

Best Practices Checklist on Monetary Penalties

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I. Information on the Defendant's Financial Resources

- Be aware that the defendant's financial resources are important in many aspects of a case, including preserving assets prior to sentencing, setting a bond, negotiating a plea, determining whether discretionary restitution should be imposed, the amount (if any) of a fine, and collecting monetary penalties for years after sentencing.
- Know what kinds of financial information the court is authorized to obtain, and that it includes assets "owned or controlled" or "jointly controlled" by the defendant. [18 U.S.C. §§ 3664\(d\)\(3\) and \(f\)\(1\)](#).
- Be aware of the many sources that can provide information on the defendant's financial resources during an investigation, including: credit bureaus, banks and credit unions, divorce records, state and federal tax returns, credit card records, loan applications, forfeiture proceedings, etc.
- Provide to the court, to the presentence and probation officers, and ultimately to the Financial Litigation Unit (FLU), all information on the defendant's financial resources.

See [Part I](#) for expanded discussion.

II. Preservation of Assets

- Consider utilizing the Fraud Injunction Statute at [§ 1345](#) or various forfeiture statutes to freeze known assets, pending the outcome of the criminal prosecution. (All section (§) citations are to Title 18 unless otherwise indicated).
- If there is a parallel civil action or matter pending, contact the ACE coordinator, who may suggest other methods to preserve assets.

See [Part II](#) for expanded discussion.

III. Bond Acceptance and Bond Forfeiture

- Require the defendant to provide to the court the value of the assets proposed to secure bond, to include the liabilities of the surety and any encumbrances against the surety's property. The surety must have an unencumbered net worth sufficient to pay the amount of the bond.
- Initiate bond forfeiture proceedings and move to judgment expeditiously whenever a defendant released on bond later fails to appear or otherwise violates the release bond conditions. [USAM 3-12.210](#). Make a record of the defendant's failure to appear, and inform the FLU of the forfeiture immediately.
- Where bond is forfeited, initiate an investigation to determine if the surety falsified assets when justifying ability to serve as surety, and pursue a prosecution for false statements where there were false sworn statements regarding the surety's worth.
- Where the bond is secured with real property, initiate forfeiture proceedings under [Fed. R. Crim. P. 46\(f\)](#), by motion to vest title in the United States, under [§ 3146\(d\)](#). Ask the court to appoint a receiver to preserve and sell the realty.
- Be prepared to file a motion at sentencing pursuant to [28 U.S.C. § 2044](#) asking the court to order any money deposited for purposes of an appearance bond to be paid to the Government for satisfaction of any assessment, fine, restitution or penalty imposed against the defendant.
- Notify the FLU of any deposits of defendant's cash or securities in the court registry for bond, given the possible application of defendant's funds toward criminal monetary penalties.

See [Part III](#) for expanded discussion.

IV. Use of Charging Format to Maximize Restitution

- Charge all fraud-type offenses, including those such as counterfeit or credit card offenses that are committed with the "intent to deceive" or "intent to defraud," using the same charging format used for traditional mail/wire fraud or conspiracy offenses, describing the nature and scope of the "scheme," how different acts are part of the scheme, and alleging each substantive-act "in furtherance" of the scheme.
- Allege the beginning and ending dates of the scheme to include all acts for which restitution should be imposed.

See [Part IV](#) for expanded discussion.

V. Plea Agreements

- All plea agreements should accurately reflect the totality and seriousness of the defendant's conduct.
- Consider requiring the defendant to agree to pay restitution to persons other than victims, or for harms that would not otherwise be included in restitution for the offense of conviction, utilizing one of the three restitution statutory plea provisions that permit imposition of a *broader* restitution order than would otherwise be authorized. [18 U.S.C. §§ 3663\(a\)\(3\)](#), [3663\(a\)\(1\)\(A\)](#), [3663A\(a\)\(3\)](#), and [3663A\(c\)\(2\)](#).
- Include the victims' names and specific amount of restitution due to each victim in the plea agreement whenever possible. If there are privilege concerns, such as minor victims, the names should be submitted under Seal in a separate document, to avoid disclosure in the public file.
- In any case in which there are identifiable victims but restitution is not authorized to be imposed as a separate sentence pursuant to a restitution statute, consider requiring the defendant to agree that restitution will be imposed solely as a condition of supervision. [USSG §5E1.1\(a\)\(2\)](#); [18 USC §§ 3563\(b\)\(2\)](#) and [3583](#)

(d).

