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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:

- 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 § 44.10, *infra*)

Each of these principles is explained in detail in this chapter.

44.01 BACKGROUND

After 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, to encourage broader use of restitution, enacted the Victim and Witness Protection Act of 1982 (VWPA), Pub. L. No. 97-291, 96 Stat. 1248 (restitution provisions codified at 18 U.S.C. § 3663). The VWPA permits restitution in, among other cases, Title 18 criminal cases and any criminal case (including Title 26 cases) where a defendant agrees to restitution in 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 a court to order full restitution for all Title 18 criminal cases, including cases involving tax-related charges under 18 U.S.C. §§ 286, 287, 371, and 1001.

Section 5E1.1 of the United States Sentencing Guidelines permits 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 requires prosecutors negotiating plea agreements to consider "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); Justice Manual § 9-16.320, Plea Agreements and Restitution. To help prosecutors comply with this statutory and Department requirement, standard language for the restitution portion of plea agreements in tax cases is included in § 44.10, *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.'"[1] ***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, 830-33 (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

[1] 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 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).

Before ordering restitution under the VWPA, the district court must consider several factors, including 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.[2] 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 earnings); ***United States v. Lawrence***, 189 F.3d 838, 848 (9th Cir. 1999) (while district court is not required to make express finding concerning

[2] 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)).

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 make detailed findings regarding these factors, the court of appeals may remand the restitution order because of "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). But the plea agreement must clearly contemplate restitution for the court to order it on this basis. As one court of appeals put it, "[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.'" ***United States v. Gottesman***, 122 F.3d 150, 151-52 (2d Cir. 1997).

To enhance the prospects of collection, prosecutors should ensure that restitution ordered as part of a plea agreement is made an independent part of the sentence, not just a condition of supervised release or probation. Restitution ordered as condition of supervised release or probation ceases to be collectible when the period of supervision or probation ends, but restitution ordered as an independent part of the sentence gives the government and the IRS 20 years to collect. *See* § 44.02[4], *infra*, for information about the longevity of a restitution order.

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 mandatory for certain crimes, including some Title 18 tax crimes. *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). the district court may not consider the defendant's economic circumstances or ability to pay when ordering mandatory restitution under the MVRA. *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 MVRA applies to (1) crimes of violence, as defined in 18 U.S.C. § 16; (2) offenses against property, including any offense committed by fraud or deceit; and (3) offenses described in 18 U.S.C. §§ 670 and 1365 (which relate to consumer and medical products). 18 U.S.C. § 3663A(c)(1)(A). 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). Aside from the differences noted above, the MVRA and the VWPA are similar 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).[3]

Although the MVRA does not apply to Title 26 offenses, it does apply to Title 18 criminal tax offenses that are offenses against property and committed by fraud or deceit. The statutory phrase "'offense against property' applies to those offenses in which

[3] There are exceptions to the MVRA's mandate that sentencing courts order restitution that may apply when there are many victims or determining restitution would unduly complicate or prolong sentencing. *See* § 43.03]9], *infra*, discussing these exceptions.

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). Conspiracies to defraud the IRS in violation of 18 U.S.C. 371 are "offenses against property" that are covered by the MVRA. ***United States v. Turner***, 718 F.3d 226, 236 (3d Cir. 2013); ***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); ***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, 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). Courts have also held that mail and wire fraud (in violation of 18 U.S.C. §§ 1341 and 1343, respectively), bankruptcy fraud, false claims against the United States (in violation of 18 U.S.C. § 287), and offenses involving stolen property are all offenses against property to which the MVRA applies . *See* ***United States v. Jones***, 289 F.3d 1260, 1263-64 (11th Cir. 2002) (MVRA applied to § 287 offense involving false tax returns); ***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); ***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 applies to an offense against property even when the victim's loss is purely financial. *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.[4]

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***,

[4] 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) — echoing § 3663A(c)(3) — provides, with exceptions likely not applicable in tax cases,[5] 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."

