraud the government to pay restitution to the IRS); *United States v. Kubick*, 205 F.3d 1117,

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<sup>3</sup> There are exceptions to the MVRA’s mandate that sentencing courts order restitution. The MVRA provides that a court is not obligated to order restitution if it finds that (1) “the number of identifiable victims is so large as to make restitution impractical” or (2) “determining complex issues of fact related to the cause or amount of the victim’s losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.” 18 U.S.C. § 3663A(c)(3). See *Serawop*, 505 F.3d at 1124-25 (district court could have left complex matters to civil determination).

1128-29 (9th Cir. 1999) (mandatory restitution ordered on convictions for conspiracy to commit bankruptcy fraud and conspiracy to impede and impair the Internal Revenue Service, each in violation of 18 U.S.C. § 371); *United States v. Bonner*, 522 F.3d 804, 808 (7th Cir. 2008) (mail fraud against Social Security Administration); *United States v. Cheal*, 389 F.3d 35, 46-47 (1st Cir. 2004) (mail and wire fraud); *United States v. Boyd*, 239 F.3d 471, 471-72 (2d Cir. 2001) (same).

The term “‘offense against property’ applies to those offenses in which physical or tangible property, including money, is taken (or attempted to be taken) by theft, deceit or fraud.” *United States v. Cummings*, 189 F. Supp. 2d 67, 73 (S.D.N.Y. 2002); *see Dickerson*, 370 F.3d at 1336 n.12 (wire fraud is an offense against property). In *United States v. Turner*, 718 F.3d 226 (3d Cir. 2013), the Third Circuit held that the defendant’s “conspiracy to defraud the IRS of its property, [defendant’s] tax dollars, in violation of 18 U.S.C. § 371, is an ‘offense against property under this title [title 18],’ and consequently covered by the MVRA.” 718 F.3d at 236; *see also United States v. Meredith*, 685 F.3d 814, 827 (9th Cir. 2012) (applying MVRA to conspiracy to defraud the IRS in violation of 18 U.S.C. § 371). Mandatory restitution has also been ordered in cases involving false claims against the United States, in violation of 18 U.S.C. § 287. *See United States v. Jones*, 289 F.3d 1260, 1263-64 (11th Cir. 2002) (defendant filed false tax returns on behalf of a number of third parties). Offenses against property may also include wire fraud, bankruptcy fraud, and offenses involving stolen property. *See United States v. Myers*, 198 F.3d 160, 168-69 (5th Cir. 1999); *United States v. Stanelle*, 184 F. Supp. 2d 854, 857 (E.D. Wis. 2002). The MVRA may also apply to offenses involving purely financial losses. *See United States v. Overholt*, 307 F.3d 1231, 1253-54 (10th Cir. 2002) (collecting cases); *United States v. Sapoznik*, 161 F.3d 1117, 1121-22 (7th Cir. 1998).

Under the MVRA, the district court must establish a payment schedule and cannot delegate this judicial function to the probation office or the Bureau of Prisons. *See Ward v. Chavez*, 678 F.3d 1042, 1049 (9th Cir. 2012); *United States v. Kyles*, 601 F.3d 82, 87-88 (2d Cir. 2010); *Corley*, 500 F.3d at 224-25 (district court cannot delegate determining payment schedule to Bureau of Prisons Inmate Financial Responsibility Program, even if it makes practical sense); *Lessner*, 498 F.3d at 202; *United States v. Day*, 418 F.3d 746, 761 (7th Cir. 2005) (where evidence indicated that defendant could not make immediate payments toward restitution, order that restitution was payable immediately constituted an impermissible delegation of judicial authority to probation officer).

When establishing the payment schedule, the district court must consider a defendant's financial resources and ability to pay. 18 U.S.C. § 3664(f)(1)(A); *see Lessner*, 498 F.3d at 202 (where record indicates court's consideration of the defendant's financial situation -- even without express findings -- requirements of Section 3664(f)(2) are met); *United States v. Ahidley*, 486 F.3d 1184, 1191-93 (10th Cir. 2007) (statute expressly instructs court to consider defendant's financial resources; although extensive remarks are not necessary, it is plain error not to consider financial resources); *Day*, 418 F.3d 746.

#### ***44.02[4] Conditions of Supervised Release or Probation (Criminal Tax Cases)***

Although neither § 3663 (VWPA) nor § 3663A (MVRA) provides for restitution as an independent part of the sentence for offenses under Title 26, *see United States v. Hoover*, 175 F.3d 564, 569 (7th Cir. 1999); *United States v. Joseph*, 914 F.2d 780, 783-84 (6th Cir. 1990), a combination of statutes, when read together, allows district courts to order restitution for Title 26 offenses as a condition of supervised release or probation.<sup>4</sup>

The probation statute, 18 U.S.C. § 3563(b), authorizes district courts to order a defendant to pay restitution as a discretionary condition of probation. The supervised release statute, 18 U.S.C. § 3583(d), authorizes district courts to impose as a condition of supervised release, “any condition set forth as a discretionary condition of probation in section 3563(b).” The text of § 3563(b) provides that a district court may order the defendant to “make restitution to a victim of the offense under section 3556 (but not subject to the limitation of section 3663(a) or 3663A(c)(1)(A).” This language makes clear that restitution ordered as a condition of probation or supervised release is available for offenses not covered by §§ 3663(a) and 3663A(c)(1)(A). Section 3556 authorizes a district court to “order restitution in accordance with section 3663,” which in turn provides that a court “may order . . . that the defendant make restitution to any victim of such offense.” And although § 3663 by its own terms limits restitution to certain (non-Title 26) offenses, § 3563(b) expressly provides that § 3663's limitation in scope does not apply to restitution as a condition of probation (or, accordingly, as a condition of supervised release). *See United States v. Perry*, 714 F.3d 570, 577 (8th Cir. 2013); *United States v. Batson*, 608 F.3d 630, 633-37 (9th Cir. 2010); *United States v. Frith*,

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<sup>4</sup> If provided for in a plea agreement, a district court can order restitution for Title 26 offenses as an independent part of the sentence. *See* § 44.02[2], *supra*.

461 F.3d 914, 919-20 (7th Cir. 2006) (discussing Title 15 offenses); *United States v. Butler*, 297 F.3d 505, 518 (6th Cir. 2002); *United States v. Bok*, 156 F.3d 157, 167 (2d Cir. 1998); *United States v. Daniel*, 956 F.2d 540, 543-44 (6th Cir. 1992); *United States v. Helmsley*, 941 F.2d 71, 101 (2d Cir. 1991); *United States v. Comer*, 93 F.3d 1271, 1278 (6th Cir. 1996).