- Where possible, require the defendant to agree to pay the special assessment *prior* to entering into any plea agreement. At a minimum, the plea agreement should state that the defendant agrees to pay the special assessment *by* sentencing, upon penalty of contempt for failure to do so. Ask the court at sentencing to enforce the agreement, if the assessment has not been paid.
- Whenever there are significant assets identified during the investigation, seek the defendant's agreement to liquidate the assets or allow the FLU to liquidate them and to deposit the funds or sales proceeds into the registry of the court (or escrow account of the defense attorney) specific amounts to be paid toward assessments, restitution, and fine that might be imposed. At a minimum, seek an agreement from the defendant in the plea agreement to pay a full or partial lump sum toward the restitution or fine by, or before, sentencing, or by a date certain soon thereafter, subject to contempt for failure to do so.
- The plea agreement should not detrimentally affect other divisions of the Department: it *should* state that payment of restitution does *not* restrict the filing of any civil suit; it should *not* waive the Government's right to treble damages under the False Claims Act; and it should *not* contain agreements that prejudice civil or tax liability without the express agreement of any affected divisions or agencies. [USAM 9-16.300](#).
- Where helpful, obtain the defendant's admission to his or her financial resources in the plea agreement.
- Consider providing any information the Government knows about specific assets, such as assets the defendant may have put in someone else's name, in the plea agreement.
- Where the defendant has posted a cash bond with his own funds, seek the defendant's agreement to assign the bond to the Government for payment of any special assessment, restitution, or fine imposed at sentencing, pursuant to [28 USC § 2044](#).
- Be aware of the guidelines for entering into pleas regarding restitution in the July 24, 1996, memorandum to prosecutors from the Attorney General; see [USAM 9-16.320](#) for summary; also, be aware of and follow the guidelines in the [Attorney General Guidelines for Victim and Witness Assistance](#).

See [Part V](#) for expanded discussion.

VI. The Special Assessment

- The special assessment should be paid either by the plea, by the sentencing, or by a date certain after sentencing as ordered by the court, upon penalty of contempt for failure to do so.
- In rare cases, where reasonable efforts to collect the assessment are not likely to be effective, the prosecutor may petition the court to remit all or part of the unpaid portion of the assessment, or extend the date upon which it is due, pursuant to [§ 3573](#).

See [Part VI](#) for expanded discussion.

VII. Determining the Restitution Amount

- In each case, ensure that restitution is fully and properly imposed in any case in which there are identifiable victims.
- In each mandatory restitution offense, ensure that the court imposes restitution for the *full* amount of the victims' losses.
- In discretionary restitution cases, ask the court to impose full restitution *unless* the defendant meets the legal burden of showing his or her (present and future) *inability* to pay any restitution, pursuant to [§ 3664](#)

(e). After consideration of the defendant's financial resources in such cases, if the court determines that restitution should be imposed, it should be imposed for the full amount, consistent with §§ 3664(f)(1) and [3553\(c\)\(2\)](#), and [USSG §5E1.1\(a\)\(2\)](#).

- Ask that restitution be imposed for any identifiable victims even where restitution is not authorized as a separate sentence under a restitution statute. In such cases, ask the court to impose the full amount of restitution solely as a condition of supervision, pursuant to §§ [3563\(b\)\(2\)](#) and [3583\(d\)](#).
- In determining the amount of restitution the court is authorized to impose, consider using the 4-step analysis: 1) Identify the offense of conviction; 2) Identify the victims of that offense; 3) Identify the harms to those victims caused by the offense; and 4) Determine which of those harms or costs are compensable as restitution.
- After arriving at the amount that results from steps 1-4 above, determine if the plea agreement permits a greater amount of restitution to be imposed.
- If ascertainable at sentencing, ask the court to include in restitution any future costs the victim will incur for treatment of harm caused by the offense, such as continuing mental or physical treatment, pursuant to [§ 3664\(d\)\(5\)](#).

See [Part VII](#) for expanded discussion.