While restitution ordered as an independent part of the sentence is enforceable for 20 years pursuant to 18 U.S.C. § 3613(b), restitution ordered solely as a condition of supervised release or probation is only enforceable during the period of supervision or probation. *See* ***United States v. Westbrooks***, 858 F.3d 317, 328 (5th Cir. 2017), *vacated on other grounds by* 138 S. Ct. 1323 (2018) (holding that restitution ordered solely as a

[5] Section 5E1.1(b)(2) applies "in the case of a restitution order under 18 U.S.C. § 3663; a restitution order under 18 U.S.C. § 3663A that pertains to an offense against property described in 18 U.S.C. § 3663A(c)(1)(A)(ii); or a condition of restitution imposed" as a condition of supervised release or probation. It thus does not apply when restitution is mandatory under the MVRA because it is a crime of violence under § 3663A(c)(1)(A)(i), or is mandatory by virtue of some other subsection of § 3663A(c)(1)(A) besides subsection (ii).

condition of supervised release is not enforceable before the period of supervision begins); ***United States v. Hassebrock***, 663 F.3d 906, 924 (7th Cir. 2011) (where restitution is imposed as a condition of supervised release, a defendant cannot be required to pay restitution until his period of supervised release begins); *see also* ***United States v. Gifford***, 90 F.3d 160, 162 (6th Cir. 1996) (holding that conditions of supervised release become unenforceable after supervised release is revoked); ***United States v. Soderling***, 970 F.2d 529, 532 (9th Cir. 1992) (same); ***United States v. Irvin***, 820 F.2d 110, 111 (5th Cir. 1987) (restitution ordered as condition of probation no longer enforceable once probation was revoked).

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. Commissioner***, 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). The IRS revised its position after ***Klein*** and has made clear that interest does not accrue on restitution-based assessments. *See* IRS Chief Counsel Notice 2019-004. Therefore, in order to allow the IRS to collect interest, prosecutors should seek to include Title 26 interest as part of the restitution order. *See* § 44.10, *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 § 44.10, *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).[6] 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 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.[7] *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, 1359-62 (2d Cir. 1989) (unpaid New York State gasoline sales tax was property under the mail

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[6] 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).

[7] 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 . . . ."

fraud statute); ***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); *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 to the victim. *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 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).

In cases involving both embezzlement and tax fraud, defendants sometimes argue that they should not have to pay restitution to the IRS because payment of restitution to the embezzlement victim eliminates any actual tax loss. In fact, funds obtained by embezzlement or theft are taxable income to the defendant in the year that he receives the funds. The Supreme Court made this clear in ***James v. United States***, 366 U.S. 213 (1961), in which the court held that criminally derived income is taxable even if the defendant has to repay the fraud victims: "When a taxpayer acquires earnings, lawfully or unlawfully, without the consensual recognition, express or implied, of an obligation to repay and without restriction as to their disposition, 'he has received income which he is required to return, even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent.'" *Id.* at 219 (quoting ***North American Oil Consolidated v. Burnet***, 286 U.S. 417, 424 (1932)). A defendant may be entitled to claim a deduction based on a restitution payment in the tax year in which the restitution payment was made, but that is a civil tax matter that is

outside the scope of the criminal case, and prosecutors should avoid making representations about deductibility of restitution payments.

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.[8] *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. § l341, the restitution order may include losses caused by acts that were part of the same scheme, even if the defendant was not convicted of offenses based on those particular acts. 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 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

[8] There are exceptions to this general rule, which will be discussed further below. Also, a plea agreement can (and should) provide for restitution for all the government's losses, including losses caused by relevant conduct.

regardless of whether the defendant is convicted of each fraudulent act in the scheme); (quoting ***Inman***, 411 F.3d at 595); ***United States v. Gordon***, 480 F.3d 1205, 1211 (10th Cir. 2007); ***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).

When a scheme, conspiracy, or pattern is an element of the offense, the MVRA requires restitution for all losses attributable to the scheme, "even for losses that occurred outside the limitations period for the underlying crime." ***United States v. Parnell***, 959 F.3d 537, 538-39 (2d Cir. 2020). In ***Parnell***, the defendant was indicted in August 2017 on four counts of wire fraud; the indictment alleged a scheme that started in 2010 and

