Notes as to NAAUSA response to GAO questions regarding restitution.

101419: GAO Study of the U.S. Courts' Authority to Award Restitution Questions for: National Association of Assistant U.S. Attorneys (NAAUSA) We are sending these questions to obtain perspectives on broadening federal courts' authority to award restitution for a study mandated by the Justice for All Reauthorization Act of 2016.1 GAO is required to submit a report to the Congress by June 14, 2017.

Factors to consider for expansion of restitution generally

1. What factors should be considered by Congress in determining whether federal courts should be provided broader authority to award restitution?

a. What factors should be considered in terms of the impact to victims, defendants, the courts (including probation officers), and prosecutors (including other relevant DOJ officials)?

There currently exists at least one issue where the courts are divided. Any proposed legislation would be an opportunity to resolve that split. Though restitution for psychological services is currently authorized for special categories of cases, such as sexual abuse, 18 U.S.C. § 2248, the generic restitution statutes that apply to most federal crimes, 18 U.S.C. § 3663 and § 3663A, do not specify whether there must be an actual physical injury in order for a court to award restitution for psychological injuries. For example, in the Fourth Circuit, a victim of an armed robbery would not be entitled to compensation for psychological injuries unless the victim also suffers a physical injury in addition. *See United States v. Manna*, 201 Fed. Appx. 146, 148 (4th Cir. 2006) (defendant convicted of solicitation to commit murder for hire could not be ordered to pay restitution to intended victims who suffered psychological injuries and incurred counseling expenses because "Section 3663A(b)(2)(A) requires proof of bodily injury to a victim before a court may order restitution for counseling. It is undisputed that the victims of the solicitation sustained no bodily injury . . ."). In contrast, some circuits read the statute to authorize restitution for psychological injuries even if no physical injury occurs. *See United States v. Breshers,* 684 F.3d 699, 703 (7th Cir. 2012) ("Breshers is correct to point out that the other circuits have held that physical injuries are required before the court may order restitution for mental treatment. *United States v. Reichow*, 416 F.3d 802, 805 (8th Cir.2005) ('[W]e hold that the MVRA requires evidence of bodily injury to victims before restitution can be ordered for their psychological treatment expenses.'); *United States v. Hicks*, 997 F.2d 594, 601 (9th Cir.1993) ('The cost of psychological counseling can be included in a restitution order only when the victim has suffered physical injury.'). Neither of these cases, however, was decided on plain error review. We conclude that the district court in the case before us did not plainly err in ordering restitution for T.A. and The Hartford."). Congress should make clear that physical injuries are not required in order to award restitution for psychological and mental injuries, just as exists for victims of child exploitation and similar statutes.

b. In your opinion, what are the benefits and challenges that might result if federal courts' authority to award restitution were expanded. (For example, the DOJ's or the Judiciary's administration of restitution, constitutional concerns, etc.).

Congress should be cautious about expanding the types of losses which are compensable as restitution. The current statutes strike an appropriate balance in terms of capturing the essential losses

a victim typically incurs without turning criminal sentencings into mini trials of tort cases. Judges will be reluctant to award restitution at all if the restitution phase of sentencing becomes too complex in terms of ascertaining a victim's losses. Victims will be reluctant to seek restitution if they are required to appear and be cross examined as to their losses. Limiting losses to the current categories is appropriate because most of those loss categories can be proved by government witnesses, and rarely does a victim have to testify in order for the government to meet its burden to prove restitution. Expanding the types of compensable losses into areas such as pain and suffering and emotional distress which are inherently difficult to quantify, will lead to more litigation and require the victim's live testimony in many instances where that is not currently required.

Specific expansion areas

2. In your opinion, what are the potential benefits and challenges of expanding the courts' authority to provide restitution in the following ways, including the potential effects on victims, defendants, courts, and prosecutors:

a. Restitution to be ordered for victims who are directly harmed by the offense (in other words, eliminating the proximate cause requirement to qualify as a victim for purposes of restitution).

b. Restitution to be ordered for victims who have suffered harm, injury, or loss caused by the defendant's "related conduct" as opposed to only conduct "as a result of the commission of the offense."

