



October 2017

# FEDERAL CRIMINAL RESTITUTION

## Factors to Consider for a Potential Expansion of Federal Courts' Authority to Order Restitution

Accessible Version

# GAO Highlights

Highlights of [GAO-18-115](#), a report to congressional committees

## Why GAO Did This Study

Victims of federal crimes may be compensated for their losses through criminal proceedings when federal courts order restitution during a defendant's sentencing. Federal law dictates the crimes for which restitution is mandatory versus discretionary and what types of losses may be compensated. Federal prosecutors and Department of Justice officials are responsible for proving and litigating issues related to victims' losses for restitution orders, enforcing orders of restitution, and collecting criminal debt, including unpaid restitution.

The Justice for All Reauthorization Act of 2016, Pub. L. No. 114-324, contains a provision for GAO to conduct a review on the factors that should be considered when broadening restitution provisions. This report describes factors stakeholders believe should be considered for a potential expansion of federal courts' authority to award restitution.

To gather information on factors, GAO interviewed a non-generalizable group of stakeholders knowledgeable about the restitution process, including individuals and entities representing federal judges and court officials, federal prosecutors and Department of Justice officials, victims, and defendants and their counsel. GAO also reviewed relevant federal laws, legal cases, agency documentation, summary data on orders for restitution from fiscal years 1996 through 2016, and the amount of outstanding restitution debt owed in federal cases as of the end of fiscal year 2016.

View [GAO-18-115](#). For more information, contact Gretta L. Goodwin at (202) 512-8777 or [goodwing@gao.gov](mailto:goodwing@gao.gov).

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## FEDERAL CRIMINAL RESTITUTION

### Factors to Consider for a Potential Expansion of Federal Courts' Authority to Order Restitution

## What GAO Found

Federal courts have authority to award restitution for authorized losses to eligible victims. Generally, victims are those directly and proximately harmed as a result of a defendant's offense of conviction and they may be awarded compensation for their actual or "out-of-pocket" losses. Provisions for the potential expansion of restitution contained in the Justice for All Reauthorization Act of 2016 that GAO reviewed could allow for courts to award restitution to additional victims and for a greater scope of losses. Stakeholders GAO interviewed identified various factors to consider related to these potential expansion provisions, for example:

- **Restitution for related conduct and no proximate cause requirement.** A factor stakeholders stated should be considered in potentially allowing restitution for conduct that is broader than the offense of conviction was that it could be a violation of a defendant's constitutional right to due process because restitution could be awarded for conduct for which the defendant's guilt was not established. In addition, they said it could lead to increased complexity to determine victim losses, which could create challenges for federal prosecutors and could result in less restitution being awarded. For a potential expansion of restitution to compensate harm that was not proximately caused by the defendant (i.e., harm that was not reasonably foreseeable as a result of the offense) stakeholders said factors that should be considered include that the current proximate harm requirement does not present challenges and that such an expansion could lead to additional sentencing-related hearings and litigation.
- **Restitution to restore victims to their position had the offense not been committed.** Stakeholders said this provision is already a goal of federal restitution, but that a potential expansion could allow judges more discretion to order restitution for victim losses not specified by statute, which could help restore the victim to his or her pre-offense condition.
- **Restitution for any injury, harm, or loss, including emotional distress.** A factor stakeholders identified in potentially expanding restitution to cover intangible losses, including emotional distress, included that it could increase the complexity of the restitution process because these are not easily quantified losses. Relatedly, stakeholders said that the suitability of criminal versus civil proceedings should be considered because the civil system, through which crime victims may seek compensation at their own expense, is set up to handle these issues and losses, whereas officials involved in criminal cases lack the specialized skills to determine these kinds of losses.

Stakeholders GAO interviewed identified additional factors related to the potential broadening of courts' authority to order restitution generally; for example, they told GAO that increased restitution debt and collectability challenges should be considered. According to the Department of Justice, the amount of outstanding restitution debt owed in federal cases as of the end of fiscal year 2016 was \$110.2 billion. Stakeholders stated that defendants often lack the financial resources to pay restitution and adding to the uncollected restitution debt through a potential expansion of authority could lead to further collection challenges.

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# Contents

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Letter		1
	Background	5
	Stakeholders Identified Various Factors Related to the Potential Expansion of Federal Courts' Authority to Order Restitution	15
	Agency Comments	28
<hr/>		
Appendix I: Overview of Restitution Provisions for Potential Expansion in the Justice for All Reauthorization Act of 2016		29
Appendix II: Restitution Imposed by the Federal Courts from Fiscal Years 1996 through 2016		32
Appendix III: GAO Contact and Staff Acknowledgments		34
	GAO Contact	34
	Staff Acknowledgements	34
<hr/>		
Appendix IV: Accessible Data		35
	Data Table	35
<hr/>		
Tables		
	Table 1: List of Ten Stakeholders GAO Interviewed from the Four Key Stakeholder Groups in the Federal Restitution Process	3
	Table 2: Provisions for Potential Expansion of Federal Courts' Authority to Order Restitution in the Justice for All Reauthorization Act of 2016 and Factors Cited by Stakeholders in the Restitution Process	30
	Table 3: Restitution Imposed for Individual and Organizational Offenders by the U.S. Courts, Fiscal Years 1996 through 2016 <sup>32</sup>	
	Table 4: Amount of Restitution Imposed at Sentencing for Individual and Organizational Offenders by the U.S. Courts, Fiscal Years 1996 through 2016 (U.S. dollars)	33
	Data Table for Figure 2: Restitution Imposed by the Federal Courts for Individual and Organizational Offenders, Fiscal Years 1996 through 2016	35

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## Figures

Figure 1: Overview of Compensation of Victims of Crime through Federal Criminal Restitution and Civil Proceedings	12
Figure 2: Restitution Imposed by the Federal Courts for Individual and Organizational Offenders, Fiscal Years 1996 through 2016	13

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### Abbreviations

CJA	The Criminal Justice Act
DOJ	Department of Justice
MVRA	The Mandatory Victims Restitution Act of 1996
USSC	U.S. Sentencing Commission

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October 12, 2017

The Honorable Charles E. Grassley  
Chairman  
The Honorable Dianne Feinstein  
Ranking Member  
Committee on the Judiciary  
United States Senate

The Honorable Robert W. Goodlatte  
Chairman  
The Honorable John Conyers, Jr.  
Ranking Member  
Committee on the Judiciary  
House of Representatives

The impact of crime on an individual victim often has significant emotional, psychological, physical, financial, and social consequences. The primary goal of federal criminal restitution is remedial or compensatory and federal courts may order defendants to pay restitution to compensate victims for their losses as authorized by statute during sentencing.<sup>1</sup> Federal law dictates the crimes for which restitution is mandatory versus discretionary and what types of harms may be compensated. For example, federal courts are required to order restitution following conviction for crimes such as stalking, arson, sexual exploitation of children, and fraud as well as all other crimes of violence and property crimes.<sup>2</sup> In addition, federal courts are permitted, but not required, to order victim restitution related to other offenses in Title 18 of

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<sup>1</sup>*Paroline v. United States*, 134 S. Ct. 1710, 1726 (2014); see, e.g., *United States v. Gushlak*, 728 F.3d 184, 190 (2d Cir. 2013) (“Federal courts have no inherent power to order restitution. A sentencing court’s power to order restitution, therefore, depends upon, and is necessarily circumscribed by, statute.”) (internal quotations and citations omitted).

<sup>2</sup>Under 18 U.S.C. § 3663A, where there is an identifiable victim who has suffered a physical injury or monetary loss, the court is required to order an offender to pay restitution, regardless of the offender’s ability to pay, for a conviction of (1) a crime of violence as defined by 18 U.S.C. § 16; (2) a property crime, including any offense committed by fraud or deceit or maintaining a drug-involved premise (21 U.S.C. § 856(a)); (3) an offense related to tampering with consumer products (18 U.S.C. § 1365); and (4) theft of and other offenses relating to pre-retail medical products (18 U.S.C. § 670). Other restitution statutes require courts to award restitution for specific offenses. 18 U.S.C. §§ 228(d), 1593, 2248, 2259, 2264, 2323(c), 2327; 21 U.S.C. § 853(q).

the U.S. Code—for example, conspiracies to commit tax evasion and violate civil rights—and various controlled substance offenses under Title 21, among others.<sup>3</sup> Further, federal courts may also order restitution to the extent agreed to by the parties in a plea agreement, including to persons other than the victim.<sup>4</sup> If no statutory authority for ordering restitution is applicable to a specific offense, the court may nevertheless order restitution to the victim, solely as a condition of probation or supervised release.<sup>5</sup> The types of compensable expenses specified in statute include, for example, the costs of medical and other services related to physical, psychiatric, and psychological care, and reimbursement for lost income as a result of the offense, among other enumerated losses.<sup>6</sup>

The Justice for All Reauthorization Act of 2016 contains a provision for us to conduct a review and, within 180 days, report on the factors that should be considered when broadening restitution provisions, including four areas. The four expansion areas are as follows: (1) to apply to victims who have suffered harm, injury, or loss that would not have occurred but for the defendant's related conduct; (2) in the case of an offense resulting in the victim's death, to allow the court to use its discretion to award the income lost by the victim's surviving family members or estate as a result of the victim's death; (3) to require that the defendant pay to the victim an amount determined by the court to restore the victim to the position he or she would have been in had the defendant not committed the offense; and (4) to require the defendant compensate the victim for any injury, harm, or loss, including emotional distress, that occurred as a result of the offense.<sup>7</sup> See appendix I for additional information on these four expansion areas to broaden courts' authority to order restitution. To meet the 180 day reporting requirement, we provided a briefing to your staff in June 2017. This report transmits the final results of our review. Specifically, this report describes the factors reported by stakeholders we interviewed that should be considered for a potential expansion of federal courts' authority to award restitution in these four specific areas.

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<sup>3</sup>18 U.S.C. § 3663.

<sup>4</sup>18 U.S.C. §§ 3663(a)(1)(A), (a)(3), 3663A(a)(3).

