

The Consequences of Conviction: The U.S. Sentencing Guidelines, Restitution, Forfeiture, and Collateral Consequences

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Agenda

- Sentencing Guidelines
- Orders of Restitution
- Civil Collection of Criminal Tax Debts
- Collection by the Department of Justice

— FEDERAL SENTENCING —

GUIDELINES MANUAL



Sentencing Guidelines and Guilty Pleas

DOJ Tax Division Major Count Policy

- Felony counts have priority over misdemeanor counts.
- Tax evasion counts (IRC 7201) have priority over all other substantive tax counts.
- The count charged in the indictment or information that carries the longest prison sentence is the major count.
- As between counts under the same statute, the count involving the greatest financial detriment to the US (*i.e.*, greatest additional tax due and owing) is the major count.
- As between counts, if the financial detriment does not differ significantly, the relative flagrancy of the offense is determinative.

DOJ Tax Division Major Count Policy

- US Attorney may request Tax Division to consider other factors not included above.
- Tax Division may need to designate more than a single count as a major count when the computed guideline sentencing range exceeds the maximum sentence that the court can impose under a single count.
- When the major count is a felony, US Attorney may not accept a plea to a lesser-included offense nor substitute a misdemeanor offense. Absent unusual circumstances, Tax Division will not approve the reduction of a charge from a felony to a misdemeanor merely to secure a plea.
- <https://www.justice.gov/tax/foia-library/criminal-tax-manual-title-page-0>

Tax Loss

The Basics:

- Object of the offense - U.S.S.G. § 2T1.1(c)(1)
- Government bears the burden - preponderance of evidence
- Tax loss need not be determined with precision
- Court needs only to make a “reasonable estimate” of loss defendant intended to inflict, not actual loss

Calculating Tax Loss:

- Unreported income - tax loss = 28% of unreported gross income (34% for corporations) plus 100% of false credits claimed
- False deduction or exemption - tax loss = 28% of improperly claimed deduction or exemption (34% for corporations) plus 100% of any false credits claimed
- Failure to file returns – tax loss = 20% of the gross income (25% for corporations) less tax withheld or otherwise paid
-*unless a more accurate determination of the tax loss can be made.* USSG § 2T1.1(c)

Tax Loss

- Tax loss does not include interest or penalties, except in willful evasion of payment under IRC § 7201 and willful failure to pay under IRC § 7203
- Where tax loss is not reasonably ascertainable, the presumptions should be used ***unless the government or defense provides sufficient information for a more accurate assessment***
- In the face of a disagreement regarding tax loss, the court must allow for an evidentiary hearing unless the court presided over a trial and the record supports a calculation of tax loss. Criminal Tax Manual, § 43.03[1] (2015) (*citing United States v. Marshall*, 92 F.3d 758, 760 (8th Cir. 1996))
- Tax loss includes the tax associated with offense of conviction and any relevant conduct, including acquitted or dismissed charges, and state and local tax loss. U.S.S.G. § 1B1.3(a)(2)

Previously Unclaimed Credits, Deductions, and Exemptions

- Court “should account for the standard deduction and personal and dependent exemptions to which the defendant was entitled.” USSG §2T1.1, comment. (n.3)
- Court “should account for any unclaimed credit, deduction, or exemption that is needed to ensure a reasonable estimate of the tax loss,” but only to the extent that three conditions are met:
 - credit, deduction, or exemption must be related to the tax offense and claimable at the time the tax offense was committed
 - credit, deduction, or exemption must be “reasonably and practicably ascertainable”
 - defendant must present “information to support the credit, deduction, or exemption sufficiently in advance of sentencing to provide an adequate opportunity to evaluate whether it has sufficient indicia of reliability to support its probable accuracy”
- Court shall not account for payments made in a manner that encouraged or facilitated a separate violation of law. *See US v. Sanchez*, 2016 WL 1103849 (E.D.N.Y.) (January 4, 2016) (disallowing unclaimed deductions for cash wages paid to undocumented workers and check cashing fees where defendant could have cashed checks without fees at his bank)
- Burden is on defendant to establish credit, deduction, or exemption by preponderance of evidence

