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Special Matters and Government Investigations

DOJ Issues Guidance for Evaluating a Business Organizations Inability to Pay a Criminal Fine or Penalty

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On October 8, 2019, Assistant Attorney General Brian A. Benczkowski issued a memorandum to the Criminal Division of the U.S. Department of Justice ("DOJ" or "the Department") that established a framework for assessing assertions by a company that it is unable to pay a criminal fine or monetary penalty.[1] In his speech announcing the policy, Benczkowski emphasized the need for transparency about what companies should expect when faced with the prospect of potentially devastating criminal fines. He stated, the Department wants "you to know what we consider to be a legitimate inability to pay argument, but also the facts and arguments that won't be given credence."[2]

Generally, fines imposed in criminal cases against business organizations are determined by various statutory provisions and the U.S. Sentencing Guidelines ("Sentencing Guidelines"). For example, 18 U.S.C. § 3572 requires courts to consider a number of factors when deciding whether to impose a fine. These include: the defendant's income and financial resources; the burden the fine will have on the defendant; whether the fine will impact the payment of any restitution; and, specifically for companies, any steps taken to discipline employees responsible for the offense and to prevent recurrence of the offense.[3] The statute is silent about situations when a reduction in the fine may be warranted, aside from specifying that the amount of the fine or penalty should not impair the ability to pay restitution to any victims.[4]

The advisory Sentencing Guidelines also inform decisions relating to the amount of criminal penalties that may be imposed on business organizations. For example, they provide a detailed methodology for calculating the amount of any fine. That methodology is based on a variety of factors including the nature of the offense and the circumstances of the defendant organization.[5] Notably, the Sentencing Guidelines state that a fine may be reduced when "the organization is not

able and, even with the use of a reasonable installment schedule, is not likely to become able to pay the minimum fine required." They provide little else to guide prosecutors in evaluating this important issue, other than to specify that "the reduction . . . shall not be more than necessary to avoid substantially jeopardizing the continued viability of the organization.[6]

The latest guidance fills in the blanks left by the Sentencing Guidelines. It notes that the decision to reduce a fine starts with an assessment of a company's assets, liabilities, and cash flow against working capital needs.[7] It also provides that Criminal Division attorneys should consider several additional factors in situations when a general assessment of a company's financial condition is insufficient to address the often complicated question of whether it can pay the contemplated fine. These factors are:

- *An assessment of the organization's current financial condition*. The Memo suggests that a reduction of the fine may not be warranted if the conditions that give rise to the inability to pay are due to ownership or management withdrawing capital, investing in capital improvements, or engaging in related-party transactions.[8]
- *Whether the company has access to alternative sources of capital*. The Memo encourages Criminal Division attorneys to "examine the availability of insurance or indemnification agreements, the existence of booked reserves, any plans for the acquisition or divestment of assets, and the details from any company forecasts."[9]
- *Consideration of the collateral consequences of the imposition of the fine*. The Memo warns prosecutors to be mindful of any significant adverse consequences that a fine might cause, from negatively impacting the funding of pension obligations or the retention of employees, to the possibility of significantly disrupting competition in a market.[10] The Memo specifies that adverse impacts on growth, future opportunities, hiring, or retention, and executive compensation, are not significant collateral consequences.[11]
- *Victim restitution considerations*. Tracking the language of 18 U.S.C. § 3572, the Memo requires Criminal Division prosecutors to consider whether the fine sought will impair the organization's ability to pay any restitution to victims of the offense.

In order to evaluate claims of inability to pay, the Criminal Division will now expect a response to an 11-point questionnaire regarding the financial situation. The new questionnaire seeks detailed information about the company's income and expenses, recent transactions, and future plans, among other things.[12] The information sought is generally in line with the types of information that companies have needed to provide in the past in order to establish their financial challenges to fines; the guidance formalizes those criteria. Criminal Division prosecutors are instructed to recommend an adjustment to the fine amount when the information in the questionnaire, along with a consideration of the factors discussed above, show that a company is unable to pay the fine.[13]

Consistency, predictability and transparency are admirable goals for the Justice Department, and are certainly important to corporate leadership. The Memo clearly attempts to meet those goals by encouraging federal Criminal Division prosecutors to follow this guidance in assessing this issue. But, as is often the case with guidance, it leaves many questions unanswered.

