



U.S. Department of Justice

Civil Division

Office of the Assistant Attorney General

Washington, D.C. 20530

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MEMORANDUM FOR ALL CIVIL DIVISION EMPLOYEES

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CIVIL DIVISION

SUBJECT: Assessing an Entity's Assertion of an Inability to Pay

The Civil Division brings civil claims on behalf of the United States that provide for the recovery of money or property, including damages and penalties. Although the Division may litigate these claims to final judgment, the Division also may agree to resolve them, either before or after judgment is entered, through settlement. In seeking to resolve a claim for money, a party may assert that it is unable to satisfy the payment sought by the Division. This memorandum provides guidance and an analytical framework for the Division to assess an assertion of an inability to pay an otherwise appropriate amount to resolve potential civil liability.¹

I. General Policy Regarding Inability to Pay

The Assistant Attorney General is authorized to compromise claims for money when any entity, including an individual, corporation, limited liability company, partnership, sole proprietorship, or estate, offers the maximum it has the ability to pay. *See* 28 C.F.R. § 0.160(a)(2). The Division may, therefore, consider an entity's assertion that it is unable to pay an otherwise appropriate amount to resolve an alleged claim or violation of the law because it lacks sufficient assets required to pay the government and meet its ordinary and necessary business and/or living expenses. *See* Justice Manual § 4-3.200. The entity bears the burden of establishing its inability to pay, and why a higher payment amount would constitute an undue financial hardship, including by providing all information requested by the Division. The entity should complete the Division's certified Financial Disclosure Form, and provide, as requested, tax returns, audited financial statements, and access to appropriate personnel. The entity must certify under penalty of perjury that the information it provides is complete, accurate, and current. Until a final settlement is reached, the Division may request periodic updates to

¹ This memorandum provides internal guidance to the Division on legal and policy issues. It does not create any substantive or procedural rights, privileges, or benefits enforceable in any administrative, civil, or criminal matter, nor does it limit the Attorney General's discretion to determine whether to compromise claims in litigation on behalf of the United States. This memorandum also does not apply to claims that are referred to the Division for approval of authority to compromise pursuant to 31 C.F.R. Part 902.

previously requested materials, and notification is required of any material changes to the financial condition that likely will affect an entity's ability to pay.

As described below, in evaluating such an assertion, the Division will analyze numerous factors, typically with the assistance of a qualified financial expert. The Division's analysis and ultimate decision, however, are determined by the specific facts and circumstances present in a particular matter. The factors identified in this memorandum are not exhaustive and do not preclude the consideration of other relevant information.

II. Relevant Factors for Assessing Inability to Pay

The Division evaluates an entity's assertion of an inability to pay consistent with the factors set forth in the Justice Manual. *See, e.g.*, § 4-3.200. The Division also reviews and analyzes responses to the Division's certified Financial Disclosure Form, which identifies assets and liabilities, current and anticipated income and expenses, cash flow, projections, working capital, and other relevant information. The Division considers additional factors as appropriate, including the following:

- **Background on Current Financial Condition.** The review considers the entity's current financial condition, what gave rise to it, and projected financial earnings and expenses. For example, the Division considers whether the entity: (1) engaged in related party transactions; (2) removed capital, such as in the form of dividends, distributions, or loans, or invested in facilities expansion, capital improvements, or acquisitions of real or personal property or other types of assets; and/or (3) may reduce discretionary expenses, such as decreasing or eliminating executive bonuses.
- **Alternative Sources of Capital.** The review considers an entity's ability to borrow funds (e.g., by obtaining a mortgage on real property), or to raise capital (e.g., through existing or new credit facilities or via a sale of assets or equity). The review also evaluates the existence of booked reserves, plans for the acquisition or divestment of assets, and an entity's forecasts. The Division also considers whether an entity has any claim under an insurance or indemnification agreement, or has any other type of enforceable monetary claim against a third party.
- **Timing of Payments.** The review considers the amount that an entity can afford to pay immediately and over time, typically for a period not to exceed three to five years. While immediate payment is preferable, *cf.* 31 C.F.R. §§ 901.8, 902.2(f), the Division may agree to accept payments over time if it determines that doing so would enhance its recovery and is administratively feasible. In such a case, any payments over time will reflect interest to maintain the present value of a resolution and the agreement will contain provisions to protect the government's recovery in the event of default or a future bankruptcy filing by the entity. The entity typically will need to provide appropriate security. In some cases, a solvent entity may provide guarantees from a third party.

- **Tax Deductibility.** The review takes into account the tax deductibility of any monetary payments.
- **Contingency Arrangements.** The review considers, in certain circumstances, acceleration or escalation contingency arrangements. Such circumstances include but are not limited to forecasts of a future sale of significant assets, a new product launch or contract, other new earnings, or growth opportunity.
- **Collateral Consequences.** The review considers any significant adverse collateral consequences of a monetary resolution that exceeds an entity's financial capacity. For example, the Division evaluates potential disproportionate impacts on an entity's ability to provide support to other family members, or an entity's operations and obligations. The Division also considers the adverse impact of a monetary resolution on an entity's ability to maintain the amount of capital, maintenance, or equipment required by law or regulation. Collateral consequences that generally are not relevant 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.
- **Third Party Liability.** In appropriate cases, the Division considers whether additional entities, including family members or related parties, may be liable for the debt as a result of a fraudulent transfer, successor liability, or the Federal Priority Statute.

III. Approval Required for Compromise Based Upon Inability to Pay

Before entering into a resolution that reduces the amount recovered based upon an entity's inability to pay, Division attorneys must secure the appropriate level of authority consistent with 28 C.F.R. § 0.160 and Civil Division Directive 1-15.