Requiring restitution to victims of related conduct would be appropriate. Sections 3663(a)(2) and 3663A(a)(2) already define "victim" as a person directly harmed as a result of the commission of an offense for which restitution may be ordered "including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern." This provision in both the discretionary and mandatory restitution statutes allows, for example, all victims of a mail fraud scheme to receive restitution even though the defendant is only convicted of one count of mail fraud. This is appropriate and efficient. It allows the prosecution to resolve a case involving hundreds of victims with a conviction for only one count and yet to obtain restitution for all victims of the scheme. It also allows a defendant to resolve a case without being convicted of hundreds of counts simply because a prosecutor insisted on multiple convictions in order to secure restitution for the victims. This notion of expanding a court's authority to award restitution to victims of the similar and related offenses without the necessity of a conviction for each discrete offense should be expanded.

c. Restitution to be ordered in an amount determined to restore the victim to the position he or she would have been in had the offender not committed the offense.

This is essentially how restitution works under the current statutory regime. *United States v. Boccagna,* 450 F.3d 107, 115 (2d Cir.2006)("the 'primary and overarching' purpose of the MVRA '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.'"), citing, *United States v. Simmonds*, 235 F.3d 826, 831 (3rd Cir. 2000). However, to the extent that a victim seeks to recover some unrealistic rate of return on an investment, for example, that would not be returning the victim to the position he would have been in but for the commission of the offense. In other words, when a defendant promises a victim a 20

percent return on investment but steals the victim's money, the victim should only be entitled to the funds he gave the defendant which were not returned. The victim should not be entitled to return of the funds plus the 20 percent promised return on investment because 1) in many instances, the victim should have known that such "too good to be true" promises are just that, and 2) there is almost never any ability to recover the victim's actual, out of pocket loss, and merely adding to the restitution amount is an exercise in futility. To the extent that the notion of returning a victim to the position he would have been in but for the commission of the crime would conflict with the current "net loss" approach to restitution, the current approach is the better choice.

d. Restitution to be ordered to compensate for income lost by the victim's surviving family members or estate as a result of an offense causing the victim's death.

Restitution for lost income in a case resulting in death is appropriate. However, these types of loss are more difficult to calculate, and run the risk of the sentencing proceeding becoming so complicated in calculating the restitution amount that courts may look for ways to avoid ordering any restitution, relying on the complexity exception at 18 U.S.C. § 3663A(c)(3)(B). Since the number of federal cases involving death and restitution are fairly small compared to the universe of all federal criminal cases, we believe courts would be able to handle the extra work necessary to make this calculation if restitution is authorized. Again, given most defendant's ability to pay, it is unlikely that adding lost income for survivors will result in much more money being paid to victims than under current law. Convicted murderers typically receive the longest prison sentences of all federal defendants, and only in rare instances will the defendant who caused a death ever pay much restitution.

e. Restitution to be ordered to compensate the victim for any injury, harm, or loss, including emotional distress that occurred as a result of the offense.

We oppose including compensation for any injury, including emotional distress, as part of the federal restitution regime. As noted above, these types of loss are difficult to calculate and can very easily complicate 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)(B). Thus, under this provision, courts would likely "opt out" of otherwise mandatory restitution because the loss calculation is too burdensome. Again, victims would be better served by changes which improve the collection of restitution than by adding more ways to increase restitution awards which are difficult to collect.

Additional challenges or ideas for changes to restitution

3. Based on your experience, how, if at all, has federal courts' authority to award restitution (particularly under 18 U.S.C. §§ 3663, 3663A) led to any challenges related to the restitution process?

a. Please describe any challenges as they relate to the restitution process and victims, such as differences based on the type of victim and type of offense(s).

The current statutory regime of discretionary restitution pursuant to 18 U.S.C. 3663 and mandatory restitution pursuant to 18 U.S.C. 3663A is limited only to specific federal crimes. Discretionary restitution is available for essentially all Title 18 offenses. 18 U.S.C. 3663(a)(1)(A). Mandatory restitution, despite its title, is generally only mandatory for Title 18 offenses that are (1) a crime of violence, or (2) an offense against property, where an identifiable victim has suffered a physical injury or pecuniary loss. 18 U.S.C. 3663A(c)(1)(A) and (B). With minor

exception, there is no restitution for offenses other than in Title 18 . *See United States v. Kilpatrick*, 798 F.3d 365, 391 (6th Cir. 2005) ("The federal restitution statutes do not authorize restitution for tax crimes under Title 26."). Thus, there are a number of federal crimes for which (1) restitution is not available at all, because the offense is not a Title 18 offense, and (2) for which only discretionary restitution is available because the offense is not a crime of violence or an offense against property.