III. Determining the Fine Amount

- Whenever the defendant has a remaining present or future ability to pay after imposition of the special assessments and restitution, ask the court to impose a fine, upon consideration of the factors listed in [§ 3572\(a\)](#) and [USSG §5E1.2\(d\)](#).
- Although a fine is discretionary by statute, the guidelines require imposition of a fine *unless* the defendant proves his or her inability to pay any fine (in which case an alternative sanction like community service should be imposed). [USSG §§5E1.2\(a\)](#) and (e).
- In those cases in which reasonable efforts to collect are not likely to be effective, the Government may waive all or part of the interest or penalty on a fine. [18 U.S.C. § 3612\(h\)](#).

See [Part VIII](#) for expanded discussion.

IX. Other Penalties, Costs, and Fees

- Determine whether a transfer of forfeited property to compensate victims of the offenses underlying the forfeiture would be appropriate under the Department's policy, and [18 U.S.C. § 981\(e\)\(6\)](#) or [21 U.S.C. § 853\(i\)\(1\)](#). See [Part IX](#) for expanded discussion.

X. Preparation for Sentencing

- Remind the court, where appropriate, of its authority under [18 U.S.C. § 3664\(d\)\(4\)](#) to request any information, even in addition to that in the presentence report (PSR), to make the necessary sentencing determinations on monetary penalties.
- Be prepared to prove the identity of the victims, and to ultimately provide specific necessary identifying information to probation and the clerk on the victims.
- Be prepared to prove the nature and extent of the loss caused by the offense to each victim, by a preponderance of the evidence, as required by [§ 3664\(e\)](#).

- Provide all available victim information to probation at least 60 days prior to the initial sentencing date, pursuant to [§ 3664\(d\)\(1\)](#), or according to Local Rule. The earlier the information is provided probation, the more likely it will be the basis of probation's recommendation regarding sentencing.
- Report to the probation officer any discrepancies between the Government's information on the defendant's resources and the victims' harms, and the information in the draft PSR.
- Make sure probation and the court receive all pertinent information on victims' losses and defendant's resources, up to and through sentencing.
- Where helpful to the court, prepare and file a Sentencing Memorandum, addressing such issues as the calculation of restitution, the imposition of a fine, and the appropriate manner of payment, such as whether full or partial lump sum payment is possible.
- Be alert to cases in which a continuance of the restitution determination would permit the court to more fully identify the victims' losses, pursuant to [§ 3664\(d\)\(5\)](#). In such cases, notify the court at least 10 days prior to sentencing. Once restitution is continued, make sure that the continuance does not exceed 90 days, unless the defendant causes or agrees to the further delay.
- Determine whether the defendant has paid the special assessment(s), immediately prior to the sentencing hearing, particularly where the defendant has agreed to pay by sentencing.

See [Part X](#) for expanded discussion.

XI. The Sentencing Hearing

- If the defendant agreed to pay the special assessment by sentencing and has not paid, ask the court to order the defendant to pay by a date certain, subject to contempt for failure to do so.
- Even in the absence of such an agreement, ask the court to order payment by a date certain soon after sentencing, upon penalty of contempt for failure to do so.
- Put all available information about the defendant's financial resources on the record at sentencing, orally or through a Sentencing Memorandum, even where redundant with information in the PSR, in order to assist victims (who do not receive the PSR), and subsequent collection efforts by the Government.
- Make sure the sentencing record is complete, in order to support both the imposition, and the subsequent collection, of the restitution and fine.
- Ask the court to make a record of its consideration of the facts regarding the defendant's present and future ability to pay wherever relevant (despite the defendant's burden to prove *inability* to pay), to protect the court's imposition of the monetary penalties and manner of payment.
- Ask the court to consider all of the defendant's financial resources, including those that are jointly owned or controlled by the defendant, pursuant to §§ [3664\(d\)\(3\)](#) and [3664\(f\)\(2\)](#), in determining what portion of his or her income or assets can reasonably be paid toward the restitution or fine.
- Push for complete disclosure of defendant's assets. This may motivate the defendant to pay the fine or restitution rather than to disclose assets.
- To facilitate compliance with "McDade," [28 U.S.C. § 530B](#), ask the court to establish on the record whether or not defendant's counsel intends to represent the defendant for appeal and/or collection of criminal monetary penalties (unless such statement was included in the plea agreement).
- Where it is apparent that more time would enable the court to more accurately determine the victims and harms, ask the court to continue the determination of restitution, pursuant to [§ 3664\(d\)\(5\)](#), making sure the

delay does not exceed 90 days (except where the defendant causes or agrees to a longer delay).