A court's authority to order restitution for Title 26 offenses as a condition of probation or supervised release is explicitly recognized in the Sentencing Guidelines, which prescribe the use of that authority. *See* USSG § 5E1.1(a)(2); *Gall v. United States*, 21 F.3d 107, 109-10 (6th Cir. 1994).

Generally, under § 5E1.1(a)(2), when a defendant has been found guilty after a trial of a tax crime under Title 26 and a court finds that the government has suffered a loss, the defendant should be ordered to make restitution as a condition of supervised release. *See* USSG § 5E1.1(a)(2). Of course, after *United States v. Booker*, 543 U.S. 220, 246, 259-60 (2005), section 5E1.1 is advisory. *See Frith*, 461 F.3d at 919 n.2.

If the sentencing court does not order restitution, it should state on the record its reasons for not imposing restitution. *See* 18 U.S.C. §§ 3663 and 3664. Section 5E1.1(b)(2) provides that restitution need not be ordered if the district court finds that (1) “the number of identifiable victims is so large as to make restitution impracticable,” or (2) “determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.”

After the period of supervised release or probation expires, the government may continue collection of the amount of restitution ordered to be paid as a condition of supervised release. Under 18 U.S.C. § 3664(m)(1)(A), “[a]n order of restitution may be enforced by the United States in the manner provided for in subchapter C of chapter 227 and subchapter B of chapter 229 of this title; or by all other available and reasonable means.”<sup>5</sup> Subchapter B of chapter 229 of Title 18 includes 18 U.S.C. § 3613, which allows the government a 20-year period to enforce monetary judgments (such as a

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<sup>5</sup> Before 1996, a slightly narrower version of this provision was contained in 18 U.S.C. 3663(h), which provided that an order of restitution could be enforced by the United States “(A) in the manner provided for the collection and payment of fines in subchapter B of chapter 229 of this title; or (B) in the same manner as a judgment in a civil action.” *See* AEDPA, Pub.L. 104-132, 110 Stat. 1214, § 205(a)(2) (deleting 3663(h) and creating 3664(m)).

restitution orders). See *United States v. Young*, 593 F.3d 773, 774 (8th Cir. 2010) (Garnishment after term of supervised release was appropriate because the obligation to pay restitution did not terminate when supervised release ended); *United States v. Sloan*, 505 F.3d 685, 693 (7th Cir. 2007) (restitution ordered as condition of probation; after probation period expired, government sought continuing garnishment order to protect its interests); *United States v. Ridgeway*, 489 F.3d 732, 738 (5th Cir. 2007) (“The limitation provisions in 18 U.S.C. § 3663(f)(1)-(3) only limit when [restitution] payments are due, not when they can be collected.”); *FDIC v. Dover*, 453 F.3d 710, 715 (6th Cir. 2006); *United States v. Berardini*, 112 F.3d 606, 611 (2d Cir. 1997); *United States v. Rostoff*, 164 F.3d 63, 66-68 & n.7 (1st Cir. 1999); *United States v. Fuentes*, 107 F.3d 1515, 1533 n.33 (11th Cir. 1997) (dicta); *United States v. House*, 808 F.2d 508, 511 (7th Cir. 1986) (under the predecessor to Section 3663).

As the First Circuit explained in *Rostoff*, “[t]his reasoning reflects the approach . . . that the VWPA should be read to protect victims and not defendants.” 164 F.3d at 66 (citing *House*, 808 F.2d at 508); *United States v. Keith*, 754 F.2d 1388, 1393 (9th Cir. 1985); see also 1982 U.S.C.C.A.N. 2515, 2515 (“The purpose of [the VWPA] is to strengthen existing legal protections for victims and witnesses of Federal crimes.”); *id.* at 2537 (uncertainties in damages determinations should be resolved with “a view toward achieving fairness to the victim”). A contrary rule would provide “defendants an incentive to ‘run[ ] out the clock in the fourth quarter of play’ rather than to redress their wrongs.” *Rostoff*, 164 F.3d at 67 (citation omitted). Moreover, the fact that the last payment of restitution is due at the end of the period of supervised release has nothing to do with the duration or expiration of the restitution order. See *id.* 66-67 & n.7; *House*, 808 F.2d at 511 (7th Cir. 1986) (rejecting government’s confession of error); *Keith*, 754 F.2d at 1393. “Common sense dictates that failure to pay at the time due renders payment overdue; it does not abate the obligation entirely.” *Rostoff*, 164 F.3d at 66 (citing *United States v. Soderling*, 970 F.2d 529, 535 & n.12 (9th Cir. 1992) (noting that a restitution order is “extinguished only by satisfaction, not by the passage of time”)).

#### ***44.02[5] Civil Assessments Based on Criminal Restitution Orders***

As of August 16, 2010, the IRS can use a restitution order in a criminal tax case as the basis for a civil tax assessment. See 26 U.S.C. § 6201(a)(4). The IRS can make the assessment as soon as any criminal appeals have concluded. See 26 U.S.C.

§ 6201(a)(4)(B). The defendant may not challenge the amount of an assessment based on a criminal restitution order. See 26 U.S.C. § 6201(a)(4)(C).

The IRS had previously taken the position that interest under 26 U.S.C. § 6601 accrued on restitution-based assessments from the last date prescribed for payment of the tax liability that is the subject of the restitution-based assessment to the date that the IRS receives full payment. In *Klein v. Comm'r*, 149 T.C. No. 15 (Oct. 3, 2017), the Tax Court held that interest under 26 U.S.C. § 6601 does *not* accrue on restitution-based assessments made pursuant to 26 U.S.C. § 6201(a)(4). Accordingly, prosecutors should seek to include Title 26 interest as part of the restitution order. See § 44.09, *infra*, for form plea language.

The IRS's ability to use restitution orders as the basis for civil assessments increases the enforcement and collection options available. In order to ensure that the IRS is able to properly assess the restitution amount, prosecutors should make sure that the court's restitution order includes a detailed breakdown of the loss amount, including the loss attributable to each tax year at issue and the names of any third-party taxpayers. See § 44.09, *infra*, for a form plea agreement.