Relevant Conduct

- Same course of criminal conduct or common scheme or plan
- Substantially connected by at least one common factor: victims, accomplices, or purpose, or similar *modus operandi*
- “all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated.” USSG § 1B1.3(a)(2), § 2T1.1 comment. (n. 2)
- Includes:
 - State and Local Taxes
 - Foreign Taxes
 - Tax Loss from Other Periods
 - Tax Loss of Related Taxpayers
 - Preparer Cases
 - Acquitted Conduct

Impact of Civil Tax & Other Collateral Issues

- “Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.” *Montana v. US*, 440 U.S. 147, 153-154 (1979)
- Estoppel applies to specific facts (i) proven at trial, (2) stipulated in a plea agreement, or (3) admitted by client or counsel in proceedings
- Estoppel applies to years/periods of conviction
- May eliminate defense of limitations on assessment
- May eliminate defense to civil fraud penalties
- May result in nondischargeability in bankruptcy
- Other Collateral Consequences:
 - Professional Licensing
 - Debarment
 - Immigration

U.S. Sentencing Guidelines

§2T1.1. Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents

(a) Base Offense Level:

- (1) Level from §2T4.1 (Tax Table) corresponding to the tax loss; or
- (2) **6**, if there is no tax loss.

(b) Specific Offense Characteristics

- (1) If the defendant failed to report or to correctly identify the source of income exceeding \$10,000 in any year from criminal activity, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.
- (2) If the offense involved sophisticated means, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.

(c) Special Instructions

For the purposes of this guideline— (1) If the offense involved tax evasion or a fraudulent or false return, statement, or other document, the tax loss is the total amount of loss that was the object of the offense (i.e., the loss that would have resulted had the offense been successfully completed)

U.S. Sentencing Guidelines

The Tax Loss Table - §2T4.1

Tax Loss (Apply the Greatest)	Offense Level
[1.25] (A) \$2,500 or less	6
[1.25] (B) More than \$2,500	8
[1.30] (C) More than \$6,500	10
[1.20] (D) More than \$15,000	12
[1.33] (E) More than \$40,000	14
[1.25] (F) More than \$100,000	16
[1.25] (G) More than \$250,000	18
[1.38] (H) More than \$550,000	20
[1.50] (I) More than \$1,500,000	22
[1.40] (J) More than \$3,500,000	24
[1.36] (K) More than \$9,500,000	26
[1.25] (L) More than \$25,000,000	28
[1.30] (M) More than \$65,000,000	30
[1.50] (N) More than \$150,000,000	32
[1.25] (O) More than \$250,000,000	34
[1.38] (P) More than \$550,000,000	36

Adjustments, Departures, Variances

Specific Offense Characteristics

- **illegal source income** – USSG § 2T1.1(b)(1) - increase in 2 levels or minimum level of 12 for receipt of more than \$10,000
- **sophisticated means** – USSG §§ 2T.1.1(b)(2), 2T1.4(b)(2) – enhancement of 2 levels or to minimum offense level of 12
- **substantial portion of income from criminal activity** – USSG § 2T1.4(b)(1)(A) - enhancement of 2 levels
- **business of preparing or assisting in preparation of tax returns** – USSG § 2T1.4(b)(1)(B) – enhancement of 2 levels
- **conspiring to impede, impair, obstruct or defeat a tax** – USSG § 2T1.9(b)(2) - enhancement of 2 levels

Adjustments, Departures & Variances

Other adjustments:

- Acceptance of responsibility - USSG § 3E1.1
- Vulnerable victim - USSG § 3A1.1
- Official victim - USSG § 3A1.2
- Aggravating role - USSG § 3B1.1
- Mitigating role in the offense - USSG § 3B1.2
- Abuse of trust or use of special skill - USSG § 3B1.3
- Obstruction of justice - USSG § 3C1.1

Adjustments, Departures & Variances

Departures are a function of and must conform to framework of Guidelines and supported by preponderance of evidence. They include government motions for substantial assistance under USSG § 5K1.1 and extraordinary acceptance of responsibility under USSG § 5K2.0

