



## White Collar, Government & Internal Investigations ADVISORY ■

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### DOJ Issues Guidance on Inability to Pay Corporate Criminal Penalties

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On October 8, 2019, the Criminal Division of the Department of Justice (DOJ) released guidance to federal prosecutors on how to assess a company's claim that it is unable to pay a merits-based criminal fine or penalty to resolve a criminal investigation. For many years, the DOJ's Civil Division has employed an inability-to-pay process for resolving civil claims under the False Claims Act. Now, the Criminal Division has outlined its process in a [memorandum](#) from Assistant Attorney General Brian Benczkowski, "Evaluating a Business Organization's Inability to Pay a Criminal Fine or Criminal Monetary Penalty."

The memorandum notes that, as a threshold matter, inability-to-pay-based arguments can only be considered by Criminal Division attorneys once the parties have reached an initial agreement on an appropriate criminal resolution and monetary penalty "based on the law and facts," without consideration of a company's financial circumstances. Although federal criminal statutes and the U.S. Sentencing Guidelines Manual have allowed consideration of a company's financial circumstances in assessing a fine or penalty, the new guidance clarifies the framework the DOJ will rely on when determining whether such a reduction is appropriate. Given the potential size of criminal penalties and fines, it will be important for companies to consider whether this process can help drive a resolution.

#### **Factors Considered in Assessing a Company's Ability to Pay Criminal Penalties**

The memorandum emphasizes it is the company's burden to establish an inability to pay, and the company must cooperate fully by providing documentation as well as "access to appropriate company personnel." The company is required to submit a timely "Inability-to-Pay-Questionnaire," which is attached to the memorandum. The Questionnaire requires the company to provide information related to: (1) recent cash-flow projections; (2) operating budgets and projections of future profitability; (3) capital budgets and projections of annual capital expenditures; (4) proposed changes in financing or capital structure; (5) acquisition or divestiture plans; (6) restructuring plans; (7) claims to insurers; (8) related- or affiliated-party transactions; (9) encumbered assets; and (10) liens on the company's assets. The Questionnaire also requires production of audited financial statements and corporate income tax returns for the past five years, recent appraisals and/or valuation studies, reports of aging receivables and payables, credit and loan agreements, reports provided to major lenders within the past three years, and compensation plans for the 10 most-highly-compensated employees.

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In addition to the information provided in the Questionnaire, the memorandum lists several additional factors the DOJ may consider if legitimate questions exist about a company's inability to pay:

- Background on the current financial condition: focusing on the cause of the company's financial condition.
- Alternative sources of capital: whether there is an ability to raise capital.
- Collateral consequences: any impact that requiring the company to pay more than its ability might have (including consideration of pension obligations, potential layoffs, or significant disruption to competition in the market). The memorandum also lists certain consequences that are not relevant.
- Victim restitution consideration: whether the company will be able to make restitution payments if required to pay more than its ability to pay.

The guidance instructs prosecutors to recommend an adjustment, "but only to the extent necessary to avoid (1) threatening the continued viability of the organization and/or (2) impairing the organization's ability to make restitution to victims." The adjustment can take the form of a reduction or an installment schedule to facilitate payment over a reasonable period of time.

Approval of a reduction based on inability to pay will come from the chief of the relevant section. If the proposed reduction exceeds 25%, approval is required from the assistant attorney general for the DOJ Criminal Division.

## Takeaway

The memorandum provides important and necessary transparency for companies wanting to raise their ability to pay a criminal fine or penalty. Our experience with the DOJ Civil Division's process for resolutions demonstrates that this can be an important part of reaching a resolution that does not bankrupt a company or put it out of business. The road to make an inability-to-pay claim is not an easy one, requiring both an initial agreement by the parties on a monetary fine or penalty and a significant, and potentially burdensome, dive by the government into a company's financials. Prosecutors may also shy away from offering such an option since the guidance instructs that they will often need to rely on accounting experts to make their decision, which could cause unwanted delay. But the potential benefit of protecting the future viability of a company is an important consideration in deciding whether to navigate these high hurdles.

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