#### **44.03 CALCULATION OF AMOUNT OF RESTITUTION**

##### **44.03[1] Actual Loss**

In any criminal tax case, prosecutors should exercise care in determining the amount of the loss suffered by the IRS. The VWPA provides guidance regarding the calculation of the amount of restitution to be ordered. See *Hughey v. United States*, 495 U.S. 411, 418 (1990); *United States v. Minneman*, 143 F.3d 274, 284-85 (7th Cir. 1998); *United States v. Mullins*, 971 F.2d 1138, 1146-47 (4th Cir. 1992).<sup>6</sup> The VWPA provides that "in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense," the restitution order may require return of the property or, if that

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<sup>6</sup> The determination of the amount of restitution imposed as a condition of supervised release for Title 18 offenses is governed by the rules set forth in the VWPA. See U.S.S.G. §5E1.1; *Gall v. United States*, 21 F.3d 107, 110-11 (6th Cir. 1996) (restitution imposed as a condition of supervised release must still be imposed in conformity with VWPA; vacating restitution ordered pursuant to guilty plea that did not mention restitution for losses arising from mere allegations of crimes for which defendant was not convicted); *United States v. Daniel*, 956 F.2d 540, 543 (6th Cir. 1992); *United States v. Husky*, 924 F.2d 223, 226 n.4 (11th Cir. 1991) (section 5E1.1 provides that restitution shall be ordered in accordance with the VWPA).

is impossible, impractical, or inadequate, payment of an amount equal to "the value of the property on the date of sentencing." 18 U.S.C. § 3663(b)(1). In a criminal tax case, the offense generally results in the loss of government property, to wit, the money to which the government was entitled under the tax laws but which was not paid by the defendant.<sup>7</sup> See *Pasquantino v. United States*, 544 U.S. 349, 355-56 (2005) (unpaid tax constituted property under the wire fraud statute); *United States v. Porcelli*, 865 F.2d 1352, 1358, 1360 (2d Cir. 1989) (obligation to pay New York State tax on gasoline sales likened to chose in action); *United States v. Pierce*, 224 F.2d 158, 165-66 (2d Cir. 2000); *United States v. Helmsley*, 941 F.2d 71, 94 (2d Cir. 1991) (necessary property interest existed in unpaid New York State income and corporate franchise taxes); *Freeman v. Mayer*, 253 F.2d 295, 298 (3d Cir. 1958) (term "choses in action" includes ordinary debts for taxes); see also *United States v. Yusuf*, 536 F.3d 178, 189 (3d Cir. 2008) (unpaid United States Virgin Islands' gross receipts tax constituted proceeds of mail fraud).

For purposes of determining the amount of restitution, Section 3663(a)(1)(A) requires a showing of actual loss. See *United States v. Chalupnik*, 514 F.3d 748, 754 (8th Cir. 2008); *United States v. Galloway*, 509 F.3d 1246, 1253 (10th Cir. 2007) (restitution must be based on actual loss, not on the amount of gain to the defendant); *United States v. Germosen*, 139 F.3d 120, 130 (2d Cir. 1998). Restitution in a criminal case may only compensate a victim for actual losses caused by the defendant's criminal conduct. See *United States v. Serawop*, 505 F.3d 1112, 1124 (10th Cir. 2007) (district court that orders restitution in an amount greater than the total loss caused by the offense exceeds its statutory jurisdiction and imposes illegal sentence); *United States v. Brock-Davis*, 504

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<sup>7</sup> In *United States v. Touchet*, 658 F.2d 1074, 1076 (5th Cir. 1981), the Fifth Circuit, relying on *United States v. Taylor*, 305 F.2d 183 (4th Cir. 1962), a Fourth Circuit case interpreting language in the now-repealed Probation Act, 18 U.S.C. 3651, stated that "[u]ntil there has been a definitive determination or adjudication of the amount of taxes Touchet owes, he may not be required to pay charged deficiency sums as a prerequisite of probation or as a condition for release from custody." See *United States v. Stuver*, 845 F.2d 73, 76 (4th Cir. 1988) (noting that the result in *Taylor* was predicated on language in the Probation Act). The law under which restitution is currently imposed contains different language. The Fourth Circuit now allows restitution to be imposed as a condition of supervised release in a tax case without satisfaction of the conditions identified in *Taylor*. See *United States v. Lewis*, 235 F.3d 215, 219 (4th Cir. 2000) (although it vacated the restitution order because the district court "did not make any factual findings as to the proper amount of restitution or as to Lewis' ability to pay," court of appeals recognized that a district court has the authority to impose restitution as a condition of supervised release in a tax case); *United States v. Long*, No. 94-5029, 1995 WL 703548, at \*1 (4th Cir. 1995) (district courts can now impose restitution as a condition of supervised release in tax cases "without having to satisfy *Taylor*"); see also *United States v. Butler*, 297 F.3d 505, 518 (6th Cir. 2002). And in *United States v. Nolen*, 523 F.3d 331, 333 (5th Cir. 2008), the Fifth Circuit made clear that "under the current statutory scheme, restitution may be imposed if done so as a condition of supervised release in a criminal tax case, even in the absence of a prior definitive determination or adjudication of the amount of taxes owed . . . ."

F.3d 991, 998 (9th Cir. 2007); *United States v. Gaytan*, 342 F.3d 1010, 1011 (9th Cir. 2003); *United States v. Bussell*, 414 F.3d 1048, 1061 (9th Cir. 2005) (reversing restitution order based on intended loss because amount of restitution is limited by the victim's actual loss; directing district court on remand to compare what actually happened with what would have happened if defendant had acted lawfully).

#### **44.03[2] Loss underlying the offense of conviction**

##### **44.03[2][a] General Rule**

Generally, the amount of restitution is limited to losses caused by the specific conduct underlying the offense of conviction, and does not include relevant conduct.<sup>8</sup> See *Hughey*, 495 U.S. at 420; *United States v. Batson*, 608 F.3d 630, 637 (9th Cir. 2010); *United States v. Nolen*, 523 F.3d 331, 332-33 (5th Cir. 2008); *United States v. Wright*, 496 F.3d 371, 381-82 (5th Cir. 2007); *United States v. Firth*, 461 F.3d 914, 920 (7th Cir. 2006); *United States v. Inman*, 411 F.3d 591, 595 (5th Cir. 2005) (remanding restitution order on plain error review where the amount of restitution was not limited to the conduct underlying the offense for which defendant was convicted); *Germosen*, 139 F.3d at 131; *United States v. Campbell*, 106 F.3d 64, 69-70 (5th Cir. 1997) ("relevant conduct" provisions of guidelines are inapplicable to determination of amount of restitution); *United States v. Daniel*, 956 F.2d 540, 543 (6th Cir. 1992).