Variances are a function of Booker, which rendered the Guidelines advisory, dramatically increased the discretion of judges, and required that sentences be procedurally and substantively reasonable. 18 USC § 3553(a)

Sentencing Table

	Offense Level	Criminal History Category (Criminal History Points)							
		(0 or 1)	(2 or 1)	I (4, 5, 6)	II (7, 8, 9)	III (10, 11, 12)	IV (13 or more)	V (13 or more)	VI
	1	0-6	0-6	0-6	0-6	0-6	0-6		0-6
	2	0-6	0-6	0-6	0-6	0-6	0-6		1-7
	3	0-6	0-6	0-6	0-6	0-6	2-8		3-9
	4	0-6	0-6	0-6	0-6	2-8	4-10		6-12
Zone A	5	0-6	0-6	1-7	4-10	6-12			
	6	0-6	1-7	2-8	6-12	9-15			12-18
	7	0-6	2-8	4-10	8-14	17-1R			15-21
		0-6	4-10	6-12	10-16	15-21			18-24
Zone B	9	4-10	6-12	8-14	12-18	18-24			21-27
	10	6-12	8-14	10-16	15-21	21-27			24-30
		8-14	10-16	17-1R	18-24	24-30			27-33
Zone C	12	10-16	12-18	15-21	21-27	27-33			30-37
	13	17-1R	15-21	18-24	24-30	30-37			33-41
	14	15-21	18-24	21-27	27-33	33-41			37-46
	15	18-24	21-27	24-30	30-37	37-46			41-51
	16	21-27	24-30	27-33	33-41	41-51			46-57
	17	24-30	27-33	30-37	37-46	46-57			51-63
	18	27-33	30-37	33-41	41-51	51-63			57-71
	19	30-37	33-41	37-46	46-57	57-71			63-78
	20	33-41	37-46	41-51	51-63	63-78			70-87
	21	37-46	41-51	46-57	57-71	70-87			77-96
	22	41-51	46-57	51-63	63-78	77-96			84-105
	23	46-57	51-63	57-71	70-87	84-105			92-115
	24	51-63	57-71	63-78	77-96	92-115			100-125
	25	57-71	63-78	70-87	84-105	100-125			110-137
	26	63-78	70-87	78-97	92-115	110-137			120-150
Zone D	27	70-87	78-97	87-108	100-125	120-150			130-162
	28	78-97	87-108	97-121	110-137	130-162			140-175
	29	87-108	97-121	108-135	121-151	140-175			151-188
	30	97-121	108-135	121-151	135-168	151-188			168-210
	31	108-135	121-151	135-168	151-188	168-210			188-235
	32	121-151	135-168	151-188	168-210	188-235			210-262
	33	135-168	151-188	168-210	188-235	210-262			235-293
	34	151-188	168-210	188-235	210-262	235-293			262-327
	35	168-210	188-235	210-262	235-293	262-327			292-365
	36	188-235	210-262	235-293	262-327	292-365			324-405
	37	210-262	235-293	262-327	292-365	324-405			360-life
	38	235-293	262-327	292-365	324-405	360-life			360-life
	39	262-327	292-365	324-405	360-life	360-life			360-life
	40	292-365	324-405	360-life	360-life	360-life			360-life
	41	324-405	360-life	360-life	360-life	360-life			360-life
	42	360-life	360-life	360-life	360-life	360-life			360-life
	43	life	life	life	life	life			life



Restitution and DOJ Collection Procedures

Orders of Restitution in Criminal Tax Cases

- Federal district courts may order restitution – 18 USC § 3556
- Restitution serves to compensate a victim for the loss
- Victim is often the Internal Revenue Service in tax cases
- Court may order a defendant to pay restitution to the Internal Revenue Service for a tax-related loss
- Enforcement of that order is retained by the government (DOJ)

Department of Justice Collection procedures

United States relies on three primary federal statutes:

- *Justice For All Act*, 18 U.S.C. 3771
- *Mandatory Victims Restitution Act*, 18 U.S.C. 3663, 3663A and 3664
- *Federal Debt Collection Procedures Act*, 28 U.S.C. 3001, et seq.

