

# Inability to pay

Defend your organization from potentially catastrophic fines

On September 4, 2020, the Civil Division of the US Department of Justice (DOJ) released a detailed inability to pay framework. Organizations and legal teams that understand the factors used to evaluate inability to pay will be better equipped to make credible arguments in favor of reduced fines.



## Evaluate inability to pay

The DOJ's guidance outlines seven key factors. Federal prosecutors will consider these factors when evaluating an organization's inability to pay proposed civil fines and monetary penalties:



### Financial condition and timing of payments

What is the entity's ability to pay immediately or over time considering tax deductibility?



### Alternative sources of capital

What resources can the organization leverage to generate capital?

- Existing or new credit facilities
- Assets or equity that can be sold
- Insurance or indemnification agreements
- Booked reserves
- Plans for the acquisition or divestment of assets
- Details from company forecasts



### Collateral consequences

How will the fine impact stakeholders and the marketplace in which the organization operates?

#### Relevant

- An entity's ability to provide support for family members, operations, or obligations
- Ability to maintain the amount of capital, maintenance, or equipment required by law or regulation

#### Not relevant

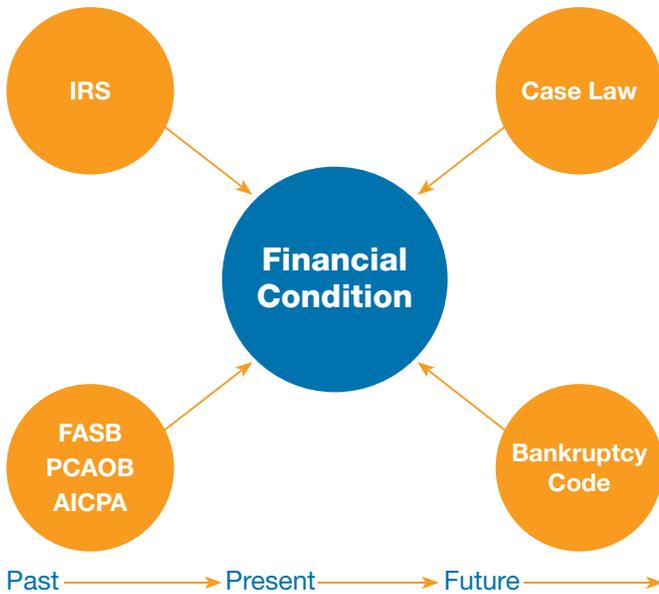
- Growth, future opportunities, planned or future product lines, future dividends, unvested or future executive compensation or bonuses, and planned or future hiring or retention



### Contingency arrangements and third party liability

Are there future asset sales, growth opportunities, other new earnings to consider? Are any additional entities liable due to a fraudulent transfer (i.e., according to the successor liability of the Federal Priority Statute)?

## Framework to assess the inability to pay



## Measure inability to pay

Independent financial, accounting, and economic analytics provide valuable insights to assess an entity's inability to pay a fine.

- Analyze and quantify the impact a fine will have on the organization; the marketplace, workforce, and other stakeholders; and the organization's ability to comply with other laws and regulations
- Consider past, present, and future financial conditions
- Leverage relevant guidance from the FASB, PCAOB, AICPA, IRS, Bankruptcy Code, and case law

## Build a credible argument

Organizations turn to CRA when they need to assess a proposed civil fine and provide credible and independent assessments for appropriate adjustments based on the inability to pay. Our valuation professionals, CPAs, and economists routinely provide independent financial, accounting, and economic analytics informed by industry, regulatory, and legal guidance. CRA offers deep experience with accepted solvency tests, exclusive relationships with leading practitioners and academic experts, and more than 50 years of experience providing expert support and testimony. Operating from nine countries around the world, CRA's clients include 83% of the Fortune 100 and 94% of the Am Law 100.

### Representative engagement

#### Ability to pay analysis

As a result of an investigation, the government sought to impose certain fines, penalties, and other costs that our client did not have the ability to pay. CRA performed an objective analysis of a client's current financial condition and assisted its counsel in advocating for a lower penalty.



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