<sup>5</sup>18 U.S.C. §§ 3563(b)(2), 3583(d). Restitution ordered as a condition of probation or supervised release expires with the term of supervision, as opposed to a sentence of restitution which is generally enforceable for at least 20 years.

<sup>6</sup>18 U.S.C. §§ 3663(b), 3663A(b).

<sup>7</sup>Pub. L. No. 114-324, § 2(d), 130 Stat. 1948, 1948-49.

To gather information on factors related to expanding federal courts' authority to order restitution, we reviewed the process of ordering restitution to victims in federal criminal proceedings, and identified four key groups: federal judges and court officials (including clerks and probation officers), prosecutors and Department of Justice (DOJ) officials, victims, and defendants and their counsel. In order to obtain the perspectives of representatives from each of these key groups, we interviewed stakeholders, including officials from the federal judiciary and DOJ, representatives from associations, and four individuals knowledgeable about the federal restitution process referred to us by other officials. Stakeholders we interviewed included at least two individuals or entities representing federal judges and court officials, prosecutors and DOJ officials, victims, and defendants and their counsel. We provided stakeholders with a summary of their opinions in order to ensure we correctly captured their views. Table 1 lists those that we interviewed and their affiliation with the federal restitution process. While the information gathered from our interviews is not generalizable to all stakeholders in the federal restitution process, it does provide insights into factors associated with expanding the authority of the federal courts to order restitution from key stakeholder groups in the restitution process.<sup>8</sup>

**Table 1: List of Ten Stakeholders GAO Interviewed from the Four Key Stakeholder Groups in the Federal Restitution Process**

Stakeholder affiliation	List of stakeholders
Judges and court officials	<p><b>1. Federal judiciary officials</b></p> <ul style="list-style-type: none"> <li>• Administrative Office of the U.S. Courts</li> <li>• Judicial Conference of the United States</li> <li>• U.S. Sentencing Commission</li> <li>• Federal Judicial Center</li> <li>• Probation and Pretrial Services</li> </ul>
Prosecutors and Department of Justice (DOJ) officials	<p><b>2. DOJ officials</b></p> <ul style="list-style-type: none"> <li>• Executive Office for United States Attorneys</li> <li>• Criminal Division</li> </ul> <p><b>3. National Association of Assistant U.S. Attorneys</b></p>

<sup>8</sup>The number of stakeholders who commented on particular provisions varied because some stakeholders did not have opinions on each provision. Additionally, the factors identified by stakeholders were provided in response to open-ended interview questions. Therefore, multiple stakeholders identified common factors only if they were mentioned spontaneously.

Stakeholder affiliation	List of stakeholders
Victims	<p><b>4. National Crime Victim Law Institute</b></p> <p><b>5. Mr. Paul Cassell, Esq., Professor, University of Utah College of Law</b></p> <p><b>6. Mr. James R. Marsh, Esq., private attorney</b></p>
Defendants and their counsel	<p><b>7. National Association of Criminal Defense Lawyers</b></p> <p><b>8. Mr. James Felman, Esq., private attorney</b></p> <p><b>9. Federal and Community Defenders<sup>a</sup></b></p>
Restitution consultant, not affiliated	<b>10. Ms. Catharine M. Goodwin, Esq., author and restitution consultant</b>

Source: GAO. | GAO-18-115

<sup>a</sup>Although part of the federal judiciary, Federal and Community Defenders represent defendants.

We also reviewed relevant federal laws and legislative history, legal cases, agency documentation, our past work on restitution, Congressional Research Service reports, and secondary legal sources on restitution, including law review articles and publications. In addition, we reviewed summary data on orders for restitution from the U.S. Sentencing Commission (USSC)<sup>9</sup> from fiscal years 1996 through 2016, a time period starting after enactment of the Mandatory Victims Restitution Act of 1996 (MVRA)<sup>10</sup> through the most recent fiscal year for which complete data were available. We also reviewed summary data from DOJ on the total amount of outstanding restitution debt owed in federal cases reported for fiscal year 2016, the most recent fiscal year for which complete data are available. To assess the reliability of the data, we reviewed agency documents and interviewed responsible officials to understand their methods for collecting, reporting, and validating the data. We found the data to be sufficiently reliable for the purposes of our report.

We conducted this performance audit from January 2017 to October 2017 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that

<sup>9</sup>USSC is an independent judicial branch agency responsible for, among other things, collection, preparation, and dissemination of information on sentences imposed across federal courts. 28 U.S.C. §§ 991, 995.

<sup>10</sup>The Mandatory Victims Restitution Act (MVRA) was enacted as subtitle A of title II of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 201-211, 110 Stat. 1214, 1227-1241. In addition to adding mandatory restitution for most federal offenses, the MVRA also required that courts order restitution in the full amount of each victim's losses without consideration of the economic circumstances of the defendant. 18 U.S.C. § 3664(f)(1)(A).

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the evidence obtained provides a reasonable basis for our findings based on our audit objectives.

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## Background

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### Stakeholders Involved in the Federal Restitution Process

Victims of federal crimes may be compensated for their losses through criminal proceedings when a federal court orders restitution pursuant to statute. Restitution is part of the sentencing process for federal offenders and there are four key groups of stakeholders involved:

- **Judges and court officials.** The federal judiciary consists of a system of courts that has the critical responsibility of ensuring the fair and swift administration of justice in the United States and handles all federal civil, criminal, and bankruptcy cases and reviews of federal administrative agency cases throughout the country.<sup>11</sup> The federal courts have various responsibilities in the restitution process. Federal judges are responsible for ordering the proper amount and type of restitution, including payment schedules and modifications.<sup>12</sup> Federal probation officers are responsible for the presentence report, which must include information for the court to use in fashioning a restitution order, including, among other things, a complete accounting of the losses to each victim and information about the economic circumstances of each defendant.<sup>13</sup> Following a defendant's sentencing and the imposition of restitution, probation officers supervise offenders to ensure compliance with orders for restitution, including conducting ongoing financial investigations, supporting U.S. Attorneys' Offices in the collection and enforcement of restitution orders, notifying the federal court of an offender's failure to pay

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<sup>11</sup>The judiciary's system of courts consists of the Supreme Court, 12 regional circuit courts of appeals, 94 district courts, and 91 bankruptcy courts, as well as courts of special jurisdiction, including the Court of Appeals for the Federal Circuit, the Court of International Trade, and the Court of Federal Claims.

<sup>12</sup>18 U.S.C. § 3664.

<sup>13</sup>*Id.* A federal probation officer completes a presentence report after conducting a presentence interview as well as an independent investigation of the offense and the defendant's background. In addition to information about the offense and defendant, the presentence report also contains the statutory range of punishment and a calculation of the relevant sentencing guidelines, victim information, and victim harms and losses applicable to restitution.

outstanding restitution, and making recommendations to amend orders based on changes in an offender's ability to pay.<sup>14</sup> Clerks of federal courts are responsible for receipting and disbursing restitution payments and notifying DOJ of such.<sup>15</sup> In addition, the Director of the Administrative Office of the U.S. Courts has statutory responsibilities related to the restitution process, including establishing procedures and mechanisms within the judicial branch for processing fines, restitution, forfeitures of bail bonds or collateral, and assessments.<sup>16</sup> The Judicial Conference of the United States, a body of 27 judges over which the Chief Justice of the United States presides, is the judiciary's principal policymaking body and operates through a network of committees created to address and advise on a wide variety of subjects such as budget, criminal law, and court administration.<sup>17</sup> Given the role of the judiciary in the restitution process, the Judicial Conference has taken policy positions on various restitution-related issues and has supported various legislative proposals to improve the process.<sup>18</sup>

- **Prosecutors and DOJ officials.** DOJ officials are responsible for prosecuting federal offenses, identifying victims of crime and informing them of restitution to which they may be entitled, identifying victim losses and harms that are subject to restitution after consulting with victims and providing that information to probation officers, demonstrating the amount of loss sustained by the victim, enforcing orders of restitution, and collecting criminal debt, including unpaid restitution.<sup>19</sup> Various entities and officials within DOJ are responsible for these activities, including federal prosecutors in the Criminal

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<sup>14</sup>As described below, DOJ has statutory responsibility for the enforcement and collection of criminal debt including restitution. 18 U.S.C. §§ 3612(c), 3664(m)(1)(A).

<sup>15</sup>18 U.S.C. § 3612. Clerks may authorize disbursement from the U.S. Treasury.

<sup>16</sup>28 U.S.C. § 604(a)(18).

<sup>17</sup>28 U.S.C. § 331.

<sup>18</sup>For example, the Judicial Conference has supported legislative proposals treating most fines and orders of restitution in criminal offenses as civil debts, payable immediately and collectable by either DOJ or the victim.

<sup>19</sup>28 U.S.C. §§ 516, 518; 18 U.S.C. §§ 3612, 3664; 34 U.S.C. § 20141 (transferred from 42 U.S.C. § 10607). DOJ officials enter victim names and contact information into DOJ's Victim Notification System, which is a free, computer-based system that provides federal crime victims with information on scheduled court events, as well as the outcome of those court events.

Division and the U.S. Attorneys' Offices, and their respective Financial Litigation Units.<sup>20</sup>

- **Victims.** A federal crime victim is a person directly and proximately harmed as the result of a federal offense.<sup>21</sup> Federal crime victims are entitled to full and timely restitution as provided in law.<sup>22</sup> Victims may provide information to prosecutors, probation officers, and to the court about their losses and have a right to be heard at sentencing, but are not required to participate in any phase of the restitution proceedings.<sup>23</sup>
- **Defendants and their counsel.** Defendants who commit federal crimes where an identifiable victim suffered a physical injury or monetary loss are generally required to pay restitution.<sup>24</sup> Defendants are required to submit information about their financial resources and the financial needs and earning ability of their dependents to the court and have the burden of demonstrating these resources and needs in any restitution proceedings.<sup>25</sup> Defendants are generally represented by counsel in criminal proceedings<sup>26</sup> and according to the judiciary approximately 90 percent qualify for court-appointed counsel under the Criminal Justice Act because they are financially unable to retain

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<sup>20</sup>28 C.F.R. § 0.171. Financial Litigation Units within all of DOJ's U.S. Attorneys' Offices are primarily responsible for the enforcement and collection of debts owed to the United States and the victims of federal crimes. DOJ's Bureau of Prisons also collects restitution payments through its Inmate Financial Responsibility Program, which is a work program instituted by the Bureau of Prisons to encourage each sentenced inmate to meet his or her legitimate financial obligations. The program allows for the development of a financial plan so that inmates may satisfy enumerated obligations, such as restitution payments, while incarcerated. 28 C.F.R. §§ 545.10, 545.11(a).