Justice For All Act, 18 U.S.C. 3771

The Victims' Bill of Rights

1. The right to be reasonably protected from the accused
2. The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
3. The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.

Victims' Bill of Rights (continued)

4. The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.

5. The reasonable right to confer with the attorney for the Government in the case.

6. The right to full and timely restitution as provided in law.

7. The right to proceedings free from unreasonable delay.

Victims' Bill of Rights (continued)

8. The right to be treated with fairness and with respect for the victim's dignity and privacy.

9. The right to be informed in a timely manner of any plea bargain or deferred prosecution agreement.

10. The right to be informed of the rights under this section and the services described in section 503(c) of the Victims' Rights and Restitution Act of 1990 (42 U.S.C. 10607(c)) and provided contact information for the Office of the Victims' Rights Ombudsman of the Department of Justice.

Mandatory Victims' Restitution Act (MVRA): Imposition of Restitution

18 U.S.C. 3663- *Discretionary* restitution, but permits the imposition of restitution “to the extent agreed to by the parties in a plea agreement” (18 U.S.C. 3663(a)(3))

18 U.S.C. 3663A- *Mandatory* restitution requires restitution for any offense against property under Title 18, including any offense committed by fraud or deceit. (18 U.S.C. 3663A(c)(1)(A)(ii))

Mandatory Victims' Restitution Act: Issuance and Enforcement of Restitution

18 U.S.C. 3664- Selected Sections

- Government bears the burden of identifying victims and amount of losses (3664(d)(1) and (e))
- Defendant bears the burden of demonstrating financial resources and ability to pay (3664(e))
- Regardless of ability to pay, amount of restitution imposed is based on full amount of loss (3664(f)(1)(A))

Mandatory Victims' Restitution Act: Issuance and Enforcement of Restitution

18 U.S.C. 3664 Selected Sections (continued)

- Court must balance Defendant's financial resources with the Victim's right to full and timely restitution when ordering a payment plan (3664(f)(2) and (3)); also references 18 U.S.C. 3572 Where victims are United States *and* non-federal victims, restitution to non-federal victims is prioritized (3664(i))
- Defendant has a continuing duty to report material changes in his/her economic circumstances (3664(k))
- Court may *sua sponte* adjust Defendant's payment schedule (3664(k))

Mandatory Victims' Restitution Act: Issuance and Enforcement of Restitution

18 U.S.C. 3664 Selected Sections (continued)

- Conviction estops Defendant from denying essential allegations of offense in any subsequent Federal or State civil proceeding brought by victim (3664(l))
- To enforce restitution, United States may use both civil and criminal collection remedies (3664 (m)(1)(A))
- Victim may reduce criminal judgment/restitution order to a civil judgment and obtain lien from District Court Clerk (3664(m)(1)(B))

Mandatory Victims' Restitution Act: Issuance and Enforcement of Restitution

18 U.S.C. 3664 Selected Sections (continued)

- Any Defendant obligated to pay restitution who receives substantial resources from any source (e.g. inheritance, settlement, etc.) while incarcerated “shall be required to apply [resource] to any restitution” (3664(n))

Mandatory Victims' Restitution Act:

Issuance and Enforcement of Restitution

- A restitution order is a final judgment and may not be modified, increased or reduced, except when
 1. Corrected under Rule 35
 2. Appealed and modified
 3. Amended under subsection (d)(5) (amount increased if victim subsequently discovers additional losses)
 4. Payment adjustments

(3664(o))

Other Selected Criminal Enforcement Sections Under Title 18

- All restitution payments must be made to the Clerk of Court. (3611)
- Statutory interest accrues on all restitution, unless waived by the Court or the United States. (3612(f))
- All restitution payments are applied first to principal, and then to interest. (3612(i))
- Limited property exemptions under 26 USC 3664(a)(1)-(8), (10) and (12) only. (3613(a)(1))

Other Selected Criminal Enforcement Sections Under Title 18 (continued)

- Obligation to pay restitution is 20 years from judgment, *plus* an period of incarceration. (3613(b))
- “In the event of the death of the person ordered to pay restitution, the individual’s estate will be held responsible for any unpaid balance of the restitution amount, and the [United States’] lien [] shall continue until the estate receives a written release of that liability.” (3613(b), effective December 16, 2016)