A far simpler approach would be to provide for mandatory restitution for ALL federal crimes, regardless of where the offense is codified in the U.S. Code and regardless of whether the offense involves a crime of violence or is a crime against property. For example, international parental kidnapping, 18 U.S.C. 1204, is neither a crime of violence nor an offense against property, which means that only discretionary restitution is available. On the other hand, a mail fraud offense is a crime against property and thus meets the criteria for mandatory restitution. The impact of these offenses on the victims could be equal, or even greater in the case of the parental kidnapping offense, but the defendant will likely avoid any requirement to pay restitution under the discretionary statute because of the current statutory scheme. Defendants might think twice about committing an offense if they know that restitution is mandatory for all federal crimes. Courts, probation officers and prosecutors would not have to engage in a currently convoluted analysis to determine which, if any, restitution statute applies. The solution is a simple provision that mandatory restitution applies to all federal offense.

Discretionary restitution pursuant to 18 U.S.C. § 3663 contains a requirement at § 3663(a)(1)(B)(i)(II) that in order to award any restitution the court consider "the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate." Essentially, if a court finds that a defendant or his family needs the money more than the victim, no restitution can be ordered. This notion of putting the defendant and his family ahead of the victim was specifically rejected in 1996 when the MVRA was enacted. *See* 18 U.S.C. § 3664(f)(1)(A). That provision directs the court to order restitution to each victim in the full amount of the victim's losses and "without consideration of the economic circumstances of the defendant." Under the current statutory scheme, if restitution is discretionary, the court must consider the defendant and his dependent's needs to determine if any restitution is appropriate, but for mandatory restitution, the court is prohibited from considering the defendant's economic circumstances. Unless an offense is governed by the MVRA, a sentencing court is effectively required to put the needs of the defendant and his dependents ahead of the needs of the victim and the victim's dependents because the statute does not even allow the court to consider the victim's or the victim's dependent's financial circumstances or needs.

b. Please describe challenges faced by defendants, the courts, or prosecutors related to the restitution process.

As discussed above, courts and prosecutors often have to grapple with whether an offense is eligible for any restitution and if so, whether restitution is mandatory or discretionary. This could be resolved as stated above with a single restitution statute which requires restitution, without consideration of a defendant's ability to pay, for all federal crimes.

4. What other changes, if any, do you think should be made to federal courts' authority to award restitution?

a. What changes, if any, do you think should be made to other parts of the restitution process, such as the collection or receipt of payment from defendants?

The actual collection of restitution is the single biggest challenge in the current statutory scheme which appears to award restitution, but in fact, often results in victims receiving little if any compensation. The solution is not to expand the current categories of losses for which victims can be compensated. The solution is to 1) provide a mechanism to prevent a defendant from dissipating assets that are needed to pay restitution prior to sentencing, and 2) eliminating a court's authority to impose payment plans which have the effect of shielding a defendant from paying restitution once imposed. The solution to the first problem is simply to adopt the pre-conviction asset preservation provisions for criminal forfeiture, and apply those to restitution. See 21 U.S.C. 853(e). These provisions require the government to satisfy a court that a defendant has committed or been charged with a crime, and there is a likelihood of conviction. Moreover, if the property which the government seeks to preserve is not traceable to the offense (substitute assets), the defendant has a right to use such property to hire counsel in the criminal case. *Luis v. United States*, 578 U.S. ___ (2016). Under the current statutory regime, even when a defendant has been convicted of an offense for which restitution is mandatory, courts lack the authority to order a defendant not to dissipate assets prior to sentencing. Defendants thus have every incentive to dissipate, conceal or place assets beyond the reach of the victim and government during the typical 3-4 month time period between conviction and sentencing. This is but an invitation for convicted defendants to take steps to make it impossible for a victim to ever collect the restitution the court must impose.

The second problem with the current regime which should be addressed is the court's authority to impose payment plans. Most circuits have concluded that courts must, pursuant to 18 U.S.C. 3664(f)(1)(B), impose a payment plan if a defendant is unable to pay the full amount of restitution immediately. *See, e.g.*, *United States v. Day*, 418 F.3d 746, 761 (7th Cir. 2005) (MVRA requires district court to fix a payment schedule at time of sentencing when immediate payment not possible); *United States v. Dawkins*, 202 F.3d 711, 716 (4th Cir. 2000) ("The MVRA clearly requires a sentencing court to consider the factors listed in 18 U.S.C.A. § 3664(f)(2) when determining how restitution is to be paid. Additionally, a sentencing court must make a factual finding keying the statutory factors to the type and manner of restitution ordered; it must find that the manner of restitution ordered is feasible."); *United States v. McGlothlin*, 249 F.3d 783 (8th Cir. 2001) (sentencing court is required to impose "detailed restitution payment schedule" for defendant who is unable to make immediate payment in full). But the notion of payment plans has come to preclude any attempt to collect restitution as long as a defendant makes the nominal payments ordered at sentencing, even if the defendant has substantial available assets. For example, in *United States v. Martinez*, 812 F.3d 1200 (10th Cir. 2015), the court of appeals found that there was a conflict between the orally announced payment plan and the written directive that restitution was due in full immediately. The "conflict" was simply that the oral pronouncement did not specifically mention the "due and payable" language which was in the written order. The court of appeals found that this "conflict" meant that the full amount of the debt was not due, and the government was prohibited from taking any collection action as long as the defendant made his monthly payment. Essentially, the court ruled that as long as the defendant was current on his original, nominal payment plan, the government was prohibited from taking any collection action.