##### **44.03[2][b] Scheme, Conspiracy, or Pattern**

However, when the count of conviction includes a scheme, conspiracy, or pattern of criminal activity as an element of the offense, as in a conspiracy to defraud, in violation of 18 U.S.C. § 371, or mail fraud, in violation of 18 U.S.C. § 1341, the restitution order may include losses caused by acts of related conduct for which the defendant was not convicted. 18 U.S.C. § 3663(a)(2); see *United States v. Foley*, 508 F.3d 627, 635-36 (11th Cir. 2007) (restitution amount properly included acquitted conduct; district court could award restitution to any victim of the scheme furthered by the defendant's mail fraud offense); *Brock-Davis*, 504 F.3d at 998-99 (restitution may be ordered for losses to persons harmed in the course of the defendant's scheme even

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<sup>8</sup> There are exceptions to this general rule, which will be discussed further below. Also, a plea agreement can (and should) provide for restitution as to all of the government's loss, including loss caused by relevant conduct.

beyond the counts of conviction); *United States v. Farrington*, 499 F.3d 854, 860-61 (8th Cir. 2007) (restitution may be ordered in wire fraud case for criminal conduct part of a broad scheme to defraud regardless of whether the defendant is convicted of each fraudulent act in the scheme); *Wright*, 496 F.3d at 381-82 (where fraudulent scheme is element of offense, court may award restitution for actions pursuant to that scheme; restitution limited to specific temporal scope of indictment) (quoting *Inman*, 411 F.3d at 595); *United States v. Gordon*, 480 F.3d 1205, 1211 (10th Cir. 2007); *United States v. Dickerson*, 370 F.3d at 1339, 1342-43 (district court may include in restitution order losses caused by acts outside the statute of limitations, when losses resulted directly from criminal conduct in course of the scheme and losses are closely related to the scheme) (citing *United States v. Welsand*, 23 F.3d 205, 206-07 (8th Cir. 1994)); *United States v. Lawrence*, 189 F.3d 838, 847-48 (9th Cir. 1999) (district court found that acts underlying bankruptcy fraud charges were part of overall scheme alleged in mail fraud count).

A defendant in a conspiracy may be held liable for all reasonably foreseeable losses caused to the victims by the conspiracy. *See United States v. Cohen*, 459 F.3d 490, 500 (4th Cir. 2006) (court properly ordered defendant to pay restitution to all victims of the offense even if the defendant did not expressly admit to each and every overt act alleged in support of the conspiracy); *United States v. Solares*, 236 F.3d 24, 26 (1st Cir. 2000); *United States v. Boyd*, 222 F.3d 47, 50-51 (2d Cir. 2000) (jury acquitted defendant on conspiracy charge but convicted defendant on substantive counts on theory of coconspirator liability under *Pinkerton v. United States*, 328 U.S. 640 (1946); not plain error for district court to require defendant to pay restitution for losses that were reasonably foreseeable; VWPA allows courts to order conspirator to pay restitution even on uncharged or acquitted counts; collecting cases); *United States v. Collins*, 209 F.3d 1, 2-3 (1st Cir. 1999) (defendant convicted of conspiracy responsible for all reasonably foreseeable losses caused in the course of defendant's criminal conduct, whether defendant is convicted of each offense); *United States v. Nichols*, 169 F.3d 1255, 1278 (10th Cir. 1999); *United States v. Hensley*, 91 F.3d 274, 276-77 (1st Cir. 1996); *see also United States v. Mann*, 493 F.3d 484, 498 (5th Cir. 2007) (court can include in restitution amount all losses caused by scheme when defendant is convicted of scheme to defraud); *but see United States v. Wright*, 496 F.3d at 382 (error to award restitution for losses unconnected to scheme of conviction); *United States v. Davenport*, 445 F.3d 366, 373-74 (4th Cir. 2006) (district court cannot order restitution under MVRA to persons not victims of the offense for which the defendant was convicted); *United States v. Pollak*, 844 F.2d 145, 149-52 (3d Cir. 1988) (a defendant named in counts charging an overall

scheme to defraud may not be required to pay restitution with respect to counts on which he was acquitted).

#### **44.03[3] Interest**

In imposing restitution, a district court may include both prejudgment and postjudgment interest. *See United States v. Perry*, 714 F.3d 570, 577 (8th Cir. 2013) (affirming inclusion of interest in restitution to IRS because the full loss to the victim included the time value of money); *United States v. Jimenez*, 513 F.3d 62, 87 (3d Cir. 2008); *United States v. Gordon*, 393 F.3d 1044, 1058-59 (9th Cir. 2004) (prejudgment interest is necessary to make the victim whole, interpreting MVRA); *Virgin Islands v. Davis*, 43 F.3d 41, 47 (3d Cir. 1994) (prejudgment interest is an aspect of victim's actual loss); *United States v. Patty*, 992 F.2d 1045, 1049 (10th Cir. 1993) (prejudgment interest reflects the victim's loss due to his inability to use the money for a productive purpose and is necessary to make the victim whole); *United States v. Kress*, 944 F.2d 155, 160 (3d Cir. 1991) (postjudgment interest may be included in restitution order); *see also Helmsley*, 941 F.2d at 101 (defendant ordered to pay restitution to government of taxes owed and all penalties and interest thereon; court found that defendant had acquiesced to the amount of restitution in the presentence report). Accordingly, prosecutors should request prejudgment interest in all cases for which restitution is imposed (i.e., in cases involving either Title 18 violations or Title 26 violations). This is especially so because interest does not accrue on the IRS's restitution-based assessment. *See* § 44.02[5], *supra*.

In cases involving the MVRA (i.e., cases involving Title 18 violations), prosecutors may be able to argue that prejudgment interest is mandatory. While the Tax Division is not aware of any cases holding that the MVRA requires the inclusion of prejudgment interest in the restitution amount, there is some authority to support such an argument. The MVRA requires the court to order the defendant to pay the greater of the value of the property on the date of the offense or the value of the property on the date of sentencing. See 18 U.S.C. § 3663A(b). The value of the tax loss on the date of sentencing should include interest. See 26 U.S.C. §§ 6601, 6621. Moreover, 18 U.S.C. § 3664(f)(1)(A) instructs the sentencing court to order "restitution to each victim in the full amount of each victim's losses" (emphasis added). Prosecutors can argue that prejudgment interest accounts for the lost time-value of money and is necessary to make the IRS whole. And the MVRA's emphasis on full compensation for victims suggests that prejudgment interest is appropriate. *See Rodgers v. United States*, 332 U.S. 371,

373-74 (1947) (holding that the test for determining whether interest should be included requires weighing the “relative equities” between the beneficiaries of the obligation and those upon whom it has been imposed); *Davis*, 43 F.3d at 47 (“the inclusion of prejudgment interest . . . is an aspect of the victim’s actual loss which must be accounted for in the calculation of restitution in order to effect full compensation”); *see also Gordon*, 393 F.3d at 1058-59 (9th Cir. 2004) (affirming order requiring defendant to pay prejudgment interest on assets embezzled from his corporate employer); *United States v. Shepard*, 269 F.3d 884, 886 (7th Cir. 2001) (stating that prejudgment interest should be included in restitution due from defendant who embezzled funds from an elderly victim’s interest-bearing account).