Other Selected Criminal Enforcement Sections Under Title 18 (continued)

- Upon the imposition of restitution, a statutory lien is created in favor of the United States “as if the liability of the person fined were a liability for a tax assessed under the [IRC].” (3613(c))
- The statutory lien is perfected by filing a notice of lien “in the manner in which a notice of tax lien would be filed under . . . The [IRC].” (3613(d))
- Restitution orders are non-dischargeable in bankruptcy. (3613(e))

Other Selected Criminal Enforcement Sections Under Title 18 (continued)

- Defaulting on restitution payments may result in revocation or modification of probation; resentencing; being held in contempt; the entry of a restraining order or injunction; and order of sale of property. (3613A)
- Defendant who knowingly fails to pay delinquent restitution may be resentenced to any sentence which might have originally been imposed. (3614(a))

Other Selected Criminal Enforcement Sections Under Title 18 (continued)

- The Fraud Injunction Statute, 18 U.S.C. 1345, authorizes prejudgment remedies of restraining orders, injunctions and receiverships
- Applicable to the following offenses:
 - False, Fictitious or fraudulent claim to the United States
(18 U.S.C. 287)
 - Conspiracy to commit an offense or defraud United States
(18 U.S.C. 371)

Other Selected Criminal Enforcement Sections Under Title 18 (continued)

- False Statement to the United States (18 U.S.C. 1001)
- Banking Law violation
- Federal health care offense

Federal Debt Collection Procedures Act (FDCPA)

- Exclusive civil remedies available to the United States to enforce payment of civil and criminal debts
- Does not curtail United States' right under any other Federal or State law to collect taxes
- Does not supersede title 11
- Preempts State law to the extent it is inconsistent with FDCPA

Federal Debt Collection Procedures Act (FDCPA) (continued)

- Allows for nationwide enforcement
- Permits financial discovery concerning a debtor
- Remedies include execution, receiverships, garnishment and installment payment orders

Federal Debt Collection Procedures Act (FDCPA) (continued)

Fraudulent transfers

- Applies to transfers occurring either before or without regard to date of judgment
- Value of asset is the value at time of transfer, but subject to adjustment “as the equities may required” (28 U.S.C. 3307)
- Statute of Limitations- 6 years after transfer made; or, if later, 2 years after transfer or obligation was or could reasonably have been discovered (28 U.S.C. 3306)

Civil Collection of Criminal Tax Debts



IRS Civil Collection Process

- Assessment of the tax
- 10-Year Collection Statute
- Billing Notices
- Threat to levy and right to a hearing
- Appeals: CDP, Equivalent and CAP



IRS Collection Tools

Levies

- The seizure of a taxpayer's property
- Generally issued when a taxpayer has either failed to respond to IRS requests or failed to provide the collection division information



IRS Collection Tools

Liens

- Pursuant to IRC §6321, a lien arises automatically whenever demand for payment is made and the taxpayer fails to pay
- No other action is required of the IRS
- IRS may file a Notice of Federal Tax Lien
 - Though the lien arises without any further IRS action, the IRS filed the Notice to inform third-party creditors of the IRS lien on the taxpayer's assets to protect its (the IRS's) interest



The Firearms Excise Tax Improvement Act of 2010 (“the FETI Act”)

- The FETI Act empowered the Service to use its administrative collection tools to enforce a restitution-based assessment
- IRS assesses the amount of Title 18 criminal restitution as a tax under Title 26 as if such amount were such tax
- the restitution-based assessment must be made only after the appeal period for the restitution order expires, and
- the existence or amount of the assessed restitution may not be challenged

The Firearms Excise Tax Improvement Act of 2010 (“the FETI Act”)

- IRC § 6204 requires the civil assessment to match the order of restitution
- Tax crimes not involving an order of restitution will not be subject to civil assessment under IRC § 6204(a)(4)(A)
- Crimes under Title 18 that are traceable to a tax crime under Title 26 may be assessed
- The decision will be case and fact specific

Crimes Assessable

- IRC § 7201 – Tax Evasion
- IRC § 7202 – Failure to Account and Pay-Over Payroll Taxes
- IRC § 7203 – Willful Failure to File a Return, Supply Information or Pay Tax
- IRC § 7205 – Fraudulent Withholding Exemption Certificate
- IRC § 7206(1) – False Statement
- IRC § 7206(2) – Aids or Assists with a False Document



Crimes Assessable (cont.)