<sup>21</sup>The term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered. This includes, 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. 18 U.S.C. §§ 3663(a)(2), 3663A(2). Victims may include the government and private entities, such as corporations.

<sup>22</sup>18 U.S.C. § 3771(a)(6).

<sup>23</sup>18 U.S.C. §§ 3664(d),(g), 3771(a).

<sup>24</sup>18 U.S.C. §§ 3663, 3663A; U.S. Sentencing Commission, Guidelines Manual § 5E1.1(a).

<sup>25</sup>18 U.S.C. § 3664(e).

<sup>26</sup>See U.S. Const. amend. VI.

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counsel in federal criminal proceedings.<sup>27</sup> Court-appointed counsel is provided by Federal Defender Organizations and panel attorneys.<sup>28</sup> A defendant may be convicted pursuant to plea agreement with the government or after a trial; more than 90 percent of defendants plead guilty rather than go to trial. A defendant is referred to as an offender following conviction of an offense.

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## Compensation in the Restitution Process

Restitution is only available to victims and for harms as statutorily authorized. Congress passed the MVRA in 1996, which substantially revised the restitution process. The legislative history reflects the balancing of competing interests—including ensuring that the loss to crime victims is recognized, that they receive the restitution that they are due, and also that the offender realizes the damages caused by the offense and pays the debt owed to the victim as well to society.<sup>29</sup> As provided in the legislative history, one of the ways that the law sought to balance the application of mandatory restitution was by limiting it to the instances where a named identifiable victim suffered a physical injury or monetary loss as a direct and proximate result of the defendant’s offense of conviction.<sup>30</sup> This means that the victim would not have been harmed “but for” the conduct underlying the offense of conviction and also that the harm was proximately caused by the conduct. Proximately caused means that the causal nexus between the conduct and the loss is not too attenuated either factually or temporally. As such, a defendant is not held

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<sup>27</sup>18 U.S.C. § 3006A.

<sup>28</sup>The Criminal Justice Act (18 U.S.C. § 3006A, or CJA) provides representation to financially eligible criminal defendants through federal defender organizations and CJA panel attorneys. There are two types of federal defender organizations: federal public defender organizations and community defender organizations. Federal public defender organizations are federal entities, and their staffs are federal employees. Community defender organizations are non-profit defense counsel organizations incorporated under state laws which receive federal grants to fund their operations. CJA panel attorneys are qualified lawyers in private practice appointed by federal courts to represent financially eligible defendants in criminal cases, typically when a federal defender organization is unable to represent the defendant.

<sup>29</sup>S. Rep. No. 104-179 (1995), at 12. The Joint Explanatory Statement accompanying the Antiterrorism and Effective Death Penalty Act, of which the MVRA was enacted as title II, subtitle A, provides that the Senate Judiciary Committee Report to accompany H.R. 665 should serve as the legislative history for the MVRA. H.R. Rep. No. 104-518 (1996), at 111-12.

<sup>30</sup>S. Rep. No. 104-179, at 19.

liable for downstream effects of an act where there were additional, intervening causes not sufficiently related to the offense.<sup>31</sup> For example, a rapist would not be held responsible for the death of a hospitalized rape victim who died in a hospital fire.<sup>32</sup> In addition, the loss caused by the defendant's conduct underlying the offense of conviction establishes the outer limits of the restitution order.<sup>33</sup> This means that harms caused by the defendant's conduct that were related to, but outside the scope of, the crime of conviction cannot be compensated through restitution.<sup>34</sup> For example, a defendant who was convicted of illegally possessing a firearm but acquitted of using the firearm to shoot someone would not be liable for restitution for medical costs for the shooting victim.<sup>35</sup>

The restitution statutes specify the types of harm that may be compensated, and federal case law interpreting these statutes provides guidance to courts when ordering restitution. For example, when a crime results in bodily injury to a victim, compensable expenses include the costs of medical and other services related to physical, psychiatric, and psychological care; costs for necessary physical and occupational therapy and rehabilitation; and reimbursement for lost income as a result of the offense, among other enumerated losses.<sup>36</sup> Courts have also ordered restitution for a victim's actual losses that were proximately caused by the defendant's conduct even when not explicitly listed in statute. When restitution is ordered by the court, it is to be in the full

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<sup>31</sup>In other words, the "causal chain" between loss and conduct may not extend so far, in terms of the facts or the time span, as to become unreasonable.

<sup>32</sup>See *United States v. Marlatt*, 24 F.3d 1005, 1007 (7th Cir. 1994) (citing *Brackett v. Peters*, 11 F.3d 78, 79-80 (7th Cir. 1993)); Catharine M. Goodwin, *Federal Criminal Restitution* (Eagan, Minnesota: Thomson West, 2016), 215-217.

<sup>33</sup>*Paroline*, 134 S. Ct. at 1720; *Hughey v. United States*, 495 U.S. 411, 413 (1990).

<sup>34</sup>The statutes also provide that where the offense 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 is also a victim. This means that a criminal defendant who is convicted of conspiracy or other scheme offenses may be liable in restitution for all losses flowing from that conspiracy; this has included harm caused by a co-conspirator for conduct not underlying the offense of conviction.

<sup>35</sup>See *United States v. McArthur*, 108 F.3d 1350, 1357 (11th Cir. 1997) (case decided under pre-MVRA law); see also *United States v. Romines*, 204 F.3d 1067, 1069 (11th Cir. 2000) (Defendant who was convicted of escape from a half-way house could not be ordered to pay restitution to employers from whom he stole money in furtherance of his escape because there was no conviction for embezzlement.).

<sup>36</sup>18 U.S.C. §§ 3663(b)(2), 3663A(b)(2).

amount of each victim's losses without consideration of the economic circumstances of the defendant.<sup>37</sup> During a defendant's sentencing, additional hearings may be held to examine losses to victims for restitution and prosecutors are responsible for proving and litigating issues related to victims' losses. Restitution may be imposed by the federal courts up to 90 days after sentencing if additional time is needed by the court to locate victims and calculate losses.<sup>38</sup> In some cases, courts can decline to order restitution, such as when the court determines that fashioning an order of restitution would complicate or prolong the sentencing process so much that the need to provide restitution is outweighed by the burden on the sentencing process.<sup>39</sup>

Separate from criminal restitution, victims may seek compensation from the offender by pursuing litigation at their own expense through a civil proceeding in a federal, state, or local court.<sup>40</sup> In the United States, criminal and civil proceedings are separate legal systems subject to different laws, standards, and rules of procedure. The types of harms for

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<sup>37</sup> 18 U.S.C. § 3664(f)(1). The defendant's financial resources are only a consideration of whether the court orders restitution, not in determining its amount, for discretionary restitution under section 3663. Should restitution be ordered under that section, it must be ordered in the full amount of each victim's losses.

<sup>38</sup> See 18 U.S.C. § 3664(d)(5). The Supreme Court has held that a sentencing court that misses the 90-day deadline nonetheless retains the power to order restitution—at least where the sentencing court made clear prior to the deadline's expiration that it would order restitution, leaving open (for more than 90 days) only the amount. *Dolan v. United States*, 560 U.S. 605, 608 (2010).

<sup>39</sup> 18 U.S.C. §§ 3663, 3663A. Under 18 U.S.C. § 3663A the court cannot decline to order restitution for crimes of violence.

<sup>40</sup> Other means for obtaining or facilitating compensation include: 1) Victims of federal crimes who have incurred a financial loss as a direct result of the commission of the offense underlying a forfeiture may seek compensation through submission of a petition for remission to DOJ for forfeited assets from defendants. This process is governed by 28 C.F.R. part 9. Under its restoration procedures, DOJ may forfeit a defendant's property and transfer the proceeds to the court in satisfaction of an order of restitution. See Department of Justice, *Asset Forfeiture Policy Manual* (2016). Forfeited assets are property of the United States and courts and defendants lack authority to use them to satisfy a defendant's criminal debts, including fines or restitution obligations. *Id.* 2) Victims of federal crimes may file a lien against an offender in a state or local court by requesting a clerk of a U.S. District Court issue an Abstract of Judgment certifying that a judgment has been entered in a victim's favor in the amount specified in the restitution order. 18 U.S.C. § 3664(m)(1)(B). 3) In instances where an offender has been convicted of an offense that gave rise to a restitution order, when a victim sues the offender for damages in a civil proceeding, the offender generally cannot deny the essential allegations of that offense. 18 U.S.C. § 3664(l).

which a victim may receive compensation differ in a civil proceeding. For example, federal criminal courts may order restitution to reimburse a victim for medical expenses, but cannot order compensation for pain and suffering caused by a crime. However, a victim may seek compensation for pain and suffering by filing a civil action against the defendant, as well as for other types of damages that are not available through restitution.<sup>41</sup> Other types of civil remedies not compensable as criminal restitution include intended harm, punitive damages, breach of contract, and disgorgement of ill-gotten gains, among others. Figure 1 below outlines the steps taken for compensation of victims of federal crimes through federal criminal restitution and civil proceedings.