#### **44.03[4] Penalties**

As a general rule, the amount of the loss does not include penalties. *See Chalupnik*, 514 F.3d at 754 (amount of restitution is limited to victim’s provable actual loss, even if more punitive remedies would be available in a civil action); *United States v. Bussell, II*, 504 F.3d 956, 964-65 (9th Cir. 2007) (actual loss for restitution purposes is determined by comparing what actually happened with what would have happened if the defendant had acted lawfully (citations omitted)); *Gordon*, 393 F.3d at 1053 (primary and overarching goal of restitution statutes is “to make victims of crime *whole*, to *fully* compensate these victims for their losses and to restore these victims to their original state of well-being” (internal quotation omitted) (emphasis in original)).

An exception applies, however, if the defendant agrees to pay penalties as part of a plea agreement. *See* 18 U.S.C. § 3663(a)(3). In addition, restitution may include penalties in evasion of payment cases and failure to pay cases in which the offense of conviction involved the willful failure to pay penalties. This is because the evasion of the penalties is the goal of the offense, and the victim IRS has accordingly been deprived of those penalties because of the defendant’s criminal conduct.

The Sentencing Guidelines’ treatment of penalties in evasion of payment and failure to pay cases is instructive. The commentary to Guidelines § 1T1.1(c)(1) provides that “[t]he tax loss does not include interest or penalties, except in willful evasion of payment cases under 26 U.S.C. § 7201 and willful failure to pay cases under 26 U.S.C. § 7203.” A number of courts have thus included penalties in the Guidelines tax loss figure in cases involving evasion of payment and willful failure to pay. *See United States v.*

*Black*, 815 F.3d 1048, 1055 (7th Cir. 2016); *United States v. Thomas*, 635 F.3d 13, 16-17 (1st Cir. 2011); *United States v. Josephberg*, 562 F.3d 478, 502-03 (2d Cir. 2009); *United States v. Barker*, 556 F.3d 682 (8th Cir. 2009).

#### **44.03[5] Tax Loss Versus Actual Loss**

The calculation of the amount of loss for purposes of restitution when the IRS is the victim may be closely related to the calculation of the tax loss used to determine a defendant's base offense level. But tax loss under the Sentencing Guidelines is usually the intended loss, while the amount of restitution is always limited to an actual loss. Thus, tax loss may be greater than the amount of restitution. Generally, however, the district court may rely upon the same "quantity and quality of evidence" to determine the amount of loss in both contexts. See *Germosen*, 139 F.3d at 130; *United States v. Copus*, 110 F.3d 1529, 1537 (10th Cir. 1997).

Although the district court has broad discretion to determine the type and amount of evidence to support an award of restitution, the court cannot simply "accept uncritically an amount recommended by the probation office." *United States v. Najjor*, 255 F.3d 979, 984 (9th Cir. 2001) (quoting *United States v. Barany*, 884 F.2d 1255, 1261 (9th Cir. 1989)); see *United States v. Tran*, 234 F.3d 798, 814 (2d Cir. 2000) (it is not enough that district court had before it a PSR including information relevant to factors mandated by 18 U.S.C. § 3364; district court's statement that it reviewed the PSR in detail is not enough to indicate that it considered specific statutory factors in setting restitution payment schedule under MVRA). The court must make an independent determination as to the amount of the loss suffered by the victim as a result of the defendant's conduct. See *Najjor*, 255 F.3d at 984.

#### **44.03[6] Proof of Restitution Amount**

The prosecutor must establish the amount of loss for restitution by a preponderance of the evidence. See *McMillan v. Pennsylvania*, 477 U.S. 79, 97-92 (1986); *Chalupnik*, 514 F.3d at 754; *Brock-Davis*, 504 F.3d at 998; *United States v. DeRosier*, 501 F.3d 888, 896 (8th Cir. 2007); *United States v. Vaghela*, 169 F.3d 729, 736 (11th Cir. 1999); *Minneman*, 143 F.3d at 284-85; *United States v. Vaknin*, 112 F.3d 579, 587 (1st Cir. 1997) (a restitution award "cannot be woven solely from the gossamer strands of speculation and surmise"); *United States v. Boney*, 977 F.2d 624, 636 (D.C. Cir. 1992); *United States v. Lowden*, 955 F.2d 128, 130 (1st Cir. 1992); *United States v.*

*Mullins*, 971 F.2d 1138, 1147 (4th Cir. 1992) (government must establish amount of restitution by preponderance of evidence if amount is disputed).

***44.03[7] District Court Must Determine Amount of Restitution and any Payment Schedule***

The district court must determine the amount of restitution and must state that the defendant is required to pay a sum certain. As a general rule, the district court may not delegate the judicial functions inherent in the grant of restitution to another body such as the probation office or the IRS. Compare *United States v. Corley*, 500 F.3d 210, 224-27 (3d Cir. 2007) (order directing immediate payment when district court knows defendant is indigent is indistinguishable from improper outright delegation of authority to Bureau of Prisons), reversed on other grounds at 533 U.S. 303 (2009); *United States v. Overholt*, 307 F.3d 1231, 1255-56 (10th Cir. 2002) (where district court knew defendant could not pay restitution immediately, court's failure to set appropriate payment schedule essentially delegated court's responsibility to Bureau of Prisons and probation office; collecting cases discussing split in circuits); *Butler*, 297 F.3d at 518 (district court could not order restitution in an amount "To be determined thru tax court or IRS."); *United States v. Pandiello*, 184 F.3d 682, 688 (7th Cir. 1999) (leaving to Inmate Financial Responsibility Program decision as to how much restitution defendant must pay while incarcerated is an improper delegation of judicial authority and constitutes plain error); *United States v. Wells*, 177 F.3d 603, 612 (7th Cir. 1999); *United States v. Kinlock*, 174 F.3d 297, 300 (2d Cir. 1999); *United States v. Mikaelian*, 168 F.3d 380, 390-91 (9th Cir. 1999) (provision that "if the probation officer were to determine that Mr. Mikaelian does not have the ability to make such restitution, the probation officer may make such adjustments in the restitution amount as is [sic] appropriate under the circumstances" invalid); *United States v. Porter*, 41 F.3d 68, 71 (2d Cir. 1994) (order that probation would have discretion to set schedule for payment of restitution improper); *United States v. Braxtonbrown-Smith*, 278 F.3d 1348, 1356 (D.C. Cir. 2002) (court may not allow Probation Office to modify amount of restitution defendant must pay upon release from custody); with *Weinberger v. United States*, 268 F.3d 346, 360 & n.3 (6th Cir. 2001) (under VWPA court may delegate setting of payment schedule so long as court first determines the amount of the restitution; collecting cases and discussing circuit split); but see *United States v. Davis*, 306 F.3d 398 (6th Cir. 2002) (MVRA requires district court to specify payment schedule; court may, however, elicit assistance of others in setting schedule). Note that imposing, as a condition of supervised release, minimum periodic

payments for restitution due and payable immediately has been held not to constitute a payment schedule and not to contradict the requirement that restitution be paid in full immediately. *See United States v. Fariduddin*, 469 F.3d 1111, 1113 (7th Cir. 2006).

