CORPORATE LIABILITY AND COLLATERAL CONSEQUENCES

Nathan Atkinson[*]

Financial penalties imposed on malfeasant corporations can produce "collateral consequences," or unintended negative impacts on employees, customers, and society more broadly. I show that the vast majority of government bodies that assess organizational penalties have adopted policies to reduce corporate liability where collateral consequences might otherwise result. Moreover, I demonstrate that officials do re- duce penalties in line with these policies, undermining deterrence, and compensation. However, evidence from reductions given to publicly-traded firms suggests that officials are often wrong in their assessment of firms' financial health, thereby awarding reductions to healthy firms where collateral consequences are unlikely to occur. I discuss how officials should approach imposing penalties when they are concerned about prospective collateral consequences.

---

[*]University of Wisconsin. Thank you to Anat Admati, Abhay Aneja, Jennifer Arlen, Ronen Avraham, Steve Callander, Scott Ganz, Jacob Goldin, Colleen Honigsberg, Curtis Milhaupt, Michael Ohlrogge, Paul Pfleiderer, Mitch Polinsky, George Triantis, Aneesh Raghunandan, Michael Sarinsky, Alan Schwartz, Kathy Spier, Alex Stremitzer, and seminar participants at George Mason Law School, Stanford Law and Economics Free Lunch, Oxford Faculty of Law, University of Texas Law School, ETH Zurich Center for Law and Economics, University of Wisconsin Law School, Northwestern Pritzker School of Law, the JLFA conference (NYU, 2019), the Law and Economic Theory Conference (Texas, 2019), and the European Association of Law and Economics Conference (2020) for helpful comments and discussions. Thank you to Cindy Alexander and Mark Cohen for sharing data. Thank you to Emma Hawley for valuable research assistance. This project uses data from the Corporate Research Project of Good Jobs First's Violation Tracker. Contact: natkinson@wisc.edu

I INTRODUCTION

Corporate liability is meant to deter illegal behavior and to compensate victims of corporate misconduct. But in the pursuit of these goals, the imposition of civil or criminal liability can lead to a variety of collateral consequences, including financial distress, job losses, decreased consumer welfare, and insolvency, thereby impacting third parties such as employees, consumers, and society at large. When imposing liability on corporations, officials may face an apparent trade-off between the deterrence/restitution goals of liability and undesirable collateral consequences.

This article considers the decision of whether to reduce corporate liability in order to avoid collateral consequences. I make four principal contributions. First, I show that there is an expansive legal basis for reducing liability in the face of potential collateral consequences. In fact, at least 96% of the monetary value of fines and penalties imposed at the federal level are imposed by an agency, department, or commission that allows for reductions. Second, I explore reductions in practice. Using data on criminal penalties, I find that 20.6% of solvent firms and 55.1% of financially distressed firms have had their penalties reduced because of concerns about inability to pay. Third, I then explore several cases in depth to probe why it is that officials reduce liability, and find that, in many cases, the case for collateral consequences is weak and that firms could in fact have paid much larger fines. Finally, I step back and consider when and how collateral consequences should be considered. In particular I argue that fines should not be reduced in most cases, but I provide a toolkit for determining when and how collateral consequences could be properly taken into account.

The following example illustrates the issue. In 2005, Hynix Semiconductor Inc. pled guilty to having engaged in price fixing for high-speed computer memory. Under the United States Sentencing Guidelines, the fine range should have been between $268 million and $537 million. Instead, Hynix was fined $185 million, to be paid over five years (interest free). The settlement agreement with the Department of Justice stated that even after having adjusted the fine downward for "substantial assistance," the fine still "would have exceeded Defendant's ability to pay." The fine was therefore reduced further "due to the inability of the Defendant to make restitution to victims and pay a fine greater than that recommended without substantially jeopardizing its continued viability."[1] This decision to lessen Hynix's fine on account of the company's solvency was consistent with Department of Justice policies and the United States Sentencing Guidelines, both of which support adjusting penalties downward to avoid financial distress.[2]

On first inspection, the fear of insolvency may seem reasonable. Shortly before the plea agreement, Hynix had $1.66 billion in liabilities that were due within one year. But Hynix only had $343 million in cash and cash equivalents and an additional $552 million in short term financial instruments. This meant that Hynix had an expected shortfall of $765 million for the year. However, Hynix was in a much stronger financial position than these numbers suggest. The firm's total assets were valued at $6.7 billion,

---

[1] *U.S. v. Hynix Semiconductor Inc.*, No. CR 05-249 PJH, Plea Agreement (N.D. Cal.)..

[2] U.S. Dep't of Justice, Justice Manual, Title 9: Criminal, 9-28.300(A)(8) (Principles of Federal Prosecution of Business Organizations – Factors to be Considered); U.S. Sent'g Comm'n, Guidelines Manual § 8C3.3 (2021) (Reduction of Fine Based on Inability to Pay).

and the firm's total liabilities were reported at $3.7 billion, for a book valuation of $3 billion. The market value of Hynix's outstanding equity was $2.16 billion. Moreover, Hynix reported an operating profit of $320 million in the first quarter of 2005. So, while the firm had current liabilities in excess of current assets, there is nothing to suggest that Hynix faced imminent financial distress or insolvency—firms frequently borrow against their assets and future earnings, and there is no reason to believe that Hynix could not have done so as well. The Hynix case illustrates that officials can and do reduce liability when concerned about collateral consequences. It also illustrates how these reductions may be based on unfounded concerns about financial distress. When financially-sound firms avoid liability, it undermines the goals of corporate liability while providing little benefit in return.