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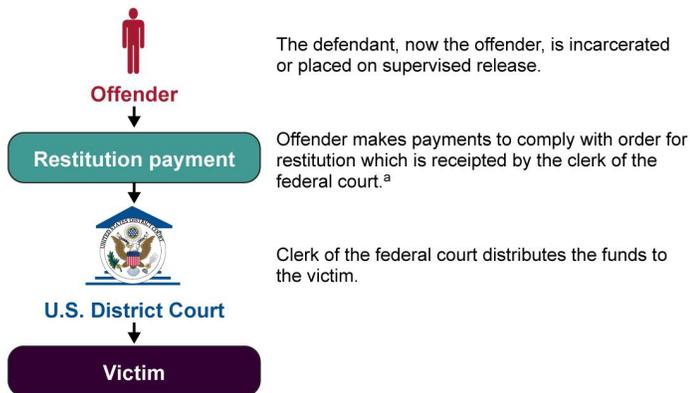
<sup>41</sup>Litigation during civil proceedings for losses to crime victims follows tort law, which is almost exclusively contained in state law and the large majority of tort cases are filed in state court. A tort is an injury to someone's person, reputation, or feelings or damage to real property. In civil proceedings, courts can hold injurers liable for compensatory damages to cover the "economic" or monetary cost of an injury—for example, medical costs and lost wages—and the "noneconomic" or non-monetary costs of pain and suffering and punitive damages intended to punish a defendant for willful and wanton conduct.

**Figure 1: Overview of Compensation of Victims of Crime through Federal Criminal Restitution and Civil Proceedings**

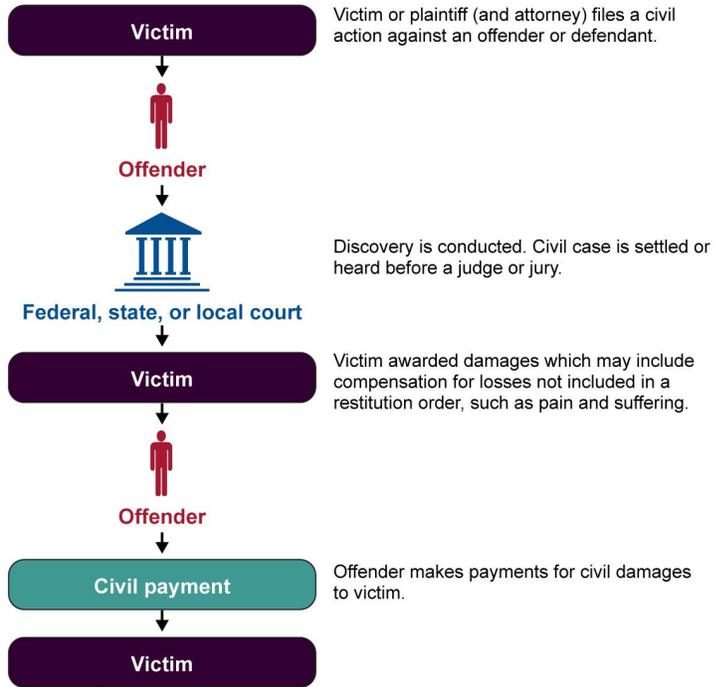
**Federal criminal proceedings**



**Post sentencing**



**Civil proceedings**



Source: GAO analysis of federal judiciary and Department of Justice information. | GAO-18-115

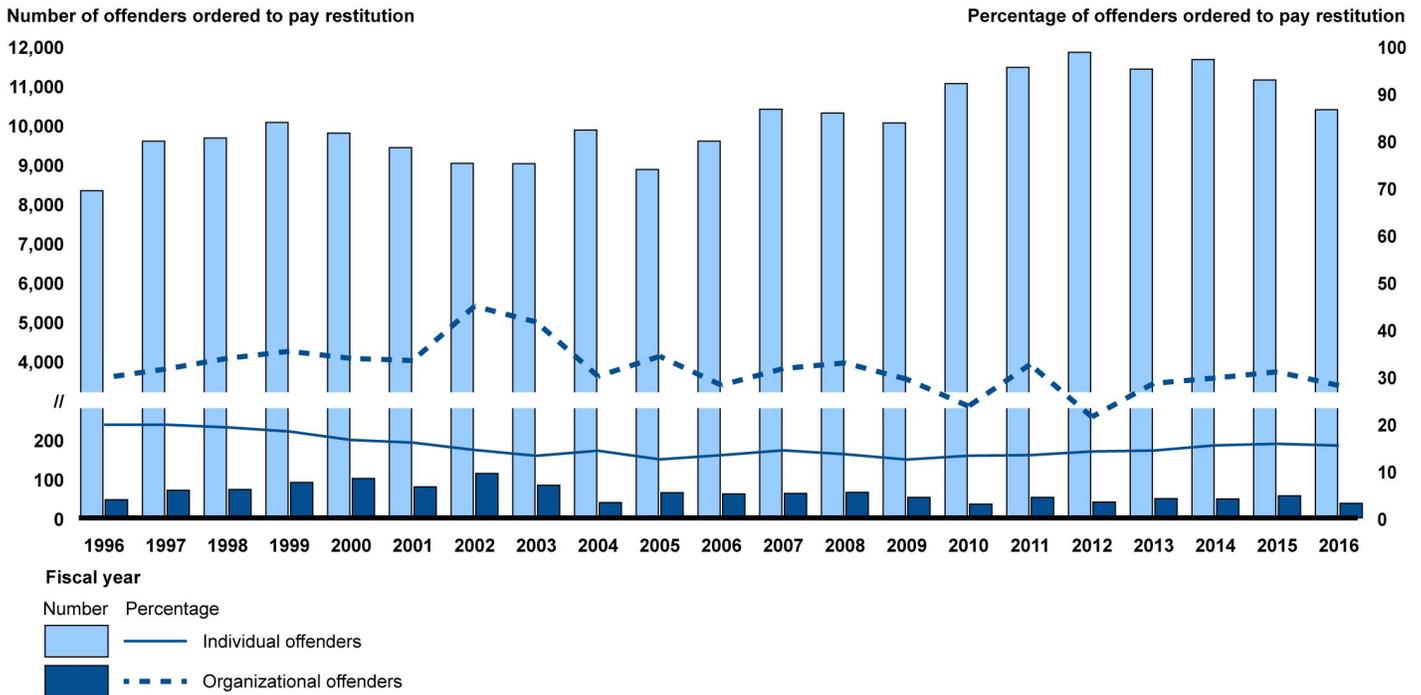
Note: Victims of federal crimes may also file a lien against an offender in a state or local court by requesting a clerk of a federal court issue an Abstract of Judgment certifying that a judgment has been entered in a victim’s favor in the amount specified in the restitution order. See 18 U.S.C. § 3664(m)(1)(B).

<sup>a</sup>Clerks of U.S. District Courts are responsible for receipting restitution payments made by offenders and distributing those funds to victims. The Department of Justice's U.S. Attorneys' Offices are primarily responsible for the enforcement and collection of debts owed to the United States and the victims of federal crimes, including restitution.

## Total Restitution Ordered Since 1996

According to USSC data for fiscal years 1996 through 2016, the percentage of offenders ordered to pay restitution by federal courts has remained fairly steady. From fiscal years 1996 through 2016, an average of 15 percent of individual offenders and 32 percent of organizational offenders annually were ordered to pay restitution by the federal courts (see fig. 2).<sup>42</sup> For more information on the restitution imposed by the federal courts from fiscal years 1996 through 2016, see appendix II.

**Figure 2: Restitution Imposed by the Federal Courts for Individual and Organizational Offenders, Fiscal Years 1996 through 2016**



Source: U.S. Sentencing Commission data. | GAO-18-115

<sup>42</sup>Organizational offenders are offenders sentenced other than persons, such as corporations, partnerships, unions, trusts, pension funds, and non-profits.

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Note: Restitution is imposed by federal courts pursuant to statute to the extent authorized for the particular offense and provided there is generally an identifiable victim. For example, restitution is not typically imposed for drug and immigration offenses.

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## Collection of Restitution

We have previously reported on issues related to the collection of federal restitution and currently have ongoing work on DOJ's collection of restitution pursuant to the Justice for All Reauthorization Act of 2016.<sup>43</sup> According to data DOJ provided to us, the total outstanding restitution debt owed in federal cases as of the end of fiscal year 2016 was \$110.2 billion. DOJ, through its U.S. Attorneys' Offices' Financial Litigation Units, is responsible for collecting restitution debt from offenders. This collection typically begins after offenders are sentenced and ordered to pay restitution and includes enforcement actions such as filing garnishments and liens.<sup>44</sup> We noted in our 2001 and 2004 reports that collection of outstanding restitution debt is inherently difficult due to a number of factors, such as offenders who may be incarcerated or have minimal earning capacity and the MVRA requirement that the assessment of restitution be based on actual loss and not on an offender's ability to pay.<sup>45</sup> In 2005, we reported that court-ordered restitution amounts far exceed likely collections for crime victims in selected financial fraud cases.<sup>46</sup> Specifically, we found that these offenders, who had either been high-ranking officials of companies or operated their own businesses, pleaded guilty to crimes for which the courts ordered restitution totaling about \$568 million to victims. As of the completion of our fieldwork, which was up to 8 years after the offenders' sentencing, court records showed that amounts collected for the victims in these cases totaled only about \$40 million, or about 7 percent of the ordered restitution.

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<sup>43</sup>GAO, *Criminal Debt: Court-Ordered Restitution Amounts Far Exceed Likely Collections for the Crime Victims in Selected Financial Fraud Cases*, [GAO-05-80](#) (Washington, D.C.: Jan. 31, 2005); *Criminal Debt: Actions Still Needed to Address Deficiencies in Justice's Collection Processes*, [GAO-04-338](#) (Washington, D.C.: Mar. 5, 2004); and *Criminal Debt: Oversight and Actions Needed to Address Deficiencies in Collection Processes*, [GAO-01-664](#) (Washington, D.C.: July 16, 2001). Pub. L. No. 114-324, § 18, 130 Stat. at 1963-64.

<sup>44</sup>Clerks of U.S. District Courts are responsible for receipt of restitution payments from offenders.

<sup>45</sup>[GAO-04-338](#), [GAO-01-664](#).

<sup>46</sup>[GAO-05-80](#).