continued into 2016. ***Ibid.*** The court of appeals upheld the district court order of restitution for all the losses during this period, notwithstanding that some of the losses occurred outside the applicable five-year statute of limitations. ***Id.*** at 539-41. As ***Parnell*** explained, the "plain meaning of the statute"—which without qualification, mandates restitution for "any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern," 18 U.S.C. § 3663A(a)(2)—by its terms "include[es] acts outside the statute-of-limitations period, as long as those losses are attributable to the same underlying scheme, and as long as some part of that scheme for which the defendant was convicted occurred within the statute of limitations." ***Parnell***, 959 F.3d at 540; *accord* ***United States v. Ellis***, 938 F.3d 757, 763–65 (6th Cir. 2019); ***United States v. Anieze-Smith***, 923 F.3d 565, 573–75 (9th Cir. 2019); ***Dickerson***, 370 F.3d at 1339, 1342-43.

Because the MVRA mandates restitution for all resulting losses when a scheme is an element of the offense, prosecutors should define the scheme as broadly as the evidence permits when charging such offenses to allow for collection of full restitution. When "a defendant is convicted by a jury . . . the scope of the scheme is defined by the indictment for purposes of restitution." ***United States v. Jones***, 641 F.3d 706, 714 (6th Cir. 2011); *accord* ***Wright***, 496 F.3d at 381-82 (where fraudulent scheme is element of offense, restitution is limited to specific temporal scope of indictment). The government, which controls the drafting of the indictment, thus "bears the burden of including language sufficient to cover all acts for which it will seek restitution." ***United States v. Akande***, 200 F.3d 136, 142 (3d Cir. 1999) (cleaned up); *accord* ***United States v. DeSalvo***, 41 F.3d 505, 514 (9th Cir. 1994). Prosecutors, moreover, should be aware that, for purposes of determining restitution, open-ended temporal language, such as "on or about" or "no later than," may not suffice to expand the temporal scope of a scheme beyond the specific dates alleged in the indictment. *See* ***Akande***, 200 F.3d at 141-42 (rejecting argument that use of "on or about" in a conspiracy charge permitted restitution outside the express dates alleged; this language did not suffice on its own to "evince[] an intent" to reach conduct outside the dates charged); ***Ellis***, 938 F.3d at 765-66 (Stranch, J., concurring) (criticizing restitution award that encompassed losses beginning in 2008 where indictment merely alleged that the scheme began "no later than in or about" 2012, but not reaching issue because defendant did not raise it; collecting cases).

In ***United States v. Adams,*** 955 F.3d 238 (2d Cir. 2020), the court of appeals affirmed a restitution order imposed as a condition of supervised release that

encompassed all the losses attributable to a "decade-long scheme to deceive the IRS" that was charged as a corrupt endeavor to obstruct the due administration of the internal revenue laws under 26 U.S.C. § 7212(a). ***Id.*** at 251 (cleaned up). Adams challenged the restitution order on grounds that it exceeded the loss charged in the counts of conviction because it included losses from four tax years that were not charged in separate tax evasion or false return counts. ***Ibid.*** The ***Adams*** court, however, was unpersuaded. It reasoned that 18 U.S.C. § 3563(b) permits restitution to the victim "of the offense," and Adams's offense under § 7212(a) here "caused the IRS losses" in the tax years not charged in other counts. ***Ibid.***

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); ***Adams***, 955 F.3d at 251-52 (prejudgment interest properly included in restitution order because it "is part of the government's loss when delinquent taxes are not timely paid"); ***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 § 2T1.1 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." U.S.S.G. § 2T1.1, comment. (n.1). 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 under the Sentencing Guidelines. But the Guidelines tax loss is usually the intended loss, *see* § 43.03[1], *infra*, while the amount of restitution is always limited to actual loss unless the defendant agrees to pay more. Guidelines tax loss also includes all losses attributable to relevant conduct, but restitution, as explained above in § 44.03[2][b], is limited to losses attributable to the offenses of conviction unless one of those offenses has a scheme as an element. Thus, the Guidelines tax loss may be greater than the amount of restitution, and prosecutors should take care not to conflate the two. 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* 18 U.S.C. § 3664(e); ***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").