First, the Memo does not discuss the burden a company must carry to demonstrate that a reduction is warranted. This should be addressed in subsequent guidance.

Second, the failure to address the burden is compounded by the Memo's failure to provide any guidance regarding how prosecutors should consider the extent to which a penalty may be reduced once that burden has been met. The failure to address that point may be particularly problematic because, as a threshold matter, the Memo on its face appears to prohibit Criminal Division attorneys from considering inability to pay arguments *before* the parties agree on both the form of a criminal resolution (e.g., non-prosecution agreement, deferred prosecution agreement, or corporate guilty plea) and

the amount of the appropriate monetary penalty.[14] Thus, as drafted, a corporate defendant must agree to a criminal resolution and a survival-threatening fine before it knows (a) if the government will agree that it cannot pay that fine, (b) how much the ultimate fine will be, and, therefore, (c) how that reduced, but likely still substantial, fine will impact its operations. This part of the guidance fails to account for the reality of how company leadership consider resolutions in the context of the exercise of their fiduciary responsibility to the company, shareholders, employees, and other stakeholders.

Further, the Memo provides a little guidance regarding a process for assessing claims of inability to pay but is not clear enough to materially improve how a company weighs the risk of availing itself of this inability to pay. As previously noted, the assessment requires a company to submit a questionnaire that sets out detailed information about its financial status. Undoubtedly, prosecutors will be thorough and probing in their analysis of the responses; indeed, they may use accounting experts to examine those responses and the overall financial condition of the business.[15] Companies should be prepared for the costs and burdens that may arise in complying with this requirement, which conceivably could include requests for additional disclosures and information beyond what is called for by the questionnaire. Companies must also understand that, by engaging in this process, they are submitting themselves to additional government scrutiny – not just about the sufficiency of the information they provide as it relates to the inability to pay analysis, but also to questions about whether that information is truthful, accurate, and complete.

Finally, the impact of the Memo may be limited across the Department. On its face, it applies only to personnel in the Criminal Division, and seemingly does not apply to other divisions in the Department or to U.S. Attorney's Offices, which handle many and significant criminal cases against corporate defendants, often without the involvement of the Criminal Division. Similarly, the Memo does not apply to quasi-criminal enforcement matters that often result in the imposition of substantial fines and monetary penalties that can threaten the viability of corporate defendants. Nonetheless, the Memo demonstrates a willingness by the Department to consider this issue. Companies facing prosecutions or enforcement actions by other offices should consider this Memo in crafting arguments relating to their inability to pay fines or monetary penalties.

If you have questions regarding how this Memo might affect compliance issues or pending or future investigations, enforcement actions, or litigation, please contact John Richter, Jason Jones, or Ed Power for more information.

[1] Memorandum for All Criminal Division Personnel: "Evaluating a Business Organization's Inability to Pay a Criminal Fine or Criminal Monetary Penalty," from Assistant Attorney General Brian A. Benczkowski, October 8, 2019, *available at* https://www.justice.gov/opa/speech/file/1207576/download ("Inability to Pay Memo" or "the Memo").
[2] Assistant Attorney General Brian A. Benczkowski Delivers Remarks at the Global Investigations Review Live New York, October 8, 2019, *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-global-investigations ("Benczkowski Remarks").
[3] 18 U.S.C. § 3572(a).
[4] 18 U.S.C. § 3572(b).
[5] *See*, U.S.S.G. § 8C2.1 *et seq*.
[6] U.S.S.G. § 8C3.3.
[7] Inability to Pay Memo at 3.
[8] *Id*.
[9] *Id*.
[10] *Id*.
[11] *Id*.
[12] *Id*. at Attachment A.
[13] *Id*. at 4.
[14] *Id*. at 1. The Memo states only that the recommended adjustment to the fine or monetary penalty should be "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." *Id*. at 4
[15] Benczkowski Remarks.