- IRC § 7206(4) – Removes or Conceals Goods with Intent to Defraud
- IRC § 7206(5) – Concealing Goods or Destroying Records in relationship to a Compromise or Closing Agreement
- IRC § 7207 – Delivering False Returns, Statements or Documents
- 18 USC § 286 – Conspiracy to Defraud the Government with Respect to Claims
- 18 USC § 287 – False, Fictitious or Fraudulent Claims
- 18 USC § 371 – Conspiracy to Commit an Offense or to Defraud the United States

Restitution Based Assessment

26 USC 6201(a)

(4) Certain orders of criminal restitution.

(A) In general. The Secretary shall assess and collect the amount of restitution under an order pursuant to section 3556 of title 18, United States Code, for failure to pay any tax imposed under this title in the same manner as if such amount were such tax.

(B) Time of assessment. An assessment of an amount of restitution under an order described in subparagraph (A) shall not be made before all appeals of such order are concluded and the right to make all such appeals has expired.

(C) Restriction on challenge of assessment. The amount of such restitution may not be challenged by the person against whom assessed on the basis of the existence or amount of the underlying tax liability in any proceeding authorized under this title (including in any suit or proceeding in court permitted under section 7422 [26 USCS § 7422]).

Restitution Based Assessment

- IRM 5.19.23.1 (Revised 3/25/2020)
- “The Internal Revenue Service (IRS) is mandated to assess and collect the amount of court ordered restitution in a criminal case in the same manner as tax. ***These assessments often create duplicate IRS debts for the same type of tax and tax periods as an existing original return or a civil exam assessment....***” (Empasis added.)
- “**Program Goals:** Duplicate assessments artificially inflate the dollar amount of total IRS balance due accounts. It is critical that RBA cross-referencing of payment and credit case actions adhere to a very high standard of account accuracy and timeliness requirements in order to provide quality customer service, maintain public trust in the Organization, and satisfy GAO & CFO requirements associated to the IRS Financial Statements that go to Congress.”

Restitution Based Assessment

- Payments to DOJ an allowable expense for IRS analysis
- Installment Agreements available
- Uncollectable Status available
- Restitution orders cannot be compromised
- If 10-year statute is going to expire, may seek to have DOJ file suit to convert the lien to a 20-year judgment



Restitution Based Assessment

- Starts 10-year civil collection statute
- Billing notices sent
- CDP rights provided
- NFTL filed with CDP rights
- IRS pursues collection
- ***Duplicate (or even triple) assessments should be anticipated***

Restitution Based Assessment

IRM 5.19.23.3 (2) - RBA payments or credits are applied in the following order:

- a. Restitution-Based Assessment/Civil assessment
- b. Court ordered Penalty assessments
- c. Collection costs and fees
- d. Other assessed penalties
- e. Assessed interest
- f. Other accrued penalties to date of payment
- g. Accrued interest to date of payment

“Payments are applied first to fraud, then to failure-to-file (FTF), then to accuracy related penalty, and then to other penalties in ascending TC number order. The Failure-to-Pay (FTP) penalty is paid after all other penalties have been paid....”

Restitution Based Assessment

- The restitution is supposed include interest pre-judgment interest. DOJ Crim. Tax Manual 44.00.
 - *Do you include interest from the due date of the return for purposes of calculating the tax loss for guideline purposes?*
 - *How do you treat interest that accrues after the order of restitution is entered?*
- Penalties are not typically includable in order of restitution

Compromise

- Other tax debts may be compromised so long as restitution-based portion is paid in full
- Example of \$78,000 RCP, \$175,000 Restitution and \$450,000 total debt resolved for \$180,000

What NOT To Tell a Client!

- Transfer away assets
- Deal in cash
- Financial statements are signed under penalty of perjury



Questions