- Where the defendant posted funds or assets with the court for bond, file or make a motion at sentencing, pursuant to [28 U.S.C. § 2044](#), asking that the court order that the funds be paid to the clerk for application to the restitution and fine.
- *Oppose* any request by the defendant for a stay of execution of the fine or restitution during appeal, *unless* the defendant posts adequate funds to pay the criminal monetary penalties, pursuant to [Fed. R. Crim. P. 38](#) (c) and (e), and to [§ 3572\(g\)](#).

See [Part XI](#) for expanded discussion.

XII. The Judgment and Manner of Payment

- The court should impose a specific, liquidated fine amount.
- The court should impose a specific restitution amount, to be paid to specified victims. The victims need not have been located yet.
- Make sure that victims' addresses or juvenile victims' names do not appear in the Judgment.
- Where sentence is imposed on more than one count, the court should articulate which counts support the fine or restitution. Where counts are imposed "concurrently," the court should specify the total amount of fine or restitution imposed.
- The court should *not* impose a separate fine amount for "costs" of incarceration or supervision.
- Monitor the court's pronouncement of the sentence, and ask that the court make any clarifications or corrections necessary on the record.
- Review the judgment immediately for errors or ask the FLU to do so. The court can correct "arithmetical, technical, or other clear error" only within 7 days after the issuance of the judgment, pursuant to [Fed. R. Crim. P. 35\(c\)](#), or "clerical mistakes . . . and errors in the record arising from oversight or omission" at any time, pursuant to [Fed. R. Crim. P. 36](#).
- Consult with the FLU to be certain which kinds of assets can be ordered to be liquidated for lump sum payments. Whenever such assets are available, ask the court to order a full or partial lump sum payment toward the restitution or fine by a date certain soon after sentencing.
- Ask the court to impose any part of the restitution or fine not paid in lump sum at or soon after sentencing, due with "payment to begin immediately" on the official judgment form. Imposition with no payment schedule permits collection during incarceration, and greater flexibility of collection during supervision.
- Do not ask for a payment schedule unless circuit law requires it.
- If only a supervision payment schedule is set, the penalty is not "due," and cannot be collected, during incarceration. Thus, if a supervision payment schedule is set, ask the court also to either: a) impose the restitution or fine with "payment to begin immediately," or b) impose a payment schedule for the period of imprisonment as well, either of which will permit at least some collection during imprisonment.
- Whenever a payment schedule is set, ask the court to also advise the defendant on the record (orally and/or in the judgment) that any schedule is a minimum schedule, that the court expects the defendant to pay more whenever possible, and that the schedule will be modified according to any changes in the defendant's financial circumstances.

- In every case, the defendant should be advised of his or her responsibility for notifying the court of any material changes in his or her financial circumstances that may affect his or her ability to pay restitution, pursuant to [§ 3664\(k\)](#).

See [Part XII](#) for expanded discussion.

III. The Role of the Prosecutor and FLU Post-Sentencing

- In each case, the prosecutor should take the following steps immediately following sentencing, to ensure that the FLU receives all available information on the defendant's financial resources:
 - Forward a copy of the PSR to the FLU, pursuant to [§ 3552\(d\)](#);
 - Provide the FLU with any information or pleading in the Government's file on defendant's financial resources not obtained through the grand jury investigation;
 - File a motion asking the court to order disclosure of any information gathered by the grand jury to the FLU, pursuant to [Fed. R. Crim. P. 6\(e\)](#), and make the disclosure as soon as it is ordered;
 - Order the transcript of any hearing in which defendant's financial resources were discussed, such as a bond hearing, and forward the transcript to the FLU.
- In accordance with local practice, either the prosecutor or the FLU should ask the court to order that the defendant be deposed on his or her financial assets, pursuant to Fed. R. Civ. P. [30](#) and [69](#), preferably before the defendant is transferred for incarceration. (Be sure to seek the court's disclosure of the grand jury information to the FLU *prior* to the deposition.)
- Assist any victim attempting to notify the court under [§ 3664\(d\)\(5\)](#) of newly discovered losses after sentencing.
- Continue enforcement of a judgment ordering restitution or a fine, even if the sentence is modified, corrected or appealed and modified -- *unless* the court specifically stays collection; it is a final judgment for all other purposes. 18 U.S.C. §§ [3562](#), [2572\(c\)](#) and [3582\(b\)](#).
- During the defendant's supervision, work closely with the FLU and with probation to facilitate the maximum payment of the restitution and/or fine possible.
- During the defendant's supervision, if the defendant willfully fails to pay what he or she is able to pay, ask the court to hold a revocation hearing, and provide full information on the defendant's resources to the court.
- During the defendant's supervision, notify the court of any apparent material change in the defendant's economic circumstances that might affect his or her ability to pay restitution, pursuant to [§ 3664\(k\)](#), and certify to the court that the victim has been notified of the change, as well. Also, assist any victim in notifying the court of such a change.