In some circumstances, the government can satisfy this burden by presenting evidence establishing a reasonable estimate of the loss. *See, e.g.*, ***United States v. Osman***, 853 F.3d 1184, 1189 (11th Cir. 2017); ***United States v. Gushlak***, 728 F.3d 184, 198 (2d Cir. 2013); ***United States v. Masek***, 588 F.3d 1283, 1287 (10th Cir. 2009) ("In the case of fraud or theft . . . [t]he court need only make a reasonable estimate of the loss, given the information available." (cleaned up)). But this principle may not apply when the "appropriate restitution amount is definite and easy to calculate." ***United States v. Sheffield***, 939 F.3d 1274, 1276 (11th Cir. 2019). In ***Sheffield***, the defendant carried out a tax credit fraud scheme where the "refunds issued by the IRS . . . were all for the same exact amount—$1,000—and the evidence the government submitted in support of its restitution request was admittedly and demonstrably inaccurate" because the spreadsheet used to calculate restitution contained duplicate entries. ***Id.*** at 1276-77. As ***Sheffield*** explained, "[t]he use of estimation is permitted because it is sometimes impossible to determine an exact restitution amount," but that principle was inapplicable on the facts before it because "figuring out the loss only required a simple mathematical exercise, i.e., multiplying each false tax credit by $1,000." ***Id.*** at 1277-78 (cleaned up).

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 ordering restitution to another body such as the

probation office or the IRS. *See* ***Butler***, 297 F.3d at 518 (district court could not order restitution in an amount "[t]o 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. 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. 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).

Before the MVRA was enacted, the courts of appeal split over whether the district court could delegate setting a restitution payment schedule to the Bureau of Prisons or the Probation Office. *See* ***Weinberger v. United States***, 268 F.3d 346, 360 & n.3 (6th Cir. 2001) (under the 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 the MVRA amended Section 3664 to provide that all restitution orders, even those that are not mandatory under the MVRA, "shall . . . specify in the restitution order . . . the schedule according to which[] the restitution is to be paid." 18 U.S.C. § 3664(f)(2); *see* ***United States v. Coates***, 178 F.3d 681, 683-85 (3d Cir. 1999) (explaining this statutory change); 18 U.S.C. § 3556 ("The procedures under section 3664 shall apply to all orders of restitution under this section," including non-mandatory restitution ordered under Section 3663). Following this statutory amendment, most courts of appeal have held that district courts lack discretion to delegate establishment of a payment schedule, but some still allow the Bureau of Prisons to determine the defendant's payment schedule during incarceration. *Compare, e.g.,* ***United States v. Kinlock***, 174 F.3d 297, 300 (2d Cir. 1999) ("When restitution cannot be paid immediately, the sentencing court must set a schedule of payments for the terms of incarceration, supervised release, or probation," but "a payment schedule expressed as a percentage of the defendant's monthly income while incarcerated . . . is satisfactory"); ***Coates***, 178 F.3d at 685 ("the fixing of restitution payments is a judicial act that may not be delegated to a probation officer"; the MVRA "overrides[] the regulations" allowing "the Bureau of Prisons to make payment schedules for all monetary penalties"); *with* ***United States v. Sawyer***, 521 F.3d 792, 794-96 (7th Cir. 2008) (Easterbrook, J.) (Section 3664(f) "does not say when the [payment] schedule must begin," so no error when

district court sets schedule that begins after incarceration and "leav[es] payment during imprisonment to the Inmate Financial Responsibility Program"; collecting cases and discussing circuit split). Some circuits that prohibit the Bureau of Prisons from determining any aspects of the payment schedule have likewise proscribed the "implicit" delegation that results when the district court orders an indigent defendant to pay restitution immediately. *See* ***United States v. Corley***, 500 F.3d 210, 224-27 (3d Cir. 2007) (such an order is indistinguishable from improper outright delegation of authority to Bureau of Prisons), *vacated and remanded on other grounds*, 533 U.S. 303 (2009); ***United States v. Overholt***, 307 F.3d 1231, 1255-56 (10th Cir. 2002) (same); ***United States v. Prouty***, 303 F.3d 1249, 1255 (11th Cir. 2002) (same).

