

Organizations Facing Criminal Fines May Be Able To Reduce Them Upon A Proper Showing Of Inability To Pay

by RJ Zayed and Beth Forsythe

So, your organization is about to resolve a criminal matter with the U.S. Department of Justice (DOJ), including agreement as to the appropriate fine or monetary penalty, but it cannot pay that fine or penalty without shutting its doors or avoiding serious collateral consequences (e.g., inability to pay victims or pension beneficiaries). What happens next?

Assistant Attorney General Brian Benczkowski answered this question last week in a [memo](#) “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.” The memo is accompanied by a questionnaire that must be completed by any organization that claims an inability to pay an agreed-upon criminal penalty. The memo and questionnaire supplement prosecutors’ long-standing ability to reduce a criminal penalty based on statutory sentencing factors in 18 U.S.C. § 3572(a) & (b), sentencing guidelines in U.S.S.G. §§ 8C2.2 & 8C3.3, and principles described in the U.S. Attorney’s Manual regarding consideration of collateral consequences in resolving a corporate criminal case.

The organization bears the burden of proving inability to pay a criminal penalty. This burden now involves completion of the Inability-to-Pay Questionnaire, which requires extensive financial disclosures: operating and capital budgets and cash flow projections; details of proposed financing changes, acquisitions, divestitures, or restructurings; lists of encumbered assets or liens; and financial miscellany including financial statements, tax returns, appraisals, aging reports, and a list of the ten most highly-compensated employees. The disclosures are intended to allow DOJ and its accounting experts to assess the organization’s current assets and liabilities, and its current and anticipated cash flows against working capital needs. Organizations also must provide access to relevant company personnel and respond to any follow-up inquiries regarding company finances.

Where the organization’s ability to pay is unclear from the assets versus liabilities or cash

Related People

- RJ Zayed
- Beth Forsythe

Related Capabilities

- Government Enforcement & Corporate Investigations
- Government Contracts Counseling & Litigation

flows versus working capital comparisons, DOJ will consider the following additional factors:

- **What caused the company's current financial situation?** Did ownership or management take capital out of the organization (e.g., through dividends or compensation), invest in facilities or capital improvements, or engage in related-party transactions? Or, is the company simply underperforming?
- **Does the company have alternative sources of capital?** Could the company raise capital through existing or new credit facilities or via a sale of assets or equity? Is insurance or indemnification coverage available?
- **What potential collateral consequences could be avoided by reducing the penalty?** What if any adverse collateral consequences are likely to result from the imposition of a criminal fine or monetary penalty that exceed an organization's ability to pay? Would the fine or penalty impact an organization's ability to fund pension obligations or provide the amount of capital, maintenance, or equipment required by law or regulation? Would it likely cause layoffs, product shortages, or significantly disrupt competition in a market?
It is important to note that the memo clearly lays out that certain collateral consequences generally will not warrant a penalty reduction, including adverse impacts on the organization's growth, future opportunities, planned or future product lines, future dividends, unvested or future executive compensation or bonuses, or planned or future hiring or retention.
- **Will the penalty impair victim restitution?**

As Benczkowski stated publicly when he issued the memorandum, the information and documents provided in response to the questionnaire will be analyzed by prosecutors and accounting experts "with a view toward making a full-informed, rational, and fair decision about a company's ability to pay." Where DOJ prosecutors determine that an organization is unable to pay the otherwise appropriate criminal fine or monetary penalty, the memo indicates they should recommend and seek supervisory approval for an adjustment to the penalty, "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."

While DOJ maintains significant discretion in resolving criminal prosecutions, including establishing appropriate penalties, this memo and use of the attached questionnaire should increase consistency and predictability of outcomes in inability to pay cases.