See [Part XIII](#) for expanded discussion.

IV. Enforcement of Restitution or a Fine by the FLU

- For each case opened, the following 4-steps should be done within 30 days of the judgment:
 - Open and record the case;
 - Issue a demand letter (including an inquiry whether the defense attorney will continue to represent the defendant for collection purposes);
 - Initiate the filing of a lien wherever possible; and
 - Conduct an initial assessment of the prioritization and collectibility of the case.

- Conduct initial discovery of each newly sentenced case, which may include the following:
 - Review the PSR for asset information;
 - Request a financial statement from the debtor;
 - Where the defendant is in prison, consult with the defendant's BOP case manager;
 - Inquire whether any victims have information about the defendant's assets;
 - Request asset information from the prosecutor and case agent; and
 - Research on-line property locator services.
- Obtain a credit report on the defendant whenever assets are suspected.
- Seek approval of the United States Attorney before seizing a debtor's residence.
- Consider asking each defendant annually for an updated financial statement, which can produce updated addresses, provide a reminder, and provide another McDade inquiry about continued representation.
- File a lien in all cases where restitution is ordered and not immediately paid.
- Conduct a *judgment debtor examination*, pursuant to Fed. R. Civ. P. [30](#) and [69](#), with the assistance of the prosecutor; send a notice and *subpoena duces tecum* listing all types of financial documents; continue the deposition if necessary until all documents have been produced; question the defendant about each document on the record; ask whether the defendant has filed a *homestead exemption*; and have the U.S. Marshal available with a writ of execution to be served on any cash or assets confirmed. State law procedures should also be considered.
- Do not restrict collection efforts where payment was ordered according to a payment plan. If additional assets are available, ask the court to raise the payment plan or order immediate lump sum payment.
- Coordinate with the Bureau of Prisons in monitoring the defendant's inmate trust account, perhaps by seeking periodic reports with a subpoena issued under [Fed. R. Civ. P. 45](#), where requested by the Bureau; collect any substantial deposits in accordance with [§ 3664\(n\)](#) by asking the court to order the immediate payment of those deposits toward restitution or a fine, upon penalty of contempt.
- Coordinate with probation while the defendant is on supervision or probation to facilitate collection, mutually exchanging information and providing advance notice to probation of collection methods.
- Consider filing a petition pursuant to [§ 3573](#) to remit or modify a fine or special assessment (but not restitution) where there is little or no likelihood of collection.
- Consider waiving all or part of the interest where reasonable efforts to collect the interest are not likely to be effective, pursuant to [§ 3612\(h\)](#).
- Provide notice to the defendant of any fine or restitution payment that is *delinquent* within 10 working days after delinquency. [18 U.S.C. §§ 3572\(h\)](#) and [3612\(d\)](#).
- Provide notice to the defendant of any fine or restitution payment that is in *default* within 10 working days after a fine or restitution payment is determined to be in default, demanding the entire amount due in full within 30 days. [18 U.S.C. §§ 3572\(i\)](#) and [3612\(e\)](#). Ask the court to find the defendant in default and to hold a hearing, pursuant to [§ 3613A](#).
- Consult with probation prior to any revocation hearing to determine the appropriate sanction to the court, under §§ [3613A](#) and [3565](#).
- Document the case file whenever any collection step is taken.

See [Part XIV](#) for expanded discussion.