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 § 44.10, *infra*, requires the defendant to agree that the restitution amount is due and payable immediately and is subject to immediate enforcement by the government. When a defendant so agrees in a plea agreement, the district court is permitted to "set a *minimum* installment as a condition of supervised release," notwithstanding that § 3664(f)(2) requires the court to establish a payment schedule. *See* ***United States v. Fariduddin***, 469 F.3d 1111, 1112-13 (7th Cir. 2006) (Easterbook, J.) (explaining that the defendant "waived th[e] entitlement" to a payment schedule when he entered into a plea agreement with such a provision); *see also* ***Carpenter v. Commissioner***, 152 T.C. 202, 214-16 (2019) (court-ordered restitution payment schedule did not limit IRS's ability to collect on restitution-based assessment because the district court, in accordance with defendant's plea agreement, made the restitution order payable immediately); ***United States v. Williams***, 898 F.3d 1052, 1054-56 (10th Cir. 2018) (government could seek garnishment in excess of payment schedule because restitution was made due in full immediately).

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.[9] *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***, 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 by statute, a plea agreement must specifically state both that the defendant will pay restitution and the amount of restitution that the defendant will pay.

[9] 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. This ensures that the restitution order will remain collectible after the supervised release term ends. *See* § 44.02[4], *supra*.

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 though the MVRA explicitly states that courts "shall order restitution" for certain crimes, exceptions to this rule exist. The MVRA provides that a court is not obligated to order restitution if the MVRA applies because the offense is one "against property" under § 3663A(c)(1)(A)(ii),[10] and the court 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 See* ***Serawop***, 505 F.3d at 1124-25 (district court could have left complex matters to civil determination); ***United States v. Galloway***, 509 F.3d 1246, 1254 (10th Cir. 2007) (court "may opt out of imposing restitution" if these provisions are satisfied).

Some courts have also recognized that the MVRA does not require payment of restitution to those who are either involved in the offense of conviction or those who have suffered losses of property otherwise obtained by unlawful means. For instance, in

[10] As explained above in § 44.02[3], Section 3663(c)(1)(A)(ii) is the provision that makes restitution mandatory in some statutes commonly charged in criminal tax cases, such as 18 U.S.C. 371 (conspiracy to defraud), and 18 U.S.C. §§ 1341 and 1343 (mail and wire fraud).

United States v. Ojeikere, 545 F.3d 220 (2d Cir. 2008) (Calabresi, J.), the court recognized that the MVRA does not require restitution of a victim's "ill-gotten gains," or when the victims "were *in pari materia* with the scheme of which [the defendant] was convicted," but "h[e]ld that that restitution under the MVRA may not be denied simply because the victim had greedy or dishonest motives." ***Id.*** at 222-23 (applying this rule to reject the defendant's argument that his victims were not entitled to restitution because they believed they were paying defendant as part of a different "fraudulent scheme"); *see also* ***United States v. Litos***, 847 F.3d 906, 907-09 (7th Cir. 2017) (Posner, J.) (vacating restitution order to bank that acted "reckless[ly]" in approving applications submitted to it in the course of the defendants' mortgage fraud scheme); ***United States v. Martinez***, 978 F. Supp. 1442, 1453 (D.N.M. 1997) (rejecting argument that an illegally operated casino was entitled to restitution where the defendant was convicted of a crime of violence against it). Likewise, some courts have held that co-conspirators are not "victims" entitled to restitution under the MVRA. ***United States v. Reifler***, 446 F.3d 65, 127 (2d Cir. 2006) ("any order entered under the MVRA that has the effect of treating coconspirators as 'victims,' and thereby requires 'restitutionary' payments to the perpetrators of the offense of conviction, contains an error so fundamental and so adversely reflecting on the public reputation of the judicial proceedings that we may, and do, deal with it *sua sponte*"); ***United States v. Lazarenko***, 624 F.3d 1247, 1249, 1251-52 (9th Cir. 2020) ("in the absence of exceptional circumstances, a co-conspirator cannot recover restitution"); ***In re Wellcare Health Plans, Inc.***, 754 F.3d 1234, 1239-40 (11th Cir. 2014) (rejecting mandamus petition of corporation seeking restitution under the MVRA for crimes committed by the corporation's officers); *but see* ***United States v. Kendre***, 486 Fed. App'x 271, 275 & n.2 (3d Cir. 2012) (questioning these cases, but not reaching the issue). It is the Tax Division's position, consistent with this authority, that absent extraordinary circumstances investors are not victims in the prosecution of a tax shelter promotor, and taxpayer-clients are not victims in the prosecution of a return preparer.

