



**U.S. Department of Justice**

**Criminal Division**


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*Office of the Assistant Attorney General*

*Washington, D.C. 20530*

October 8, 2019

TO: All Criminal Division Personnel

FROM: Brian A. Benczkowski   
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SUBJECT: Evaluating a Business Organization's Inability to Pay a Criminal Fine or Criminal Monetary Penalty

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**I. Overview**

In seeking to resolve a criminal case, a business organization may assert that it is unable to pay the criminal fine or monetary penalty sought by the Criminal Division, despite agreeing that the proposed amount is otherwise appropriate based on the law and the facts. This memorandum and the accompanying Inability-to-Pay Questionnaire (Attachment A) are intended to provide guidance and an analytical framework for Criminal Division attorneys to assess assertions by a business organization that it is unable to pay an otherwise appropriate criminal fine or monetary penalty.<sup>1</sup>

As a threshold matter, before Criminal Division attorneys are able to consider an inability to pay argument, the parties must first reach an agreement as to both the form of a corporate criminal resolution (*e.g.*, non-prosecution agreement, deferred prosecution agreement, or corporate guilty plea) and the monetary penalty that is appropriate based on the law and facts, irrespective of inability to pay considerations. As reflected herein, when evaluating a company's assertion that it is unable to pay an agreed upon penalty, Criminal Division attorneys should carefully consider the statutory sentencing factors set forth at 18 U.S.C. § 3572(a) & (b), the guidance set forth in U.S.S.G. §§ 8C2.2 & 8C3.3, and the Justice Manual's principles regarding the consideration of collateral consequences in resolving a corporate criminal case. In most cases, prosecutors also will need to consult an accounting expert to examine the financial condition of the business.

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<sup>1</sup> The contents of this memorandum provide internal guidance to Criminal Division attorneys on legal and policy issues. Nothing in it is intended to create any substantive or procedural rights, privileges, or benefits enforceable in any administrative, civil, or criminal matter by prospective or actual witnesses or parties.

The burden of establishing an inability to pay rests with the business organization making such a claim, and the organization must cooperate fully in providing information and access to appropriate company personnel to respond to prosecutors' inquiries. In every case where an inability to pay is asserted, the business organization will be expected to provide a complete and timely response to the Inability-to-Pay Questionnaire, as well as to any follow up inquiries.

## **II. Legal Considerations Relevant to the Evaluation of Inability to Pay Claims**

For context, 18 U.S.C. § 3572(a) requires courts to consider a number of factors when deciding whether to impose a criminal fine, how much to impose, and the payment method, which include:

- (1) the defendant's income, earning capacity, and financial resources;
- (2) the burden that the fine will impose upon the defendant, any person who is financially dependent on the defendant, or any other person (including a government) that would be responsible for the welfare of any person financially dependent on the defendant, relative to the burden that alternative punishments would impose;
- (3) any pecuniary loss inflicted upon others as a result of the offense;
- (4) whether restitution is ordered or made and the amount of such restitution;
- (5) the need to deprive the defendant of illegally obtained gains from the offense;
- (6) the expected costs to the government of any imprisonment, supervised release, or probation component of the sentence;
- (7) whether the defendant can pass on to consumers or other persons the expense of the fine; and
- (8) if the defendant is an organization, the size of the organization and any measure taken by the organization to discipline any officer, director, employee, or agent of the organization responsible for the offense and to prevent a recurrence of such an offense.

Section 3572(b) also requires courts to: (a) consider whether the amount of any criminal fine will impair a defendant's ability to make restitution to victims of the offense; and (b) impose a criminal fine only to the extent that it will not impair the ability of the defendant to make restitution to victims of the offense.