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## Stakeholders Identified Various Factors Related to the Potential Expansion of Federal Courts' Authority to Order Restitution

Stakeholders we interviewed identified various factors related to the potential expansion of federal courts' authority to order restitution in the four areas listed in the Justice for All Reauthorization Act of 2016: (1) to apply to victims who have suffered harm, injury, or loss that would not have occurred but for the defendant's related conduct; (2) in the case of an offense resulting in the victim's death, to allow the court to use its discretion to award the income lost by the victim's surviving family members or estate as a result of the victim's death; (3) to require that the defendant pay to the victim an amount determined by the court to restore the victim to the position he or she would have been in had the defendant not committed the offense; and (4) to require the defendant compensate the victim for any injury, harm, or loss, including emotional distress, that occurred as a result of the offense. Stakeholders also identified additional factors to consider, beyond the ones identified for the four provisions above, for potential broadening of courts' authority to order restitution generally. For a summary of the provisions and factors cited by stakeholders, see appendix I.

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### Factors to Consider in a Potential Expansion of Restitution Authority if it were to Include a Defendant's Related Conduct and Eliminate the Proximate Cause Requirement

#### Related Conduct

Federal courts have the authority to order defendants to pay restitution for a victim's losses that resulted from the defendant's conduct underlying the offense of conviction. However, at times, a defendant's related conduct can be broader than the offense of conviction and can include criminal conduct for which the defendant's guilt was not established either by trial or plea agreement with the government. For example, in a case before the Fourth Circuit where restitution was not allowed for conduct that was broader than the offense of conviction, the government asserted

that the defendant was the ringleader of a nationwide pickpocketing ring and submitted a list of victims for restitution that included five financial institutions and four individuals who had suffered losses.<sup>47</sup> However, because the defendant had pleaded guilty to, and was convicted for, fraudulent use of a credit card related to one individual on one date—and the defendant’s offense did not involve as an element a scheme, conspiracy, or pattern—the court determined that restitution was not proper for the additional victims because they were not harmed by the conduct underlying the offense of conviction.<sup>48</sup> On the other hand, when a defendant has been convicted of an offense that involves as an element a scheme, conspiracy, or pattern, the court may order restitution for direct harm caused by that scheme, conspiracy, or pattern. For example, in another case involving credit card fraud, because the defendant pleaded guilty to and was convicted of conspiracy to traffic in counterfeit credit cards—in contrast to the previous case where the defendant was convicted of only one fraudulent use—the Eleventh Circuit held that the sentencing court could order a defendant to pay restitution for losses from additional credit card fraud that were to advance the conspiracy.<sup>49</sup>

Stakeholders we interviewed identified the following factors to consider if federal courts’ authority were to be broadened to allow a defendant’s related conduct to be included in an order for restitution:

- **Constitutional issues.** Eight of 10 stakeholders we spoke with identified potential constitutional issues if the federal courts could order restitution for a defendant’s related conduct. For example, two stakeholders representing defendants and an association representing federal prosecutors told us that including a defendant’s related conduct in orders for restitution could result in potential violations of a defendant’s rights under the Fifth Amendment’s Due Process Clause, which provides that no person shall be deprived of life, liberty, or property without due process of law.<sup>50</sup> This was also a

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<sup>47</sup>*United States v. Davenport*, 445 F.3d 366, 368, 372-73 (4th Cir. 2006).

<sup>48</sup>*Id.* at 373-74.

<sup>49</sup>*United States v. Obasohan*, 73 F.3d 309, 310-11 (11th Cir. 1996).

<sup>50</sup>U.S. Const. amend. V. Defendants are entitled to constitutional protections, including due process under the Fifth Amendment of the U.S. Constitution. Due process involves administration of law equally applicable to all citizens, according to rules based on fundamental principles of private rights, and adjudication in a competent tribunal with jurisdiction, by hearing upon notice.

concern noted in the legislative history of the MVRA,<sup>51</sup> and an individual knowledgeable about restitution we interviewed noted that the Supreme Court has also suggested that due process could be a concern if the court were to order federal criminal restitution beyond the conduct underlying the conviction.<sup>52</sup>

- **Increased complexity to determine losses.** Four of 10 stakeholders we spoke with stated that if the authority of federal courts to order restitution were broadened to allow inclusion of harms for a defendant's related conduct, there would be increased complexity to determine losses for restitution. For example, DOJ officials told us that inclusion of a defendant's related conduct would allow restitution to be open to a larger pool of potential victims, and identifying and calculating losses for all victims with a nexus to the offense of conviction could become an impossible task. An association representing federal prosecutors stated that this increased complexity could have the effect of federal courts ordering less restitution through the exception for complex cases, which would negatively impact victims.<sup>53</sup>
- **DOJ's practices for plea bargaining.** In contrast, two individuals we spoke with who represent victims stated that prosecutors could more consistently follow DOJ's guidelines to include a defendant's related conduct in plea agreements without expanding federal courts' authority to order restitution.<sup>54</sup> DOJ guidelines, which are based on statutory direction, provide that prosecutors must consider requesting full restitution to all victims for all charges contained in the indictment,

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<sup>51</sup>S. Rep. No. 104-179, at 23 ("It is the committee's view that permitting the court to order restitution for offenses for which the defendant has neither been convicted nor pleaded guilty may violate the due process clause of the fifth amendment.").

<sup>52</sup>See *Hughey*, 495 U.S. at 420 n.5.

<sup>53</sup>Both sections 3663 and 3663A have exceptions for the court to decline to order restitution for reasons of complexity. See 18 U.S.C. §§ 3663(a)(1)(B)(ii) (court may decline to order restitution if complication and prolongation of the sentencing process outweighs the need to provide restitution to any victims), 3663A(c)(3) (section does not apply for certain offenses if restitution is made impracticable due to such a large number of identifiable victims; or determining complex issues related to the cause or amount of a victim's losses would so complicate or prolong the sentencing process as to outweigh the need to provide restitution to any victim). The exception under § 3663A(c)(3) does not apply to crimes of violence, or crimes relating to tampering with consumer products or theft of medical products.

<sup>54</sup>See *U.S. Attorneys' Manual, Plea Agreements and Restitution*, 9-16.320. See also Department of Justice, *Attorney General Guidelines for Victim and Witness Assistance* (May 2012).

without regard to the counts to which the defendant actually pleaded guilty.<sup>55</sup> In other words, when DOJ and the defendant agree to certain terms as part of a plea agreement in which the defendant pleads guilty to one or more charged offenses, or lesser or related offenses, prosecutors must consider requesting the defendant pay restitution for all of the charges, not just the ones to which the defendant is pleading guilty.<sup>56</sup> As a result, federal courts may order restitution pursuant to the plea agreement for losses sustained by crime victims for related conduct or criminal conduct that is not part of the offense of conviction.

### Proximate Cause

Federal courts currently have the authority to order an offender to pay restitution to victims who have suffered harms as a direct and proximate consequence of the crime of conviction. This means that the harm must have been not only caused by the offense, as a matter of fact, but also that it was reasonably foreseeable as a result of the offense. For example, courts have allowed damage caused by the escape from a robbery—such as damage to police cars hit during a car chase—to be compensable as restitution because the flight was casually related to the bank robbery.<sup>57</sup> Although 5 of 10 stakeholders stated that the proximate harm requirement does not generally present challenges related to federal courts' authority to order restitution, stakeholders identified additional factors to consider if the federal courts' authority were to be expanded to eliminate the proximate cause requirement:

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<sup>55</sup>Section 209 of the MVRA directed the Attorney General to, among other things, ensure that "in all plea agreements negotiated by the United States, consideration is given to requesting that the defendant provide full restitution to all victims of all charges contained in the indictment or information, without regard to the counts to which the defendant actually pleaded." Pub. L. No. 104-132, tit. II, subtit. A, § 209, 110 Stat. at 1240.

<sup>56</sup>In a plea agreement, the defendant may plead guilty to the original or another charge in return for some concession from the prosecutor; for example, the plea agreement may specify that the prosecutor will not bring other charges or will recommend a particular sentence. DOJ and defense counsel present the agreement to the court, which does not have to accept the agreement. If the court rejects the plea agreement, the defendant may withdraw the guilty plea and the case may proceed to trial. Courts are not permitted to participate in plea discussions between the prosecutor and defendant's counsel. Fed. R. Crim. P. 11.

<sup>57</sup>See *United States v. Washington*, 434 F.3d 1265, 1268-70 (11th Cir. 2006). See also *United States v. Reichow*, 416 F.3d 802, 805 (8th Cir. 2005) and *United States v. Donaby*, 349 F.3d 1046, 1053-54 (7th Cir. 2003).

- **Additional sentencing-related hearings and litigation.** Three of 10 stakeholders we interviewed stated that eliminating the proximate harm requirement could result in prolonged sentencing for defendants due to additional sentencing-related hearings and litigation. For example, judiciary officials and an association representing federal prosecutors stated that if federal courts' authority to order restitution were expanded to eliminate the proximate harm requirement, more litigation would be required during sentencing to examine harms to victims and to determine how losses related to the offense of conviction.
- **Plea bargaining could be affected.** Two of 10 stakeholders we interviewed stated that eliminating the proximate harm requirement would impact plea bargaining between defendants and DOJ. For example, an individual knowledgeable about federal restitution stated that eliminating proximate harm would hinder plea bargaining as during plea agreement negotiations a defendant would no longer have a sense of how much federal criminal restitution could be ordered. At the time the MVRA was passed, Congress also recognized the central role of plea bargaining in the federal criminal justice system with the legislative history of the MVRA noting the intent that the legislation not impair the role of plea bargaining.<sup>58</sup>

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### Factors to Consider in the Potential Expansion of Restitution to Include Income Lost by Deceased Victims and Their Family Members

In cases involving the death of a crime victim, federal courts may order restitution for losses to be paid to a deceased crime victim's surviving family members or estate, including for funeral expenses, as applicable.<sup>59</sup> Further, according to 6 of 10 stakeholders we interviewed, federal courts currently have the authority to order compensation for future lost income of a deceased crime victim's family member or estate due to precedent established in case law. For example, the Tenth Circuit held that restitution for the future lost income of a three-month-old victim of voluntary manslaughter was not precluded by the MVRA; thus a court may exercise its discretion in declining to grant an award, or, as it did in

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<sup>58</sup>S. Rep. No. 104-179, at 19.

<sup>59</sup>18 U.S.C. §§ 3663(a)-(b), 3663A(a)-(b).