When a district court imposes a payment schedule, prosecutors should seek to make clear that such a schedule is a minimum obligation that does not prevent the government from additional collection action. Some courts have held that the existence of a payment schedule prevents additional collection action by the government. *See, e.g., United States v. Martinez*, 812 F.3d 1200, 1204 (10th Cir. 2015). The Tax Division's form plea language, available at § 44.09, *infra*, requires the defendant to agree that the restitution amount is due and payable immediately and is subject to immediate enforcement by the government.

#### ***44.03[8] Amount of Loss Agreed to in Plea Agreement***

The major exception to the general rule that restitution is limited to losses caused by the offense of conviction is in cases involving plea agreements. The VWPA provides that district courts may order restitution "in any criminal case to the extent agreed to by the parties in a plea agreement . . . ." 18 U.S.C. § 3663(a)(3) (emphasis added). Thus, the parties to a plea agreement in any criminal tax case may authorize restitution in an amount greater than the loss attributable to the offense of conviction.<sup>9</sup> *See e.g., United States v. Sloan*, 505 F.3d 685, 695 (7th Cir. 2007); *United States v. Cooper*, 498 F.3d 1156, 1158 (10th Cir. 2007) (party to plea agreement can agree in plea agreement to pay restitution to persons other than the victim of the offense of conviction, 18 U.S.C. § 3663A(a)(2)); *United States v. Blake*, 81 F.3d 498, 506 (4th Cir. 1996); *United States v. Schrimsher*, 58 F.3d 608, 609 (11th Cir. 1995); *United States v. Silkowski*, 32 F.3d 682, 688-89 (2d Cir. 1994); *United States v. Baker*, 25 F.3d 1452, 1457 (9th Cir. 1994). This is sometimes referred to as "heightened restitution." The best practice is to identify in the plea agreement the specific amount of restitution the defendant agrees to pay. Keep in mind that any ambiguity in the plea agreement will be construed against the government. *See, e.g., United States v. Phillips*, 174 F.3d 1074, 1076-77 (9th Cir. 1999).

The parties to a plea agreement may also agree that the court may order restitution to persons other than the victim of the offense. 18 U.S.C. § 3663(a)(1)(A); *see Gordon*,

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<sup>9</sup> In Title 26 cases, plea agreements can (and should) additionally provide that restitution is ordered as an independent part of the sentence and not merely as a condition of supervised release.

480 F.3d at 1211; *Cooper*, 498 F.3d at 1158; *United States v. Firment*, 296 F.3d 118, 122 (2d Cir. 2002); *United States v. Ubakanma*, 215 F.3d 421, 427-28 & n.7 (4th Cir. 2000) (reversing restitution ordered payable to United States, where victim of offense was a specifically named person in the United Arab Emirates and plea agreement did not provide for payment of restitution to persons other than the victim of the offense). When a defendant agrees to pay heightened restitution, the government must still prove that the loss to be repaid resulted from the defendant's criminal conduct. *See Patty*, 992 F.2d at 1050 (heightened restitution agreed to by defendant included amounts and victims not charged in the indictment, but defendant's fraudulent conduct caused losses).

A court may order a defendant to pay restitution to the victim of an offense in excess of the loss that resulted from the offense only up to the amount agreed upon by the parties. *See United States v. Bartsh*, 985 F.2d 930, 933 (8th Cir. 1993); *United States v. Arnold*, 947 F.2d 1236, 1238 (5th Cir. 1991). To permit any restitution beyond that generally allowable, a plea agreement must specifically state both that the defendant will pay restitution and the amount of restitution that the defendant will pay. *See Phillips*, 174 F.3d at 1077; *Weinberger*, 268 F.3d at 356-57; *United States v. Gottesman*, 122 F.3d 150, 152-53 (2d Cir. 1997). If, however, the plea agreement does not provide for heightened restitution in excess of the loss caused by the offense of conviction, the court may still order restitution to any victim, including the IRS, to the extent of the loss caused by the offense of conviction. *See Wienberger*, 268 F.3d at 357; *United States v. Broughton-Jones*, 71 F.3d 1143, 1148 (4th Cir. 1995).

#### **44.03[9] Mandatory Restitution**

The restitution amount under the MVRA is generally the amount of the property taken from the victim. 18 U.S.C. § 3663A(b)(1)(A), (B). The MVRA directs that restitution be ordered to any victims who are "directly and proximately harmed" as a result of the offense of conviction. 18 U.S.C. § 3663A(a)(2). Thus, the district court lacks discretion to consider a defendant's financial circumstances in calculating the restitution amount under the MVRA. *See United States v. Chay*, 281 F.3d 682, 686 (7th Cir. 2002); *United States v. Jones*, 289 F.3d 1260, 1265-66 (11th Cir. 2002).

Even under the MVRA, there are exceptions to the requirement to order restitution. While the MVRA explicitly states that courts "shall order restitution" for certain crimes, both statutory and judicial exceptions to the rule exist. The MVRA

provides that a court is not obligated to order restitution if it finds that (1) "the number of identifiable victims is so large as to make restitution impractical" or (2) "determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process." 18 U.S.C. 3663A(c)(3). See *United States v. Galloway*, 509 F.3d 1246, 1254 (10th Cir. 2007).

One district court created a judicial exception to mandatory restitution when it found that restitution would be "patently absurd." *United States v. Martinez*, 978 F. Supp. 1442, 1453 (D. N.M. 1997). In *Martinez*, the court rejected the argument that an illegally operated casino was entitled to restitution where the defendant was convicted of a crime of violence against it. The court stated that although the MVRA unambiguously states that restitution must be ordered for victims of a crime of violence, "[i]t is intuitively obvious that Congress did not intend to have the federal judiciary take the lead in rewarding, through restitution orders, persons robbed of monies they had obtained by unlawful means . . . ." *Martinez*, 978 F. Supp at 1453.