44.04 LIMITED CIRCUMSTANCES IN WHICH A RESTITUTION ORDER MAY BE MODIFIED

A restitution order is a final judgment that can be modified only 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*. But unless one of the provisions identified in 18 U.S.C. § 3664(o) applies, the district court lacks 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

A defendant may experience significant changes in his economic circumstances after a court has entered a restitution order. ***United States v. Overholt***, 307 F.3d 1231, 1256 (10th Cir. 2002). The court is to be notified of the change in circumstances—either by the defendant, or by the government or the victim—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 § 44.10, *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. Commissioner***, 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 penalties or 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, holding that "because the government elected to include his civil tax liabilities as part of the restitution order, when the U.S. Attorney discharged the restitution obligation, Creel's civil tax liabilities were also extinguished." ***Creel***, 419 F.3d at 1140-42.

Use of the standard language for the restitution portion of plea agreements should prevent this type of problem from recurring. *See* § 44.10, *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 § 44.10, *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 DEFERRING THE DETERMINATION OF RESTUTION

Under the MVRA, the district court is not always required to determine the defendant's restitution on the day of sentencing. Instead, when "the victim's losses are not ascertainable . . . 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing." 18 U.S.C. § 3664(d)(5).

In ***Dolan v. United States***, 560 U.S. 605 (2010), the Supreme Court held that § 3664(d)(5)'s 90-day limit for scheduling a post-sentencing restitution hearing does not limit the district court's power to impose restitution once the deadline has lapsed. ***Dolan*** concluded that the 90-day limit was "a deadline [that] seeks speed by creating a time-related directive that is legally enforceable but does not deprive a judge or other public official of the power to take the action to which the deadline applies if the deadline is missed." ***Id.*** at 611. The 90-day limit for scheduling a hearing thus is neither a jurisdictional limitation on the district court's power to impose restitution, nor a "claims-processing rule" that the district court is obligated to enforce if a party raises it. ***Id.*** at 610-11. In so holding, the Court relied upon the fact that the MVRA's "text places primary weight upon, and emphasizes the importance of, imposing restitution upon those convicted of certain federal crimes," and reasoned that the MVRA "seeks speed primarily to help the victims of crime and only secondarily to help the defendant." ***Id.*** at 612-13.

The ***Dolan*** Court discussed, but did not decide, whether a defendant whose restitution hearing has been deferred may immediately appeal the balance of his sentence or must await a restitution order. The court stated in *dicta* that "strong arguments favor the appealability of the initial judgment irrespective of the delay in determining the restitution amount," including the argument that such a sentence is appealable as a "final judgment" under 18 U.S.C. § 3582(b) if it contains a "sentence to imprisonment." ***Id.*** at 617-18.

In ***Manrique v. United States***, 137 S. Ct. 1266 (2017), the Supreme Court took up this issue, and concluded that "deferred restitution cases involve two appealable judgments, not one." **Id**. at 1273. Manrique filed a timely notice of appeal from the district court's initial sentence, but failed to file a second notice of appeal from the district court's later restitution order. **Id**. at 1270-71. The court of appeals refused to

consider his challenge to the restitution order on account of this failure. **Id**. at 1271. The Court, relying on its dicta in ***Dolan***, rejected Manrique's argument that his earlier notice of appeal "springs forward" to encompass the deferred restitution order once it is entered. **Id**. at 1272-73. The Court, however, declined to decide whether the requirement to file a second notice of appeal from a deferred restitution judgment is a jurisdictional rule or a mandatory claim-processing rule, reasoning that it is "at least" the latter, and that the difference was immaterial on the facts presented because the government objected to Manrique's failure to file a second notice of appeal in the court of appeals. **Id**. at 1271-72.

44.10 FORM PLEA LANGUAGE AND ADDITIONAL RESOURCES

44.10[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 through the date of sentencing. 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

9. 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**]**

10. 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

11. 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.

44.10 [2] ADDITIONAL RESOURCES

IRS has issued three Chief Counsel Notices about 26 U.S.C. § 6201(a)(4), the restitution-based assessment statute: one issued on August 26, 2011, one issued on July 31, 2013, and one issued on June 27, 2019.

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