Similarly, in in *United States v. Villongco*, No. CR 07-009 (BAH), 2016 WL 3747508 (D.D.C. July 11, 2016), the district court had ordered the defendant to pay restitution of over $14,000,000 and directed that "the special assessment and restitution are immediately payable . . ." The sentence also provided that as a special condition of supervised release, the defendant "must pay the balance of any restitution owed at a rate of no less than $500 each month . . ." Defense counsel asked a question about the timing of the restitution payments, and the district judge made some confusing comments and then said: "payment schedules end up getting worked out when people don't have the full amount of all that's due and payable immediately." Eight years after sentencing, the government sought to garnish the defendant's retirement and brokerage accounts which had a value of over $800,000. Defendant objected on the basis that he had been making his $500 per month payments on schedule. Relying mostly on *Martinez*, another district judge to whom the case had been assigned quashed the writ of garnishment concluding:

> [B]ecause the restitution order requires the defendant to pay his restitution obligation in monthly installments of $500.00 each month, J & C at 6, and he has fully complied with this requirement, the government may not garnish the defendant's retirement and brokerage accounts to satisfy a judgment in a manner not countenanced in the restitution order. The Court does not intend for this "decision [to] be read as discouraging the government from zealously attempting to collect restitution and make the victims of crime whole," *Roush*, 452 F. Supp. 2d at 682, but such efforts must take place within the statutory framework that Congress enacted.

United States v. Villongco, No. CR 07-009 (BAH), 2016 WL 3747508, at *11 (D.D.C. July 11, 2016).

These absurd results, which put the interests of criminals ahead of their victims, could be avoided if payment plans were abolished altogether, or if the statute specifically provided that restitution is due and payable in full at sentencing, ***notwithstanding*** any periodic payment directive. Payment plans end up shielding defendants who pay some minimal amount from any collection action, even when they have substantial assets that could be used to pay restitution. Rarely are payment plans good for the victim. Indeed, criminal defendants who are ordered to pay a set monthly amount enjoy protection from collection of restitution that mere civil debtors do not enjoy. The civil debtor has only the statutory protections as to exemptions provided in law, but criminal defendants who owe restitution and are lucky enough to have a payment plan, are immunized from collection action as long as they make the nominal monthly payments that courts typically impose.

This problem is best illustrated by Judge Frank Easterbrook of the Seventh Circuit who wrote:

> [A] schedule that lets the defendant profit from crime diminishes the public reputation of judicial proceedings. Let=s not kid ourselves: One reason defendants want judges to set schedules is to avoid paying what they owe. It is hard, perhaps impossible, for a judge to know how much a given defendant will be able to pay years later. Schedules are guesswork. If the judge sets one that turns out to be too high, the defendant won=t pay (you can=t get blood from a stone); but if the judge errs on the low side, the defendant keeps the money and the victim loses out. *** No wonder defendants like schedules; they are a great way to escape paying what=s owed.

United States v. Sawyer, 521 F.3d 792, 797-98 (7th Cir. 2008).

5. Within the current law, please describe potential best practices or policy changes that could be implemented to improve any of the following:

a. requests for restitution by U.S. Attorneys;

U.S. Attorney's offices should ask judges to provide that restitution is due and payable immediately, notwithstanding any directive to make minimum monthly payments.

b. orders for restitutions by judges; or

Courts should be clear that any monthly payment directive as to restitution is a minimum expectation and not a limit on what the government can collect using the statutory provisions which apply to the collection of restitution.

c. collection of restitution by DOJ or victims.

DOJ should explain to criminal prosecutors the critical aspects of the court ordering restitution so that prosecutors can advocate for appropriate restitution orders that do not tie the hands of the government and victims when it comes to enforcing restitution.