#### **44.04 LIMITED CIRCUMSTANCES IN WHICH A RESTITUTION ORDER MAY BE MODIFIED**

A restitution order is a final judgment that can only be modified in a limited set of circumstances. See *United States v. Puentes*, 803 F.3d 597, 605-06 (11th Cir. 2015) ("The law is clear that the district court has no inherent authority to modify a sentence; it may do so only when authorized by a statute or rule."). The circumstances under which a restitution order can be modified are listed in 18 U.S.C. § 3664(o). Within 14 days of sentencing, "the court may correct a sentence that resulted from arithmetical, technical, or other clear error" pursuant to Fed. R. Crim. P. 35(a). See 18 U.S.C. § 3664(o)(1)(A). A restitution order may be modified if it is appealed and remanded under 18 U.S.C. § 3742. See 18 U.S.C. § 3664(o)(1)(B). If a victim discovers additional losses after sentencing and petitions the district court, the court may amend the restitution order to include the additional losses "upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief." 18 U.S.C. § 3664(o)(1)(C) (citing § 3664(d)(5)). And the court may modify a defendant's payment schedule upon finding a change in defendant's financial circumstances. See 18 U.S.C. § 3664(o)(1)(D); see also § 44.05, *infra*. Unless one of the provisions identified in 18 U.S.C. § 3664(o) applies, the district court will lack jurisdiction to modify a restitution order after the fact. Of special

note, there is no statutory basis to reduce the amount of restitution ordered payable to the IRS based on a claim that the actual tax loss is less than the restitution ordered. *See United States v. Sloan*, 505 F.3d 685, 697 (7th Cir. 2007); *United States v. Obie*, No. 2:10-cr-20142 (E.D. Mich.).

#### **44.05 CHANGE IN FINANCIAL CIRCUMSTANCES**

Once a court has entered a restitution order, a defendant may experience significant changes in his economic circumstances. *United States v. Overholt*, 307 F.3d 1231, 1256 (10th Cir. 2002). Changes in the economic circumstances of a defendant may also come to the attention of the government. Section 3664 of Title 18 specifically addresses what is to happen in such a situation. The court is to be notified of the change in circumstances and then may adjust the schedule accordingly. Section 3664(k) states:

A restitution order shall provide that the defendant shall notify the court and the Attorney General of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution. The court may also accept notification of a material change in the defendant's economic circumstances from the United States or from the victim. The Attorney General shall certify to the court that the victim or victims owed restitution by the defendant have been notified of the change in circumstances. Upon receipt of the notification, the court may, on its own motion, or the motion of any party, including the victim, adjust the payment schedule, or require immediate payment in full, as the interests of justice require.

Note that while a change in financial circumstances can justify modification of the payment *schedule*, it does not justify modification of the restitution *order*. Restitution orders can only be modified pursuant to the limited circumstances identified in 18 U.S.C. § 3664(o). *See* § 44.04, *supra*.

#### **44.06 DISCHARGE OF RESTITUTION ORDERS IN BANKRUPTCY**

Restitution orders are not subject to discharge in bankruptcy proceedings. 11 U.S.C. §§ 523(a)(7), 1538(a)(3). See *Kelly v. Robinson*, 479 U.S. 36, 52 (1986); *United States v. Ridgeway*, 489 F.3d 732, 737-38 (5th Cir. 2007); *In re Verola*, 446 F.3d 1206, 1207-08 (11th Cir. 2006) (state restitution order not dischargeable); *United States v. Leahy*, 438 F.3d 328, 342 (3d Cir. 2006).

#### **44.07 NO COMPROMISE OF CIVIL TAX LIABILITY**

Prosecutors should remember that, as discussed in Section [44.03](#) above, restitution in criminal tax cases is limited only to losses caused by the criminal conduct of the defendant and generally does not include penalties or amounts of tax related to purely civil items. Therefore, in all criminal tax cases in which a restitution order is contemplated, care should be taken not to compromise the ability of the IRS to attempt to collect the civil tax liability, interest, and penalties. The form plea language located in § 44.09, *infra*, contains language designed to protect the civil liability.

For an example of what can happen when care is not taken to protect the IRS's ability to collect civil tax liability, see *Creel v. Comm'r*, 419 F.3d 1135 (11th Cir. 2005). In *Creel*, the defendant agreed to pay "\$83,830 plus any applicable penalties and interest" for the years 1986 to 1991. 419 F.3d at 1138. Creel paid the full \$83,830, but no interest. *Id.* The United States Attorney's Office (USAO) issued a satisfaction and release of lien that stated that "restitution imposed by the Court . . . having been paid or otherwise settled," the monetary judgment is satisfied. The satisfaction and release of lien also directed that the judgment lien previously recorded should be "fully released, satisfied, discharged, and cancelled" because it had been "paid in full." *Id.* The IRS applied the restitution payments to tax, interest, and penalties for 1986 and part of 1987. After the USAO issued its satisfaction of judgment and release of lien, the IRS attempted to collect tax, interest, and penalties for 1987 through 1991. 419 F.3d at 1138. Creel petitioned the Tax Court, which held that Creel's debt for those years had been settled by the satisfaction and release of lien issued by the USAO. *Id.*, at 1139. The court of appeals affirmed. *Creel*, 419 F.3d at 1141-42.

Use of the standard language for the restitution portion of plea agreements should prevent this type of problem from recurring. See § 44.09, *infra*.

#### ***44.08 THE DAY OF SENTENCING***

Prosecutors should recognize that any number of unusual things can happen on the day of sentencing. A defendant may come to sentencing with completed tax returns. If this happens, the prosecutor should ensure that the special agent takes the returns. The special agent should deliver the returns to IRS Technical Services, Fraud Coordinator (Exam). An important consideration in such an instance is preserving the ability of the IRS to assert the fraud penalty.

A defendant may also show up at sentencing with a large check, wanting to make a payment. The prosecutor and the special agent need to try to determine what exactly it is that the defendant is trying to pay. The defendant may be trying to pay restitution that he or she agreed to pay in a plea agreement. If that is the case, the prosecutor or the special agent should take the check but wait until after the sentencing to find out whether the court actually orders the defendant to pay restitution. For additional guidance on payment, see the form plea language at § 44.09, *infra*.

It is also possible that the defendant may simply want to make a payment on his or her past due tax liabilities in order to demonstrate to the sentencing judge that the defendant is remorseful or has accepted responsibility. In that case, the prosecutor should refer the defendant to the special agent who should take the check and find out from the defendant to what years or periods the defendant wants the money applied. After the sentencing hearing, the special agent should check to see whether a revenue officer or revenue agent has been assigned to the defendant's case. If not, the special agent should deliver the check to Technical Services, Fraud Coordinator (Exam) and ensure that the defendant's account is properly credited.

#### ***44.09 FORM PLEA LANGUAGE AND ADDITIONAL RESOURCES***

##### ***44.09[1] FORM PLEA LANGUAGE***

1. Defendant agrees to pay restitution to the Internal Revenue Service in the total amount of \_\_\_\_\_, pursuant to 18 U.S.C. § 3663(a)(3). [FN 1/]
2. Defendant agrees that the total amount of restitution reflected in this agreement results from Defendant's fraudulent conduct.
3. The total amount of restitution consists of the following: [FN 2/]

Tax Year(s) or Period(s) and Item(s)	Amount to Be Credited to Tax [see footnote 2 about inclusion of interest and penalties]
Total:	

Defendant agrees to pay Title 26 interest on the restitution amount; interest runs from the last date prescribed for payment of the relevant tax liability until the IRS receives payment in full. The government will provide an updated interest figure at sentencing.

