DOJ Issues New Guidance on "Inability-to-Pay" Claims in Corporate Criminal Resolutions

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On October 8, 2019, the Criminal Division of the U.S. Department of Justice (DOJ) issued new guidance to assist federal prosecutors in assessing claims by companies that they are unable to pay a fine when resolving corporate criminal investigations and charges. The new guidance is set forth in a memorandum to all DOJ Criminal Division personnel titled, "Evaluating a Business Organization's Inability to Pay a Criminal Fine or Criminal Monetary Penalty" (available here).

Assistant Attorney General Brian Benczkowski announced the new memorandum during a speech at the *Global Investigations Review* Live New York 2019 conference in Manhattan. In providing "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," AAG Benczkowski stated, DOJ hopes to promote transparency by helping to ensure that white collar prosecutors "stick to a more uniform set of considerations, and also that companies looking to resolve matters have greater insight into how prosecutors think."[1]

Attached as Exhibit A to the memorandum is a two-page "Inability to Pay Questionnaire" that contains a set of document requests to be propounded upon the company, covering eleven topics focused on key financial metrics. The memorandum provides that inability-to-pay claims often can be resolved simply by analyzing responses to the Questionnaire "to determine the company's current assets and liabilities . . . [and] compar[ing] current and anticipated cash flows against working capital needs." But in more complex situations, it explains, it may be necessary to employ a multi-factor analysis to assess such claims, examining:

- Background on Current Financial Condition (e.g., what caused the Company's current financial predicament);
- Alternative Sources of Capital (e.g., the availability of insurance, credit lines, or other assets);
- Collateral Consequences (e.g., layoffs, product shortages, inability to fund pension obligations); and
- Victim Restitution Considerations (e.g., impairment of Company's ability to satisfy restitution obligations).

If this process results in a determination that the organization is unable to pay the otherwise appropriate criminal fine or monetary penalty, the memorandum instructs prosecutors to recommend that the fine be adjusted downward or that an installment plan be negotiated, "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 memorandum states that "[i]n most cases, prosecutors also will need to consult an accounting expert to examine the financial condition of the business."

Importantly, the memorandum provides that as a threshold step, before considering an inability-to-pay claim, the parties must first agree on "both the form of [the] corporate criminal resolution (*e.g.*, non-prosecution agreement, deferred prosecution agreement, or corporate guilty plea)" and the appropriate fine under the U.S. Sentencing Guidelines. In addition, the memorandum establishes supervisory approval requirements for fine reductions based on an inability to pay, including AAG approval for fines that exceed 25%.

AAG Benczkowski's memorandum provides much-needed transparency for companies wishing to raise legitimate inability-to-pay claims, particularly small and medium-sized businesses and privately-held companies for which the costs of a criminal investigation and prosecution can be devasting. The U.S. Sentencing Guidelines (*see* U.S.S.G. §§ 5E1.2, 8C3.3) and 18 U.S.C. § 3571 contemplate such claims, and other DOJ divisions have procedures for assessing such claims (*see* Justice Manual § 4-11.300 (Civil Division), Justice Manual § 6-6.412 (Tax Division), Antitrust Division Manual, Fifth Ed. at IV-78)). But specific inability-to-pay guidance has been noticeably absent from Criminal Division policies and pronouncements. The new memorandum is a step in the right direction towards fixing this problem.

That said, in our view, there are four aspects of this new guidance worth further consideration. First, the memorandum does not on its face look to apply to individuals, only to companies. Yet individuals are far more likely to face a financially devasting criminal prosecution than companies, and would benefit greatly from similar guidance.

Second, the memorandum, addressed only to DOJ Criminal Division personnel, would not appear to apply to criminal prosecutors in the 94 U.S. Attorney's Offices throughout the country, and it does not appear to have been incorporated into DOJ's Justice Manual, the internal policy manual that binds all federal prosecutors. This omission raises the question of whether federal prosecutors outside of main justice will follow the guidance, and it also contradicts earlier pronouncements by the Trump DOJ stating that "[m]emos generally should be brief cover memos and commentary, not freestanding policy statements," and criticizing the need to "search for policies and guidelines scattered in various places."[2]

Third, the requirement in the new guidance that prosecutors and company counsel first calculate the appropriate fine under the Sentencing Guidelines presupposes that there is a particular criminal charge upon which the parties agree. But where the parties are negotiating a corporate non-prosecution agreement, for example, unlike a deferred prosecution agreement or corporate guilty plea, there often is no single charge upon which the parties agree, and thus no applicable Sentencing Guideline to determine the baseline fine. Accordingly, the policy raises questions as to how prosecutorial discretion should be exercised in this context and leaves open the possibility of disputes on this threshold issue.

Fourth, the suggestion that in most cases prosecutors will need to consult with an accounting expert to analyze the company's financial condition could deter prosecutors from considering inability-to-pay claims in order to avoid the potential delay and expense associated with retaining and consulting with such an expert.

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