In addition to these statutory requirements, the federal Sentencing Guidelines advise courts that they may reduce a criminal fine amount below the prescribed Guidelines range where "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 by § 8C2.7 (Guideline Fine Range – Organizations) and § 8C2.9 (Disgorgement)." U.S.S.G. § 8C3.3(b). This advisory provision is qualified by the condition that "the reduction under this subsection shall not be more than necessary to avoid substantially jeopardizing the continued viability of the organization." U.S.S.G. § 8C3.3.<sup>2</sup>

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<sup>2</sup> The provisions of U.S.S.G. § 8C3.3 do not apply if a business organization "operated primarily for a criminal purpose or primarily by criminal means." U.S.S.G. § 8C1.1. In these instances, a criminal fine



### III. Relevant Factors for Assessing Whether a Business Organization has Demonstrated an Inability to Pay the Otherwise Appropriate Criminal Fine or Monetary Penalty

A business organization's ability to pay an agreed upon criminal fine or monetary penalty will often be determined by an analysis of its responses to the Inability-to-Pay Questionnaire to determine the company's current assets and liabilities, as well as to compare current and anticipated cash flows against working capital needs. Where legitimate questions exist regarding an organization's inability to pay, the analysis can be more complex, requiring the consideration of a range of factors, including the following:

- **Background on Current Financial Condition.** Criminal Division attorneys should assess what gave rise to the organization's current financial condition. For example, did ownership or management take capital out of the organization in the form of dividends, distributions, loans, or other compensation? Has the organization recently made investments in the form of facilities expansion, capital improvements, or an acquisition? Has the organization engaged in related-party transactions?
- **Alternative Sources of Capital.** Criminal Division attorneys should consider the organization's ability to raise capital through existing or new credit facilities or via a sale of assets or equity. Criminal Division attorneys should also 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.
- **Collateral Consequences.** Criminal Division attorneys also should be mindful of any significant adverse collateral consequences that are likely to result from the imposition of a criminal fine or monetary penalty exceeding an organization's ability to pay. Relevant collateral consequences include impacts on an organization's ability to fund pension obligations or provide the amount of capital, maintenance, or equipment required by law or regulation. Criminal Division attorneys also may consider whether the proposed monetary penalty is likely to cause layoffs, product shortages, or significantly disrupt competition in a market.

Certain collateral consequences are generally not relevant in assessing an organization's inability to pay. These include adverse impacts on growth, future opportunities, planned or future product lines, future dividends, unvested or future executive compensation or bonuses, and planned or future hiring or retention.

- **Victim Restitution Considerations.** Criminal Division prosecutors also must consider whether the proposed criminal fine or monetary penalty will impair an organization's ability to make restitution to any victims.

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or monetary penalty "shall be set at an amount (subject to the statutory maximum) sufficient to divest the organization of all of its net assets." *Id.*

Where Criminal Division attorneys find that an organization is unable to pay the otherwise appropriate criminal fine or monetary penalty, they should recommend an adjustment to the monetary penalty amount, but only to the extent necessary to avoid (1) threatening the continued viability of the organization<sup>3</sup> and/or (2) impairing the organization's ability to make restitution to victims.<sup>4</sup> An adjustment may consist of an appropriate reduction in the proposed criminal fine or monetary penalty, or the use of an installment schedule to facilitate the payment of the proposed fine or penalty amount over a reasonable period of time.

#### **IV. Approval Requirement for Reductions in Monetary Penalties Based Upon Inability to Pay**

Before agreeing to a reduction in a criminal fine or monetary penalty based upon an organization's inability to pay, Criminal Division attorneys handling the matter must first receive approval from their supervisors, including the Chief of the relevant Section. Where the proposed reduction exceeds 25% from the otherwise agreed upon criminal fine or monetary penalty, Criminal Division attorneys will also be required to receive approval from the Assistant Attorney General for the Criminal Division or his/her designee.

