October 10, 2019

DOJ Announces Guidance for "Inability-to-Pay" Claims

On October 8, 2019, the Criminal Division of the U.S. Department of Justice released guidance on how federal prosecutors should evaluate claims that corporations are unable to pay a proposed fine or monetary penalty.[1] In announcing the guidance, Assistant Attorney General Brian A. Benczkowski noted that the evaluation of "inability-to-pay" claims is one area of white-collar criminal enforcement that the DOJ has determined would benefit from greater transparency. He said that guidance on this issue, along with recent DOJ guidance relating to compliance programs and monitorships, is "part and parcel of [DOJ's] broader mission . . . to establish more predictable guideposts by which companies can gauge expectations, conform their conduct, and act as responsible corporate citizens."[2]

In addition to releasing this new guidance, the DOJ announced a reorganization of the Securities and Financial Fraud Unit of the Fraud Section to "capture the broad range of fraud enforcement work that the [Securities and Financial Fraud Unit's] prosecutors actually perform."[3] Recognizing that the Unit's "mission has expanded beyond its stated message and moniker," the DOJ announced that the Unit will be renamed the Market Integrity and Major Frauds Unit, and that it will be reorganized into five dedicated teams focusing on: (1) securities fraud; (2) commodities fraud; (3) government procurement fraud; (4) fraud on financial institutions; and (5) consumer fraud, regulatory deceit and investor schemes.

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1 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.

2 Assistant Attorney Gen. Brian A. Benczkowski, Remarks at the Global Investigations Review Live New York (Oct. 8, 2019), available here. For additional information on other DOJ initiatives to provide greater transparency in enforcement actions, *see, e.g.*, Client Memorandum, Paul, Weiss, Rifkind, Wharton & Garrison LLP, "DOJ Updated Guidance for Evaluating Corporate Compliance Programs Focuses on Effectiveness" (May 6, 2019), available here; Client Memorandum, Paul, Weiss, Rifkind, Wharton & Garrison LLP, "DOJ Announces New Standards for Corporate Cooperation" (Dec. 5, 2018), available here; Client Memorandum, Paul, Weiss, Rifkind, Wharton & Garrison LLP, "DOJ Announces New Guidance for Imposing Compliance Monitors in Criminal Division Matters" (Oct. 17, 2018), available here; Client Memorandum, Paul, Weiss, Rifkind, Wharton & Garrison LLP, "DOJ Issues New FCPA Corporate Enforcement Policy" (Nov. 30, 2017), available here.

3 Assistant Attorney Gen. Brian A. Benczkowski, Remarks at the Global Investigations Review Live New York (Oct. 8, 2019), available here.

Overview of the "Inability-to-Pay" Guidance

While the sentencing provisions of Title 18 and the U.S. Sentencing Guidelines respectively provide that courts must consider a corporation's financial resources in determining an appropriate penalty or fine,[4] and may reduce an otherwise appropriate penalty or fine if a company demonstrates that it cannot pay,[5] neither source provides clear direction on evaluating claims of corporate poverty. The DOJ's new guidance, entitled "Evaluating a Business Organization's Inability to Pay a Criminal Fine or Criminal Monetary Penalty," sets forth a detailed framework for federal prosecutors to assess a corporation's "inability to pay" once the corporation and DOJ have agreed on both a corporate criminal resolution and an appropriate monetary penalty or fine based on the law and the facts (without considering the corporation's assertion that it is unable to pay).

As part of the DOJ's evaluation process, corporations claiming that they cannot afford a criminal fine or penalty must timely submit to the DOJ a completed "Inability-to-Pay Questionnaire" that focuses primarily on the company's financial condition and projections. The Questionnaire asks companies to provide documents on ten topics: (1) recent 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 or affiliated party transactions; (9) encumbered assets; and (10) liens on the company's assets. In addition, the Questionnaire asks for a number of additional financial materials, including, among other things, current and prior financial statements, recent federal corporate income tax returns, recent appraisals and valuation studies, copies of current credit and loan agreements, and compensation information for the ten most highly compensated employees in the company.

The DOJ's guidance directs prosecutors to use the information gathered from the company's responses to the Questionnaire to make an initial determination about the company's ability to pay a proposed fine or monetary penalty based on its current assets, liabilities and cash flows. To the extent there are remaining questions about the company's ability to pay after such information is collected and analyzed, prosecutors are to consider a range of factors, including: (1) an assessment of the issues that gave rise to the company's financial condition; (2) the company's ability to raise capital through various mechanisms; (3) the collateral consequences that may flow to the company from the proposed penalty or fine; and (4) whether restitution payments to the company's victims would be hampered by the proposed penalty or fine.

If prosecutors determine that a company is unable to pay an appropriate criminal fine or monetary penalty, the guidance instructs them to recommend an adjustment to avoid threatening the organization's continued viability and/or impairing the organization's ability to provide restitution to victims.

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4 18 U.S.C. § 3572(a).

5 U.S. Sentencing Guidelines Manual § 8C3.3 (U.S. Sentencing Comm'n 2018).

Practical Takeaways

Companies now have guidance beyond what can be gleaned from DOJ resolutions in determining whether to advance inability-to-pay claims. While there are recent examples of corporate fine or penalty reductions based on an inability to pay, the resolutions have not provided detailed information on how such claims are assessed. For instance, in 2018, Transport Logistics International Inc. ("TLI"), a Maryland-based provider of services for the transport of nuclear material, reached a deferred prosecution agreement ("DPA") with the DOJ in connection with a scheme to pay more than $1.7 million to shell companies associated with a Russian government official.[6] According to the DPA, the DOJ agreed that because of TLI's inability to pay the appropriate penalty calculated under the U.S. Sentencing Guidelines, TLI was only required to pay a $2 million criminal penalty.

More notably, in December 2016, Odebrecht, a Brazilian construction conglomerate, pleaded guilty to conspiracy to violate the anti-bribery provisions of the FCPA. At the time it reached the plea agreement, Odebrecht agreed that the appropriate total criminal fine was $4.5 billion but represented that it was only able to pay a maximum of $2.6 billion.[7] Following its own independent assessment made in coordination with Brazilian authorities, the DOJ agreed with Odebrecht's claim and reduced the fine to $2.6 billion.[8]

The Criminal Division's new guidance represents the latest initiative in the DOJ's ongoing effort to provide increased transparency in corporate enforcement actions. In addition to promoting greater consistency in how prosecutors handle inability-to-pay claims, the new guidance is likely to serve as an additional tool that companies facing challenging financial circumstances may utilize to make strategic decisions about their regulatory dealings, including on issues such as self-disclosure and cooperation with the DOJ. Finally, public companies that are considering making inability-to-pay claims would be well served to consult disclosure counsel about any potential disclosure issues that may arise when providing financial information to the DOJ under the guidance.

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6 Deferred Prosecution Agreement, *United States* v. *Transport Logistics International Inc.*, 18-cr-00011 (D. Md. Jan. 10, 2018).

7 Plea Agreement, *United States* v. *Odebrecht S.A.*, No. 16-644 (RJD) (E.D.N.Y. Dec. 21, 2016).

8 Sentencing Memorandum, *United States* v. *Odebrecht S.A.*, No. 16-644 (RJD) (E.D.N.Y. Apr. 11, 2017).

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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