

## DOJ May Reduce Corporate Fines To Avoid 'Severe' Effects

By Jody Godoy

*Law360 (October 8, 2019, 10:40 PM EDT)* -- A memo unveiled Tuesday that offers prosecutors in the Department of Justice's Criminal Division new guidance on how to assess a company's claim that it can't afford to pay a criminal fine states that other "severe" effects, aside from an inability to pay, may also warrant a discount.

The memo, previewed in a speech last month, was rolled out by Brian Benczkowski, head of the Criminal Division, at a private event in New York on Tuesday. The DOJ posted the memo along with a copy of his prepared remarks online.

In the speech, Benczkowski said the memo was of a piece with previous policy tweaks meant to promote transparency and incentivize corporate compliance.

"We want 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," Benczkowski said.

The Federal Sentencing Guidelines that currently dictate criminal fines allow for fines to be reduced in the event that a company cannot pay a fine, even on installment, but not by "more than necessary to avoid substantially jeopardizing the continued viability of the organization."

However, the guidelines provide little detail on how to assess such a claim. In practice, companies and prosecutors have generally used outside accountants to comb the company's books and determine what it can afford.

The new guidance doesn't change that process, but lets companies know what the DOJ expects. The memo states that corporate poverty claims should only be considered after both sides agree what the fine should be under the law.

At that point, the DOJ will expect companies to respond to an 11-point questionnaire on their financial situation. The questionnaire asks about the company's income and expenses, whether it has engaged in any recent transactions with affiliates and whether the company plans any sales or acquisitions, among other things.

Prosecutors are to evaluate the answers on the questionnaire, along with factors including the fine's potential effects, such as whether making the company pay the fine is "likely to cause layoffs, product

shortages or significantly disrupt competition in a market."

Also included were examples of what is "generally not relevant" to the decision. Those 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," the memo states.

However, a footnote adds that prosecutors are still able to "make an adjustment" to a fine "based on the existence of a significant adverse collateral consequence that, while severe, may not necessarily threaten the continued viability of the organization." Mirroring the language in the sentencing guidelines, the memo states that the adjustment should "not be more than necessary to avoid causing the severe adverse collateral consequence at issue."

The memo did not offer further instruction as to what would fall under that category.

Pamela Davis, a partner at Winston & Strawn LLP, said the note shows the DOJ is open to hearing about a fine's potential adverse consequences, even if they fall short of corporate extinction. But she expects it will take more than a nebulous argument about future harm to convince prosecutors.

"Do I think it's going to reduce the penalty? Probably not, unless you really can show it's something that has true collateral consequences that are immediate in nature," Davis said.

The footnote appears to be consistent with a 1999 memo written by then-Deputy Attorney General Eric Holder on collateral consequences which is now a part of the Justice Manual that guides prosecutors. The policy states that prosecutors should consider the collateral consequences when deciding whether to charge a company and weighing settlement options that avoid a conviction, such as deferred or non-prosecution agreements.

However, the policy known as the Principles of Federal Prosecution of Business Organizations says nothing about adjusting fines.

Tinos Diamantatos, deputy chair of the white collar practice at Morgan Lewis & Bockius LLP, said the term "collateral consequence" is now common parlance in negotiations with the government as a way to point out what is at stake.

"I think the footnote is talking about considering that. What if it is a company that is putting out a product that is key to people's health? Think about tempering the blow if you are going to undermine the company's ability to do that," Diamantatos said.

Sandra Moser, former head of the DOJ's Fraud Section and now a partner at Quinn Emanuel Urquhart & Sullivan LLP, said that while much in corporate resolutions is the product of closed-door discussions, if a company ultimately gets a lower fine under the policy, the reason should be spelled out in the settlement.

"I would absolutely expect to see the papers lay out a justification and detailed explication for what the 'significant adverse collateral consequence' was, consistent with the Criminal Division's approach to providing more transparency to companies and the white collar defense bar in all of its corporate resolutions over the past several years," Moser said.

In general, members of the defense bar welcomed the new guidance on Tuesday, saying it illustrates the

DOJ's emphasis on making procedures more transparent.

Pablo Quiñones, a former assistant chief in the Fraud Section who now practices at Quiñones Law, sees the policy as part of a larger effort to create incentives for companies to disclose misconduct to the government.

"With the idea that among the potential consequences is a huge fine that they may be able to argue should be lower because of an inability to pay, it shifts the calculus in favor of disclosure," Quiñones said.

Also on Tuesday, Benczkowski announced a re-brand of the Fraud Section's Securities and Financial Fraud Unit. The unit will now be referred to as the Market Integrity and Major Frauds Unit, in recognition of the fact that its prosecutors go after more than just financial fraud. As an example, Benczkowski cited the \$1 billion case against Takata Corp. over faulty airbags.

In addition, the unit will now reorganize into five "teams" focused on different areas: securities fraud, commodities fraud, procurement fraud, fraud on financial institutions and a team focused on "consumer fraud, regulatory deceit and investor schemes."

Benczkowski noted that different types of crime call for different investigative methods and involve different types of victims.

"We believe the increased specialization and mission-driven focus of this reorganization will put us on better footing to pursue cases and vindicate the interests of those particular victims," Benczkowski said.

--Editing by Michael Watanabe.