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this case, undertake such proceedings.<sup>60</sup> In a Ninth Circuit case, the court held that “restitution for future lost income may be ordered under the MVRA so long as it is not based upon speculation, but is reasonably calculable,” and returned the case to the district court to redetermine the amount of restitution to be awarded.<sup>61</sup>

Stakeholders we interviewed also identified the following factors to consider if federal courts’ authority were to be expanded to include compensation for the future lost income of a deceased crime victim and to compensate the deceased victim’s surviving family members for their lost income as a result of the victim’s death:

- **Increased victim compensation awards.** Four of 10 stakeholders we interviewed stated that expanding federal courts’ authority to include compensation for future lost income of a deceased crime victim could result in more compensation awarded through restitution. For example, three stakeholders representing victims stated if this provision were specified or made explicit in statute, it would be more likely that federal courts would order compensation for the future lost income of a deceased crime victim. One of the stakeholders added that having such loss specified and enumerated in restitution statutes would ensure it is considered during the restitution process and is less likely to be challenged during appeal. Further, another stakeholder representing victims stated that including the surviving family members’ lost income in a restitution order could allow for compensation of those family members who lost income prior to a victim’s death, such as in cases where those family members provided care to a victim prior to the victim’s death.
- **Complexity of calculation and need for experts.** Three of 10 stakeholders we interviewed stated that determining a deceased crime victim’s future and family members’ lost income would add complexity to the restitution process. For example, an association representing federal prosecutors stated that it would be difficult for federal probation officers and prosecutors to determine the amount of future lost income for deceased victims as that area of specialization is currently in civil law. In addition, DOJ officials stated that the complexity and need for experts to make these specialized

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<sup>60</sup>*United States v. Serawop*, 505 F.3d 1112, 1120, 1125 (10th Cir. 2007).

<sup>61</sup>*United States v. Cienfuegos*, 462 F.3d 1160, 1161 (9th Cir. 2006).

calculations could increase the cost of prosecution given the government's burden to prove victim losses.

- **Suitability of criminal versus civil proceedings.** Three of 10 stakeholders we interviewed stated that compensation for a deceased crime victim's future and family members' lost income is more appropriate for litigation through civil proceedings rather than combining or merging such litigation in a federal criminal proceeding. For example, an association representing defendants stated that federal criminal proceedings are not suitable venues to fairly vet and litigate this type of victim issue. This stakeholder further stated that issues of this type are routinely litigated vigorously in civil proceedings and involve extensive discovery practices, such as taking of depositions, exchanges of documents, and assessments by competing experts. An association representing federal prosecutors additionally noted that federal prosecutors are not well positioned to handle typical civil losses in criminal trials.
- **Sentencing of defendants could be prolonged.** Two of 10 stakeholders we interviewed stated that including a deceased crime victim's future and family members' lost income in an order for restitution could result in a defendant's sentencing being prolonged. For example, judiciary officials stated that the sentencing of defendants could take more time due to the need for multiple hearings to examine losses and calculate a deceased crime victim's future lost income.
- **Collectability of debt due to these offenders' ability to pay.** Two of 10 stakeholders stated that the potential collectability of restitution from offenders for a deceased crime victim's future and family members' lost income should be considered. For example, an association representing federal prosecutors stated that these offenders are most likely to be incarcerated with the least ability to pay. As a result, the amount of resources needed to order restitution compared to collectability of the debt for a deceased crime victim's future lost income should be considered. Further, according to that stakeholder, resources—such as prosecutorial expertise, money to hire experts, judicial resources like probation officers—need to be weighed against the collectability of the debt. This issue was also described in the legislative history of the MVRA:

[A] significant number of defendants required to pay restitution...will be indigent [and]... many...may also be sentenced to prison terms as well, making it unlikely that they will be able to make significant payments... At the same time, these factors do not obviate the victim's right to

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restitution or the need that defendants be ordered to pay restitution.<sup>62</sup>

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### Factors to Consider in the Potential Expansion of Restitution to Restore the Victim to His or Her Position Had the Offense Not Been Committed

According to 6 of 10 stakeholders we interviewed, the provision “to require that the defendant pay to the victim an amount determined by the court to restore the victim to the position he or she would have been in had the defendant not committed the offense” is already the goal of federal restitution. These stakeholders stated that this is established in case law and is not an expansion of federal courts’ current authority. Other stakeholders we interviewed identified the following factor to consider if federal courts’ authority were to be expanded to include the provision “to require that the defendant pay to the victim an amount determined by the court to restore the victim to the position he or she would have been in had the defendant not committed the offense”:

- **Expansion of authority to include general restitution.** Three of 10 stakeholders we interviewed stated that the provision would expand federal courts’ authority to order restitution by allowing general restitution, meaning courts would have more discretion to determine awards for all harms that victims suffered in order to restore the victim to his or her pre-offense condition.<sup>63</sup> Further, an association representing victims stated that federal courts’ authority to order restitution is listed as elements or categories of losses. For example, losses such as the cost of necessary physical and occupational therapy and rehabilitation, and necessary funeral and related services, among others. This association explained that by including a provision for general restitution, the courts would be able to order

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<sup>62</sup>S. Rep. No. 104-179, at 21.

<sup>63</sup>In its September 2006 *Report of the Proceedings of the Judicial Conference of the United States*, the Judicial Conference agreed to support legislation that would authorize general restitution in any criminal case at the discretion of the judge when the circumstances of the case warrant it. Further, the Judicial Conference noted that there is no authorization under federal law for general restitution to crime victims and a judge may order restitution only if the loss suffered by the victim falls within certain categories specified by statute. In April 2017, judiciary officials told us the recommendation for general restitution is under reconsideration.

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restitution to victims for any losses outside of those categories, which would function as a catchall for all victim harm.

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## Factors to Consider in the Potential Expansion of Restitution to Include Any Injury, Harm, or Loss, Including Emotional Distress That Occurred as a Result of an Offense

Federal courts may order restitution for actual losses—in other words, these must be tangible or “out-of-pocket” losses, and they must be supported by the record.<sup>64</sup> This includes, for example, reimbursement of medical expenses for bodily injuries resulting from the victimizing offense. However, federal courts are not authorized to order restitution for losses such as pain and suffering and emotional distress to crime victims. For example, in a case where the defendant was convicted of committing a brutal hate crime against the victim, leaving him with severe physical injuries and depression, among other harms, the sentencing court acknowledged that it did not have authority to award restitution for pain and suffering and noted that the victim would be allowed to pursue civil remedies.<sup>65</sup> Stakeholders we interviewed identified the following factors to consider if federal courts’ authority were expanded to allow any injury, harm, or loss, including emotional distress, to be included in an order for restitution:

- **Suitability of criminal versus civil proceedings.** Five of 10 stakeholders we interviewed stated that including compensation to victims for any injury, harm, or loss, including emotional distress, in

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<sup>64</sup>See, e.g., *United States v. Frazier*, 651 F.3d 899, 904-08 (8th Cir. 2011) (limiting restitution to the full amount of victim’s actual, provable loss); Goodwin, *Federal Criminal Restitution*, 256-257.

<sup>65</sup>*United States v. Serrata*, 679 Fed. Appx. 337, 339, 2017 U.S. App. LEXIS 2454, at \*3 (5th Cir. Feb. 10, 2017). Other types of civil remedies are also not compensable as criminal restitution, such as intended harm, punitive damages, breach of contract, and disgorgement of ill-gotten gains, among others. For example, in a case before the Eighth Circuit, the defendant was convicted of selling CDs he had removed from the trash and had made \$78,818 in profits. *United States v. Chalupnik*, 514 F.3d 748, 750-51 (8th Cir. 2008). The lower court ordered the defendant pay \$78,818 in restitution, noting that this was an appropriate amount because the victim could recover these ill-gotten gains in a civil law suit. *Id.* at 751. The Eighth Circuit vacated the restitution award and remanded for resentencing because “the amount of restitution that may be awarded is limited to the victim’s provable actual loss, even if more punitive remedies would be available in a civil action.” *Id.* at 750, 754.

restitution orders raises issues related to the types of harms that should be compensated in civil versus criminal proceedings. For example, a stakeholder representing defendants stated that federal criminal law is not suited to determine injuries such as emotional distress and pain and suffering, whereas the civil system is set up to handle these kinds of issues and losses. Further, an association representing federal prosecutors stated that federal prosecutors and federal probation officers in criminal cases lack the specialized skills to determine losses for cases involving compensation for pain, suffering, and emotional distress. This was an issue that was considered during passage of the MVRA as well, as the report accompanying the MVRA provides, "It is the committee's intent that courts order full restitution to all identifiable victims of covered offenses, while guaranteeing that the sentencing phase of criminal trials do not become fora for the determination of facts and issues better suited to civil proceedings."<sup>66</sup>

- **Increased complexity to determine losses.** Four of 10 stakeholders we interviewed stated that determining losses such as emotional distress and pain and suffering would add complexity to the restitution process. For example, DOJ officials stated that pain and suffering and emotional distress are not easily quantified and restitution hearings to examine such losses would involve experts trying to prove these kinds of losses.

