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## DOJ’s New Guidance on Inability-to-Pay Claims: A Clearer Path to Imposing Corporate Fines and Penalties

On October 8, 2019, the Criminal Division of the U.S. Department of Justice (“DOJ” or the “Government”) issued new guidance for federal prosecutors to follow when corporations claim they are unable to pay a criminal fine or monetary penalty. For 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 delineated its own process in a memorandum from Assistant Attorney General Brian Benczkowski titled, “Evaluating a Business Organization’s Inability to Pay a Criminal Fine or Criminal Monetary Penalty” (the “Memorandum”).<sup>1</sup> The DOJ’s new guidance puts forward a detailed framework for federal prosecutors to assess a corporation’s “inability to pay” once the corporation and DOJ have come to agreement on both a criminal resolution and a monetary fine or penalty based on the law and facts.

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Corporate defendants commonly raise “inability to pay” claims in cases where the Government seeks to impose a fine or monetary penalty that, while appropriate under the law, may have a crippling effect on the company. However, with settlement negotiations rarely made public and scarce DOJ guidance to date, the path to a successful inability-to-pay claim has been murky. While federal criminal statutes and the U.S. Sentencing Guidelines have allowed for consideration of a company’s financial situation in assessing a penalty, the new DOJ guidance clarifies the framework it will rely upon when determining whether a reduction is appropriate. The DOJ issued the new guidance with the goal of bringing transparency and consistency to the process, and thus is welcome direction. By providing an “analytic framework” to assess a corporation’s inability to pay, the guidance aims to ensure consistency and predictability within the DOJ, while providing companies with the “information and security they need to invest fully in compliance on the front end, and to make good decisions in the face of misconduct on the back end.”<sup>2</sup>

The burden of establishing inability to pay rests with the corporation making the claim, and the corporation must cooperate in providing information responsive to prosecutors’ inquiries. This includes a complete and timely response to the “Inability-to-Pay Questionnaire” (attached as an exhibit to the Memorandum). In addition to furnishing the DOJ with financial materials such as income tax returns and audited financial statements, the Questionnaire requests information on (1) 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 party transactions; (9) encumbered assets; and (10) liens on assets.

Where a company raises a legitimate financial concern, the Memorandum instructs prosecutors to consider of a range of factors, including background on the company’s current financial condition, whether alternative sources of capital exist, whether the fine or penalty will result in adverse collateral consequences, and whether the fine or penalty will impair the company’s ability to make restitution payments. Collateral consequences expressly include, among other things, the likelihood of layoffs, product shortages, or significant disruptions in market competition, but generally do not include adverse impacts on growth, future opportunities and dividends, product lines, executive compensation and bonuses, or hiring and retention.

<sup>1</sup> Brian A. Benczkowski, Assistant Attorney General, Criminal Division, U.S. Dep’t of Justice, *Evaluating a Business Organization’s Inability to Pay a Criminal Fine or Criminal Monetary Penalty* (Oct. 8, 2019), available [here](#). We note that the guidance is addressed to “All Criminal Division Personnel.”

<sup>2</sup> *Id.*

If the prosecutor determines the company is unable to pay, he or she is authorized to recommend monetary adjustments to the extent necessary to avoid “threatening the continued viability of the organization” or “impairing the organization’s ability to make restitution to victims.” Yet, the DOJ clarified in a footnote that fines or penalties may be adjusted if there is a “significant adverse collateral consequence that, while severe, may not necessarily threaten the continued viability of the organization.” Therefore, the DOJ appears open to considering “severe” collateral consequences that do not necessarily result in the company’s extinction.

The Memorandum demonstrates that federal prosecutors will consider—and not consider—a range of factors when evaluating a company’s ability to pay, marking the first time the DOJ has formally recognized that collateral consequences should factor into the fine or penalty determination. Overall, in line with its purpose, this guidance should increase transparency by setting forth the criteria that federal prosecutors will apply in the face of inability-to-pay claims, thereby better preparing corporate defendants in formulating and advancing their arguments.

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