

Dispute Advisory Services

Ability to Pay Services



SERVICES

Laws and Statutes

Our professionals have extensive experience advising clients on reducing criminal fines arising from violations of the following laws:

- False Claims Act
- Foreign Corrupt Practices Act
- Sherman Act

Governmental Authorities

On behalf of companies as well as governmental agencies, our professionals have presented to the following authorities on a company's ability to pay a criminal fine:

- Environmental Protection Agency
- UK Serious Fraud Office
- U.S. Department of Justice

Industries Analyzed

With respect to calculating a company's ability to pay, our professionals have experience evaluating issues for the following industries:

- Auto Parts Manufacturing
- Aviation
- Healthcare
- Heavy Manufacturing
- Logistics

THEORY OF THE ABILITY TO PAY DEFENSE

When facing a criminal fine, a company need not accept the amount calculated initially, for Section 8C3.3 of the United States Sentencing Guidelines allows for a reduction in the fine based on a company's inability to pay. As provided by the Sentencing Guidelines, an Ability to Pay defense is prudent when the fine imposed is so onerous that even with a reasonable installment schedule, the fine will impair the company's ability to pay restitution to victims of its conduct and/or substantially jeopardize the continued viability of the organization.

While the Sentencing Guidelines offer no prescribed methodology for analyzing a company's ability to pay, that analysis is typically performed by analyzing the company's projected free cash flows and assessing the strength of its balance sheet.

DESCRIPTION OF THE PROCESS

Although the Ability to Pay defense may be sensible, the burden of proof is on the entity accused of wrongdoing. When presenting an Ability to Pay defense, the company must produce relevant documents demonstrating the burdensome nature of the proposed fine. The company will be asked to produce documents such as the following: organizational charts, five years of audited financial statements, strategic business and operating plans, borrowing and repayment schedules, detailed capital expenditure budgets, projections, tax returns, asset schedules, among others.

FTI Consulting professionals can help identify and obtain the documentation necessary to fairly and fully analyze the issues in an Ability to Pay matter. FTI Consulting can serve as a sounding board and help to organize productions to the requesting governmental authority in order to ensure that the company is cooperative and responsive. We understand the tenor of these exercises and from behind the scenes, we can aid counsel in fostering this relationship with the authority levying the fine. Whether physically locating or recreating financial records, we assist counsel in all phases of the "discovery" process.

While FTI Consulting performs its analysis, the governmental authority will often engage its own expert to perform a similar analysis concurrently. We have found it successful and persuasive in presenting our analyses to the governmental authority on behalf of the company. Having presented to multiple governmental authorities on numerous occasions, FTI Consulting has developed a rapport with opposing experts and a methodology that is effective in reducing criminal fines.

FTI Consulting has unique insight into how governmental authorities treat these matters. Though we have typically performed these analyses on behalf of the company, the UK Serious Fraud Office retained FTI Consulting to evaluate a company's Ability to Pay defense.

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PROJECTED FREE CASH FLOW

FTI Consulting has a team of seasoned valuation and accounting professionals with expertise in developing free cash flow models and projections to aid in proving that the proposed fine is beyond the company's ability to pay. The Sentencing Guidelines allow payment of a fine with a reasonable installment schedule, and consequently, FTI Consulting develops projections over a proposed installment period, which can be up to five years. We understand the breadth that the projections must cover in order to defend the company's position persuasively.

Beyond any projections of the company's free cash flow and income statements, FTI Consulting will incorporate the projections into developing projected balance sheets and cash flow statements to present a comprehensive and coherent argument. The governmental authority and its experts will scrutinize every line item, often giving particular attention to dividends and capital expenditures. FTI Consulting exercises that same scrutiny in order to evaluate the business case of the company's projections and adjust accordingly to maintain a compelling position.

FTI Consulting understands the mindset and theory employed by the governmental authority's experts, and as such, utilizes similar resources such as analyst and industry reports to corroborate its analyses. Because a fine must not jeopardize the continued viability of the organization, FTI Consulting performs a robust analysis of the company's peer group in order to benchmark projected operational performance, liquidity, and capital structure.

STRENGTH OF THE BALANCE SHEET

Besides the additional cash flow generated during the installment period, governmental authorities often consider additional sources of cash available to pay a fine, such as non-essential assets, borrowing capacity, and additional equity raises. Certain non-essential assets may still be necessary to

comply with loan agreements or maintain relationships with business partners, as is common in Japanese business, custom, and practice. FTI Consulting considers the local business customs of the jurisdictions where the company operates and also evaluates any credit lines which could partially satisfy a fine.

Moreover, FTI Consulting applies its peer group analysis and conducts a thorough evaluation of the company's liquidity in order to ensure that the company has sufficient working capital to not jeopardize the continued competitiveness and viability in its industry.

PRESENTATION TO THE GOVERNMENTAL AUTHORITY

A persuasive presentation requires outstanding credentials and an effective delivery premised on proven methods and sound analysis. Working with a carefully assembled team with the right combination of functional and industry skills, we make the complex business and valuation issues in Ability to Pay cases understandable and support our defensible position with compelling graphics and exhibits.

When the governmental authority delivers its preliminary conclusion at a later date, FTI Consulting remains invested in the engagement. Should an Ability to Pay issue remain, FTI Consulting can support the resolution process through additional analyses, responses to the authority's position, or subsequent presentations.

While eliminating a fine in its entirety may prove difficult, FTI Consulting's expertise in calculating and presenting the Ability to Pay defense has been effective at reducing fines, preserving a company's ability to pay restitution to victims, and protecting the company's continued viability.

FTI Consulting, Inc., including its subsidiaries and affiliates, is a consulting firm and is not a certified public accounting firm or a law firm.

Basil Imburgia	Jeff Litvak	Geoffrey Ihnow
+1 212 499 3665 Basil.Imburgia@fticonsulting.com	+1 312 252 9323 Jeff.Litvak@fticonsulting.com	+1 312 252 9375 Geoffrey.Ihnow@fticonsulting.com

EXPERTS WITH IMPACT

About FTI Consulting

FTI Consulting, Inc. is an independent global business advisory firm, dedicated to helping organizations manage change and mitigate risk: financial, legal, operational, political & regulatory, reputational and transactional. FTI Consulting professionals, located in all major business centers throughout the world, work closely with clients to anticipate, illuminate and overcome complex business challenges and opportunities. Connect with us on [Twitter \(@FTIConsulting\)](#), [Facebook](#) and [LinkedIn](#).