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### Stakeholders Identified Additional Factors to Consider Related to the Potential Expansion of Courts' Authority to Award Restitution

Stakeholders we interviewed identified the following factors to consider related to the potential broadening of courts' authority to order restitution generally, in addition to the factors discussed above associated with particular expansions of federal courts' authority to order restitution:

- **Increased restitution debt and collection challenges.** Seven of 10 stakeholders we interviewed told us that increased restitution debt and collectability challenges should be considered in the potential broadening of federal courts' authority to order restitution. For example, two stakeholders representing defendants stated that offenders often lack the financial resources to pay restitution. Under

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<sup>66</sup>S. Rep. No. 104-179, at 18.

the MVRA, federal courts must order mandatory restitution without consideration of a defendant's financial resources which has resulted in large amounts of uncollected federal restitution debt.<sup>67</sup> These two stakeholders stated that by broadening federal courts' authority to order restitution, the amount of uncollected restitution debt owed to victims would continue to increase. One of these stakeholders further suggested that the addition of secondary restitution (i.e., additional victims entitled to compensation) could have the effect of reducing the amount paid to the primary victims because all classes of victims will be forced to compete for payment on restitution awards that will often far exceed an offender's ability to pay. According to judiciary officials, adding to the uncollected restitution debt would lead to further collection challenges, including the additional DOJ efforts needed to collect more restitution debt and additional supervision of offender restitution payments by probation officers.<sup>68</sup> These issues were also observed during the passage of the MVRA. The report accompanying the law states that the Chair of the Criminal Law Committee of the Judicial Conference of the United States had testified before the Senate Judiciary Committee that 85 percent of all federal defendants are indigent at the time of sentencing and mandatory restitution would not lead to an appreciable increase in victim compensation; however, the report noted the Committee's view of the benefits of even nominal payments to victims as well as the potential penological benefits of requiring the offender to be accountable for the harm caused to the victim.<sup>69</sup>

- **Suitability of criminal versus civil proceedings.** Seven of 10 stakeholders we interviewed told us that the suitability of criminal versus civil proceedings should be considered in the potential broadening of federal courts' authority to order restitution. According to judiciary officials, a system has been developed with rules to litigate damages in civil proceedings which are not included within criminal trials. Further, an association representing defendants told us that attorneys who directly represent alleged victims in civil proceedings are more appropriate parties to pursue this type of litigation. The

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<sup>67</sup>According to data DOJ provided to us, the amount of outstanding restitution debt owed in federal cases as of the end of fiscal year 2016 was \$110.2 billion.

<sup>68</sup>DOJ efforts for debt collection include conducting financial investigations of offenders and filing garnishments and liens, among other things.

<sup>69</sup>S. Rep. No. 104-179, at 18. Penological interests are interests that relate to the treatment (including punishment, deterrence, rehabilitation, etc.) of persons convicted of crimes.

association said this is because the prosecutor represents the public at large instead of an individual client, whereas a private attorney has an obligation to obtain a maximum recovery for the client. Comparing the process for the compensation of victims through restitution and civil proceedings, a stakeholder knowledgeable about federal restitution told us that the restitution process to compensate victims is more efficient for victims compared to civil proceedings which can last longer and result in victims incurring costs for litigation. Further, this individual stated that through the federal criminal restitution process in contrast to civil proceedings, victims receive help collecting funds through the federal courts, prisons, and probation officers during offender supervision. Other stakeholders did not consider the civil forum to be a suitable alternative for victims. One stakeholder representing victims stated that civil proceedings are inadequate for compensating victims and should not be considered. Additionally, another stakeholder representing victims also stated that victims may lack access to evidence to pursue civil litigation against an offender in cases where the conduct was not part of an offense of conviction or listed in a plea agreement.<sup>70</sup> The legislative history of the MVRA also acknowledged the need for a balance, providing, as noted above, the intent that courts order full restitution but also that sentencing not become a forum for issues better suited to civil proceedings; to that end, the MVRA restricted mandatory restitution requirements to the specified set of crimes.<sup>71</sup>

- **Impacts to federal resources.** Five of 10 stakeholders we interviewed told us that impacts to judiciary and DOJ resources—

<sup>70</sup>Under 18 U.S.C. § 3664(l) a defendant's conviction for an offense involving the act giving rise to an order of restitution prevents the defendant from denying the essential allegations of that offense in a subsequent civil proceeding brought by the victim. However, this would not apply to offenses that were charged but where there was no conviction. A party seeking material from DOJ's case files is generally required to make a request pursuant to DOJ's administrative regulations ("Touhy regulations"). These regulations provide discretion to DOJ as to whether or not to comply with such a request, and require approval from the proper DOJ officials before release. 28 C.F.R. §§ 16.21 to 16.29; *see also, e.g., Aiken v. Eady*, Civil Action No. 14-811, 2016 U.S. Dist. LEXIS 13932, at \*13 (D.N.J. Feb. 4, 2016) ("However, it seems clear that, pursuant to *Touhy*, most courts require a party seeking information from the Government, as a non-party, to make a request to the DOJ pursuant to their administrative regulations. The DOJ then has discretion in responding to the request. If the requesting party is dissatisfied with what is obtained in the administrative process, review may be sought either through a separate action commenced pursuant to the Administrative Procedures Act, or alternatively, in the Court from which the subpoena was served pursuant to Rule 45.") (citing *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951)).

<sup>71</sup>S. Rep. No. 104-179, at 18.

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including increased workloads, additional legal services, and the need for more experts—should be considered in the potential broadening of federal courts’ authority to order restitution. According to judiciary officials, broadening federal courts’ authority to order restitution could result in increased workloads by probation officers who could have to conduct more investigations to support additional restitution orders. As discussed above, federal probation officers could also be required to track and supervise more restitution payments. Officials from Federal and Community Defenders told us that if federal courts’ authority to order restitution were broadened, additional legal services would need to be provided to offenders. For example, these officials stated that larger restitution orders could require increased workloads for federal defenders to work on behalf of offenders to modify payment schedules and their level of supervision by probation officers. Likewise, an association representing defendants stated that increased collection efforts could be required by U.S. Attorneys’ Offices’ Financial Litigation Units if the number of victims eligible for restitution increased. According to DOJ officials, prosecutors could experience increased workloads as they would be identifying more victims, thereby having to spend more time investigating and determining losses. Moreover, an association representing defendants told us that additional federal experts could be needed as sentencing courts and probation officers lack the resources and expertise to examine the harms that would result from broadening restitution authority. Attention to the costs to the justice system for mandatory restitution was considered in 1995, with the legislative history of the MVRA noting the attempt to reduce costs by limiting mandatory restitution to offenses in which an identifiable victim suffered a physical injury or monetary loss.<sup>72</sup>

- **Concerns about offenders’ reentry into society.** Two of 10 stakeholders we interviewed told us that offenders’ reentry into society should be considered in the potential broadening of federal courts’ authority to order restitution. These two stakeholders, an association that represents defendants and officials from Federal and Community Defenders, told us that if the authority of the federal courts to order restitution were broadened to include non-monetary harms, offenders would be further burdened in their ability to reenter society due to excessive monetary sanctions from restitution orders. Further, these

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<sup>72</sup>S. Rep. No. 104-179, at 18. The report also notes the intent that the amendment streamlining the process for issuing and enforcing an order of restitution will also reduce the costs associated with victim restitution. *Id.*

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two stakeholders stated that offenders with large restitution orders face challenges obtaining employment, securing housing, and satisfying other financial obligations, which could increase their risk for recidivism and reduce their ability to pay any restitution.

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## Agency Comments

We provided a draft of this report for review and comment to DOJ, USSC, the Administrative Office of the U.S. Courts, and the Federal Judicial Center. The Administrative Office of the U.S. Courts provided technical comments that we incorporated as appropriate.

We are sending copies of this report to the Attorney General, the Judicial Conference of the United States, the Directors of the Administrative Office of the U.S. Courts and the Federal Judicial Center, the Staff Director of USSC, and other interested parties. In addition, the report is available at no charge on the GAO website at <http://www.gao.gov>.

If you and your staff have any questions about this report, please contact me at (202) 512-8777 or [goodwing@gao.gov](mailto:goodwing@gao.gov). Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made key contributions are listed in appendix III.



Gretta L. Goodwin  
Director, Homeland Security and Justice

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## Appendix I: Overview of Restitution Provisions for Potential Expansion in the Justice for All Reauthorization Act of 2016

Table 2 summarizes and describes the provisions included in the Justice for All Reauthorization Act of 2016 for potential expansion of federal courts' authority to order restitution and the factors cited by stakeholders that Congress should consider in broadening existing restitution statutes.<sup>1</sup>

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<sup>1</sup>Pub. L. No. 114-324, § 2(d), 130 Stat. 1948, 1948-49.

**Appendix I: Overview of Restitution Provisions  
for Potential Expansion in the Justice for All  
Reauthorization Act of 2016**

**Table 2: Provisions for Potential Expansion of Federal Courts' Authority to Order Restitution in the Justice for All Reauthorization Act of 2016 and Factors Cited by Stakeholders in the Restitution Process**

Potential expansion of restitution authority <sup>a</sup>	Potential expansion	Factors to consider cited by stakeholders interviewed
"to apply to victims who have suffered harm, injury, or loss that would not have occurred but for the defendant's related conduct"	The provision may expand the authority of the federal courts to provide for restitution for losses resulting from the defendant's conduct that was related to, but not a basis for, the defendant's conviction; and to eliminate the proximate cause requirement to make a defendant liable for all harms caused by his or her actions. In order to be awarded restitution under existing law, a victim must be directly and proximately harmed as a result of the commission of the offense. This means that the victim's harm must have been directly caused by the defendant's conduct underlying the offense of conviction ("but for") and that the harm was reasonably foreseeable at the time of the offense.	<p>Expansion to include related conduct:</p> <ul style="list-style-type: none"> <li>• Constitutional issues.</li> <li>• Increased complexity to determine losses.</li> <li>• Department of Justice practices for plea bargaining.</li> <li>• Increase in litigation in the federal courts.</li> <li>• Sentencing of defendants could be prolonged.</li> <li>• Increase in victim compensation awards.</li> <li>• Less burdensome on prosecutorial resources in some offense contexts, such as child pornography offenses.</li> <li>• Suitability of criminal versus civil proceedings.</li> <li>• Decrease in victim compensation awards.</li> <li>• Plea bargaining could be affected.</li> <li>• Low likelihood of implementation.</li> <li>• Defendants should bear the burden of victims' losses.</li> <li>• May reduce collectability of restitution for primary victims.</li> <li>• Impacts to federal resources.</li> </ul> <p>Expansion to eliminate proximate cause requirement:</p> <ul style="list-style-type: none"> <li>• No issues with current statutes for proximate harm.</li> <li>• Plea bargaining could be affected.</li> <li>• Additional sentencing-related hearings and litigation.</li> <li>• Suitability of criminal versus civil proceedings.</li> <li>• Increased burdens on victims to provide information to support losses.</li> <li>• Burden to restitution process because more victims and harms.</li> <li>• Constitutional issues.</li> <li>• Adverse impacts to defendants due to broader class of victims.</li> <li>• Successful example in practice in state criminal proceedings.</li> <li>• Low likelihood of implementation.</li> <li>• Additional judicial discretion.</li> </ul>
"in the case of an offense resulting in bodily injury resulting in the	The provision may clarify or expand the federal courts' authority to order restitution to	<ul style="list-style-type: none"> <li>• Courts have the authority through case law.</li> <li>• Increased victim compensation awards.</li> </ul>