4. Defendant agrees that restitution is due and payable immediately after the judgment is entered and is subject to immediate enforcement, in full, by the United States. If the Court imposes a schedule of payments, Defendant agrees that the schedule of payments is a schedule of the minimum payment due, and that the payment schedule does not prohibit or limit the methods by which the United States may immediately enforce the judgment in full. The IRS will use the amount of restitution ordered as the basis for a civil assessment under 26 U.S.C. § 6201(a)(4). Defendant does not have the right to challenge the amount of this restitution-based assessment. *See* 26 U.S.C. § 6201(a)(4)(C). Neither the existence of a restitution payment schedule nor Defendant's timely payment of restitution according to that schedule will preclude the IRS from immediately collecting the full amount of the restitution-based assessment.
5. Defendant is entitled to receive credit for restitution paid pursuant to this plea agreement against those assessed civil tax liabilities due and owing for the same periods for which restitution was ordered. Defendant understands and agrees that the plea agreement does not resolve the Defendant's civil tax liabilities, that the IRS may seek additional taxes, interest and penalties from Defendant relating to the conduct covered by this plea agreement and for conduct relating to another time period, and that satisfaction of the restitution debt does not settle, satisfy, or compromise Defendant's obligation to pay any remaining civil tax liability. Defendant authorizes release of information to the IRS for purposes of making the civil tax and restitution-based assessments.
6. Defendant understands that [ he/she ] is not entitled to credit with the IRS for any payment until the payment is received by the IRS.
7. If full payment cannot be made immediately, Defendant agrees to make a complete and accurate financial disclosure to the IRS on forms prescribed by the IRS (including, but not limited to, IRS Form 433-A and Form 433-B, as appropriate), and

to disclose to the IRS any and all additional financial information and financial statements provided to the probation office. Defendant also agrees to provide the above-described information to the probation office.

8. If Defendant makes a payment of the restitution agreed to in paragraph [3] prior to sentencing, the payment will be applied as a credit against the restitution ordered pursuant to paragraph [3]. [FN 3/]

### **PROVISIONS REGARDING PAYMENT**

10. Defendant agrees to send all payments made pursuant to the court's restitution order to the Clerk of the Court at the following address:

[ insert appropriate address here]

11. With each payment to the Clerk of the Court made pursuant to the District Court's restitution order, defendant will provide the following information:

- A. Defendant's name and Social Security number;
- B. The District Court and the docket number assigned to this case;
- C. Tax year(s) or period(s) for which restitution has been ordered; and
- D. A statement that the payment is being submitted pursuant to the District Court's restitution order.

Defendant agrees to include a request that the Clerk of the Court send the information, along with Defendant's payments, to the IRS address below:

IRS - RACS

Attn: Mail Stop 6261, Restitution

333 W. Pershing Ave.

Kansas City, MO 64108

12. Defendant also agrees to send a notice of any payments made pursuant to this agreement, including the information listed in the previous paragraph, to the IRS at the following address:

IRS - RACS  
Attn: Mail Stop 6261, Restitution  
333 W. Pershing Ave.  
Kansas City, MO 64108

## NOTES

1/ If the defendant is not agreeing to pay a sum certain in restitution, *i.e.* the amount of restitution will be determined at sentencing, clearly identify the conduct for which the defendant is agreeing to pay restitution, including the relevant tax years and the names of any taxpayers. A defendant can agree to (and under Department policy should be required to) pay restitution for loss caused by conduct beyond the count(s) of conviction, but the plea agreement must specify the conduct. Ensure that the fact that the court may order the defendant to pay restitution is included in paragraph setting out defendant's awareness of possible punishment.

2/ Explain here (or refer to attached and incorporated documents), in as much detail as possible, the years, periods, and items for which the defendant has agreed to pay restitution. This sample chart is for use in a typical criminal tax case, where the defendant agrees to make restitution for his own personal past due income taxes. If taxes other than income taxes are involved, if other taxpayers or entities are involved, or if the restitution order is joint and several, additional information will be required. In cases involving additional taxpayers or entities, provide the court with a detailed chart that includes the names and Social Security Numbers of the relevant taxpayers, along with the loss for each tax period. The Tax Division recommends filing this information with a motion to seal that also informs the court that the information will be provided to civil IRS to permit the proper cross-referencing and crediting of the various accounts.

Title 26 interest should be included in the final amount of restitution, but this figure must be calculated as of the date of sentencing. The final restitution amount should clearly identify the amount attributable to each tax year, the principal, and the interest due and owing.

Penalties may be included in restitution if the defendant agrees to pay them. Even if the defendant does not agree to pay penalties, they should be included where the object of the offense was the evasion of assessed tax, penalties, and interest. In such cases, the restitution order should include, and separately state, the tax, penalties, and interest evaded.

If the defendant seeks to pay restitution in full before sentencing, the defendant must include Title 26 interest and any applicable penalties with the payment. Calculation of the interest must take into account that interest will continue to accrue until full payment is actually received by the IRS.

**3/ [Alternative paragraph 9 where the amount of restitution ordered is to reflect pre-sentencing payments]** If Defendant makes a payment of the restitution agreed to in paragraph [3] prior to sentencing, Defendant agrees that [he/she] will sign IRS Form 870, Form 2504, or other appropriate form enabling the IRS to make an immediate assessment of the liability underlying the restitution agreed to in paragraph [3]. Defendant agrees that [he/she] will not claim a refund of the payment or otherwise challenge the existence or amount of the tax liability underlying the restitution agreed to in paragraph [3]. If the amount of restitution identified in paragraph [3] has not already been reduced to account for any such payments, the government agrees that the amount of the restitution to be ordered by the court shall be reduced by a payment made in conformity with this provision.

#### ***44.09[2] ADDITIONAL RESOURCES***

IRS has issued two Chief Counsel Notices about 26 U.S.C. § 6201(a)(4), the restitution-based assessment statute: [one issued on August 26, 2011](#), and [one issued on July 31, 2013](#).

In May 2013, the United States Attorneys' Bulletin published an article entitled [“Restitution-Based Assessments Pursuant to 26 U.S.C. § 6201\(a\)\(4\).”](#)

Prosecutors with questions on restitution can contact attorney Elissa Hart-Mahan, who may be reached at the general number for the Criminal Appeals & Tax Enforcement Policy Section, (202) 514-5396, or by email at [elissa.r.hart@usdoj.gov](mailto:elissa.r.hart@usdoj.gov)