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<sup>3</sup> In addition to the considerations outlined in this memorandum, where there is uncertainty about a business organization's current viability or continuing viability after payment of a criminal fine or monetary penalty, Criminal Division attorneys should consider how, if at all, the organization has addressed going concern issues with its outside auditor prior to asserting an inability to pay claim. In doing so, Criminal Division attorneys may find it helpful to consult the accounting standards amendment promulgated by the Financial Accounting Standards Board ("FASB") in August 2014 regarding "Disclosure of Uncertainties about an Entity's Ability to Continue as a Going Concern." Accounting Standards Update No. 2014-15, Presentation of Financial Statements – Going Concern (Subtopic 205-40): Disclosure of Uncertainties about an Entity's Ability to Continue as a Going Concern, FASB (Aug. 2014) (available at [https://www.fasb.org/jsp/FASB/Document\\_C/DocumentPage?cid=1176164329772&acceptedDisclaimer=true](https://www.fasb.org/jsp/FASB/Document_C/DocumentPage?cid=1176164329772&acceptedDisclaimer=true)).

<sup>4</sup> Consistent with the principles of this memorandum, Criminal Division attorneys may, where appropriate, make an adjustment to a proposed criminal fine or monetary penalty based on the existence of a significant adverse collateral consequence that, while severe, may not necessarily threaten the continued viability of the organization. In such cases, the adjustment to the monetary penalty amount should not be more than necessary to avoid causing the severe adverse collateral consequence at issue.



## ATTACHMENT A

### Inability-to-Pay Questionnaire

1. **Recent Cash Flow Projections**
  - Provide all cash flow projections, including supporting documentation for cash flow projections, created during the past year.
2. **Operating Budgets and Projections of Future Profitability**
  - Provide all operating budgets and projections for the company, prepared within the past year, including all schedules of debt repayments and covenant calculations, for the current year and beyond.
3. **Capital Budgets and Projections of Annual Capital Expenditures**
  - Provide all capital budgets and/or projections of annual capital expenditures for the company, prepared within the past year, for the current year and beyond.
4. **Proposed Changes in Financing or Capital Structure**
  - If the company is planning any proposed changes in financing, including debt restructuring, or any proposed changes in capital structure, provide details and all supporting documentation.
5. **Acquisition or Divestiture Plans**
  - If the company has any acquisition and/or divestiture plans relating to material assets or subsidiary companies, provide details and all supporting documentation.
6. **Restructuring Plans**
  - If the company has any restructuring plans, including any bankruptcy or liquidation plans, provide details and all supporting documentation.
7. **Claims to Insurers**
  - If the company has made, or is contemplating making, any claims to the company's insurers, including but not limited to claims under directors and officers insurance policies, for payment of any kind for costs or expenses incurred in connection with this matter or others, provide all correspondence, relevant policies, and payment information.
8. **Related or Affiliated Party Transactions**
  - If the company, any of its owners, or any of its affiliates has engaged in any related party or affiliated party transactions, including intercompany loans, services agreements, and/or agreements relating to the transfer of funds, within the past two

years, or if the company anticipates undertaking any such transactions in the next two years, provide descriptions of each such transaction and all supporting documentation.

9. **Encumbered Assets**

- If the company has any encumbered assets: (a) identify each encumbered asset and its physical location, (b) describe each asset and the nature of its encumbrance, and (c) provide all documents sufficient to value each asset and establish its encumbrance.

10. **Liens on the Company's Assets**

- If any liens have been placed on any of the company's assets, specify the asset and the amount of the lien, identify the lienholder, and indicate the reason for the lien.

11. **Additional Materials**

- Provide the following additional materials:
  - A complete set of (a) audited financial statements for the past five years and (b) year-to-date financial statements for the current fiscal year, including balance sheets, income statements, statement of cash flows, and all accompanying footnotes, accounting explanations, disclosures, and supporting schedules;
  - Complete, signed federal corporate income tax returns for the past five tax years, including all accompanying schedules, forms, and attachments;
  - Copies of recent appraisals and/or valuation studies, including liquidation studies, prepared on any or all assets, and if any such assets are insured, insurance amounts for those assets;
  - A recent aging of receivables report that breaks-out receivables by payer;
  - A recent aging of payables report that breaks out payables by payer;
  - Copies of all current credit and loan agreements;
  - Information regarding the compensation plans for the ten most highly-compensated employees with the organization; and
  - All reports provided to major lenders within the past three years, including all correspondence and materials, if any, with lenders concerning attempts to obtain additional credit and capital.