**Appendix I: Overview of Restitution Provisions  
for Potential Expansion in the Justice for All  
Reauthorization Act of 2016**

<b>Potential expansion of restitution authority<sup>a</sup></b>	<b>Potential expansion</b>	<b>Factors to consider cited by stakeholders interviewed</b>
victim's death, to allow the court to use its discretion to award an appropriate sum to reflect the income lost by the victim's surviving family members or estate as a result of the victim's death"	compensate the deceased victim's surviving family members for their lost income as a result of the victim's death and to the victim's estate for the future lost income of the deceased victim. Case law currently allows for future lost income to be compensable in certain circumstances.	<ul style="list-style-type: none"> <li>• Suitability of criminal versus civil proceedings.</li> <li>• Low likelihood of implementation.</li> <li>• Complexity of calculation and need for experts.</li> <li>• Sentencing of defendants could be prolonged.</li> <li>• Collectability of debt due to these offenders' ability to pay.</li> <li>• Concerns about offenders' re-entry into society.</li> </ul>
"to require that the defendant pay to the victim an amount determined by the court to restore the victim to the position he or she would have been in had the defendant not committed the offense"	The provision provides for language consistent with how restitution has been defined in case law and may expand restitution to allow federal courts the discretion to order restitution for losses not otherwise enumerated by existing statutes.	<ul style="list-style-type: none"> <li>• Provision states the goal of federal restitution.</li> <li>• Expansion of authority to include general restitution.</li> <li>• Increased litigation related to victim compensation awards.</li> <li>• Increased complexity to determine losses.</li> <li>• Inconsistency of restitution awards.</li> <li>• Suitability of criminal versus civil proceedings.</li> <li>• Increased victim compensation awards.</li> </ul>
"to require that the defendant compensate the victim for any injury, harm, or loss, including emotional distress, that occurred as a result of the offense"	The provision may expand the federal courts' authority to order restitution for damages not currently compensable by statute, including losses typically determined in civil proceedings, such as emotional distress and pain and suffering.	<ul style="list-style-type: none"> <li>• Suitability of criminal versus civil proceedings.</li> <li>• Increased complexity to determine losses.</li> <li>• Sentencing of defendants could be prolonged.</li> <li>• Inadequacy of civil proceedings to compensate victims.</li> <li>• Constitutional issues.</li> <li>• Defendants may be less willing to plea bargain.</li> <li>• Could burden all parties in the restitution process.</li> <li>• Could lead to inconsistency in victim compensation awards.</li> <li>• Compensation should be for direct economic losses closely tied to the offense.</li> <li>• Victims' compensation awards could be reduced due to increased complexity of determining losses.</li> <li>• Victims' compensation could be increased due to fewer proceedings.</li> </ul>

Source: GAO analysis of statutes, case law, and stakeholder interviews. | GAO-18-115

<sup>a</sup>As provided in the Justice for All Reauthorization Act of 2016, Pub. L. No. 114-324, § 2(d), 130 Stat. 1948, 1948-49.

## Appendix II: Restitution Imposed by the Federal Courts from Fiscal Years 1996 through 2016

Table 3 and 4 summarize restitution imposed by the federal courts from fiscal years 1996 through 2016 for individual and organizational offenders.

**Table 3: Restitution Imposed for Individual and Organizational Offenders by the U.S. Courts, Fiscal Years 1996 through 2016**

Fiscal year	Total number of individual offenders	Number of individual offenders (restitution)	Total number of organizational offenders	Number of organizational offenders (restitution)	Total number of offenders	Total number of offenders (restitution)	Percent of total offenders (restitution)
1996	42,151	8,315	155	46	42,306	8,361	19.76%
1997	48,522	9,575	222	70	48,744	9,645	19.79%
1998	50,360	9,655	213	72	50,573	9,727	19.23%
1999	54,924	10,052	255	90	55,179	10,142	18.38%
2000	59,283	9,779	296	100	59,579	9,879	16.58%
2001	59,047	9,414	237	79	59,284	9,493	16.01%
2002	62,684	9,012	252	113	62,936	9,125	14.50%
2003	68,465	9,003	200	83	68,665	9,086	13.23%
2004	69,333	9,861	130	39	69,463	9,900	14.25%
2005	71,510	8,857	187	64	71,697	8,921	12.44%
2006	72,148	9,578	217	61	72,365	9,639	13.32%
2007	72,643	10,389	196	62	72,839	10,451	14.35%
2008	76,353	10,292	198	65	76,551	10,357	13.53%
2009	81,328	10,040	177	52	81,505	10,092	12.38%
2010	83,926	11,041	148	35	84,074	11,076	13.17%
2011	86,172	11,453	160	52	86,332	11,505	13.33%
2012	84,153	11,835	187	40	84,340	11,875	14.08%
2013	80,033	11,410	172	49	80,205	11,459	14.29%
2014	75,833	11,651	162	48	75,995	11,699	15.39%
2015	71,003	11,132	181	56	71,184	11,188	15.72%
2016	67,742	10,375	132	37	67,874	10,412	15.34%
<b>Total</b>	<b>1,437,613</b>	<b>212,719</b>	<b>4,077</b>	<b>1,313</b>	<b>1,441,690</b>	<b>214,032</b>	<b>14.85%</b>

Source: U.S. Sentencing Commission data. | GAO-18-115

**Appendix II: Restitution Imposed by the  
Federal Courts from Fiscal Years 1996 through  
2016**

**Table 4: Amount of Restitution Imposed at Sentencing for Individual and Organizational Offenders by the U.S. Courts, Fiscal Years 1996 through 2016 (U.S. dollars)**

<b>Fiscal year</b>	<b>Amount of restitution imposed for individual offenders</b>	<b>Amount of restitution imposed for organizational offenders</b>	<b>Total amount of restitution imposed</b>
1996	\$1,436,928,571	N/A <sup>a</sup>	\$1,436,928,571
1997	\$1,473,942,805	N/A <sup>a</sup>	\$1,473,942,805
1998	\$2,541,766,654	N/A <sup>a</sup>	\$2,541,766,654
1999	\$2,838,524,724	N/A <sup>a</sup>	\$2,838,524,724
2000	\$4,097,524,800	\$76,037,843	\$4,173,562,643
2001	\$2,934,298,443	\$318,418,643	\$3,252,717,086
2002	\$5,604,073,972	\$704,776,852	\$6,308,850,824
2003	\$9,283,825,823	\$187,267,646	\$9,471,093,469
2004	\$5,902,998,735	\$252,907,942	\$6,155,906,677
2005	\$8,762,092,868	\$89,668,413	\$8,851,761,281
2006	\$4,872,160,002	\$120,572,166	\$4,992,732,168
2007	\$10,224,762,012	\$191,626,000	\$10,416,388,012
2008	\$16,779,256,356	\$405,143,107	\$17,184,399,463
2009	\$13,991,110,807	\$82,752,528	\$14,073,863,335
2010	\$8,138,763,331	\$624,396,068	\$8,763,159,399
2011	\$13,596,971,681	\$119,057,879	\$13,716,029,560
2012	\$13,406,049,682	\$17,897,607	\$13,423,947,289
2013	\$12,126,996,662	\$158,564,574	\$12,285,561,236
2014	\$14,157,238,075	\$55,330,593	\$14,212,568,668
2015	\$10,709,898,260	\$1,090,430,902	\$11,800,329,162
2016	\$9,062,148,439	\$184,334,943	\$9,246,483,382
<b>Total</b>	<b>\$171,941,332,702<sup>b</sup></b>	<b>\$4,679,183,706<sup>b</sup></b>	<b>\$176,620,516,408<sup>b</sup></b>

Source: U.S. Sentencing Commission data. | GAO-18-115

<sup>a</sup>N/A stands for not applicable. The U.S. Sentencing Commission was unable to provide data on the amount of restitution imposed for organizational offenders from fiscal years 1996 through 1999.

<sup>b</sup>According to the U.S. Sentencing Commission, in cases of joint and several restitution, the full amount of restitution is attributed to each offender, which may result in over-inflation of the total amount of restitution reported for all offenders.

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## Appendix III: GAO Contact and Staff Acknowledgments

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### GAO Contact

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### Staff Acknowledgements

In addition to the contact named above, Dawn Locke (Assistant Director); Carl Potenzieri; Janet Temko-Blinder; David Alexander; Sasan J. "Jon" Najmi; Amber Edwards; Kathleen Donovan; and Emily Hutz, made key contributions to this report.

# Appendix IV: Accessible Data

## Data Table

**Data Table for Figure 2: Restitution Imposed by the Federal Courts for Individual and Organizational Offenders, Fiscal Years 1996 through 2016**

Fiscal year	Number of offenders ordered to pay restitution		Percentage of offenders ordered to pay restitution	
	Individual offenders	Organizational offenders	Individual offenders	Organizational offenders
1996	8315	46	19.73	29.68
1997	9575	70	19.73	31.53
1998	9655	72	19.17	33.8
1999	10052	90	18.3	35.29
2000	9779	100	16.5	33.78
2001	9414	79	15.94	33.33
2002	9012	113	14.38	44.84
2003	9003	83	13.15	41.5
2004	9861	39	14.22	30
2005	8857	64	12.39	34.22
2006	9578	61	13.28	28.11
2007	10389	62	14.3	31.63
2008	10292	65	13.48	32.83
2009	10040	52	12.35	29.38
2010	11041	35	13.16	23.65
2011	11453	52	13.29	32.5
2012	11835	40	14.06	21.39
2013	11410	49	14.26	28.49
2014	11651	48	15.36	29.63
2015	11132	56	15.68	30.94
2016	10375	37	15.32	28.03

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