In this paper, I make four principal contributions related to corporate liability and collateral consequences. I first show that there is currently an expansive legal basis for considering collateral consequences when imposing corporate liability. I provide an extensive survey of statutes, regulations, and polices from across the federal government to show that there exists a broad legal basis for considering financial distress when imposing civil or criminal liability on corporations. I show that when imposing fines, government officials are allowed, encouraged, or even required to consider the effect of penalties on: "innocent employees," "customers," "competition," "ability to pay," "ability to continue in business," "others not proven personally culpable," and "the public generally." Using data on over 400,000 criminal and civil cases with penalties totaling more than $600 billion, I show that at least 96% of the monetary value of federal penalties are imposed by departments, agencies, and commissions governed by statutes, regulations, or policies that instruct officials to consider collateral consequences.

Second, I show that government officials do in fact reduce corporate liability because of concerns about collateral consequences. I provide statistical evidence for the frequency of penalty reductions in corporate criminal proceedings. Under the United States Sentencing Guidelines for organizations, liability may be reduced based on a defendant's inability to pay so long as the "reduction under this subsection shall not be more than necessary to avoid substantially jeopardizing the continued viability of the organization."[3] I collect data from the United States Sentencing Commission on organizational defendants from 2002 through 2020 to gauge reductions in practice. I find that 20.6% of solvent firms and 55.1% of financially distressed firms have had their fines explicitly reduced because of concerns about financial distress.

[3] *Id.*

Third, I then examine which aspects of a defendant corporation's finances lead officials to reduce liability. To do so, I provide detailed case studies of instances where government officials explicitly reduced liability because of the fear of collateral consequences. The examples include liability arising from price-fixing, bribery, fraud, and environmental harm. I analyze the settlement language and the firms' financial conditions at the time of liability to judge whether the concerns about financial distress were well-founded, and conclude that these concerns appear valid in some, but not most, cases. In the sample of cases that I consider, the reductions in fines seem to be driven by misconceptions about corporate finance and financial accounting rather than by true financial distress. In particular, the firms that I analyze often have low or negative net current assets (i.e., cash on hand), despite having book values and market values well in excess of the fines imposed.[4] These firms could have afforded to pay the full amount without facing distress.

Fourth and finally, I discuss how government officials should better approach the decision of whether, and how, to take collateral consequences into account. I provide a simple corporate finance framework to help officials understand whether collateral consequences are in fact likely. I suggest that, in most cases, fines need not be reduced, because collateral consequences are unlikely. I also argue that when collateral consequences are likely to occur, reductions should not be a forgone conclusion. However, when officials do decide to take collateral consequences into account, I discuss how liability can be structured to maximize the fine while avoiding insolvency.

The implications of this paper call into question the balance between ex ante regulation and ex post litigation as methods for controlling harmful actions.[5] Regulation is imperfect because regulators' imperfect knowledge about risks. Litigation is imperfect because of the possibility that judgment proofness or the absence of any litigation means that litigants will not internalize their harms. It is generally believed that using regulation and litigation together is generally superior to using either alone.[6] However, the more imperfect one system is, the more slack must be taken up by the other system. This paper shows a key way in which ex post litigation fails to create proper incentives for corporate actors. Avoiding liability because of collateral consequences means that corporations do not fully internalize their externalities. If the

[4] In personal-finance terms, the corporations had large credit-card balances and little money in the bank, despite having well-paying jobs and owning their houses outright.

[5] Steven Shavell, *A model of the optimal use of liability and safety regulation*, 15 RAND J. ECON. 2 (1984).

[6] *Id.*

government ties officials' hands' ex post, then, in principle, regulation should be used to prevent misconduct in the first place.

However, it is far from clear that further ex ante regulation can effectively combat large-scale corporate misconduct. Given the information disparities between the government and target corporations, it is difficult or impossible to detect and prevent many harmful corporate actions such as price fixing and bribery before significant harm is done. This in turn means that these actions need to be controlled largely through ex post litigation rather than ex ante regulation.[7] The difficulty of preventing corporate misconduct through ex ante regulation makes it all the more remarkable that the government has limited the power of the vast majority of regulatory agencies to impose ex post litigation when collateral consequences may result.

Before continuing any further, a note on terminology. I consider a wide variety of cases and law from a variety of jurisdictions, and I use the terms "liability", "penalty", and "fine" interchangeably. Moreover, I use the term "official" when discussing a generic or abstract case of "corporate misconduct."

Theoretical research on corporate misconduct has largely focused on how to structure liability in the presence of an agency conflict between managers and shareholders.[8] In particular, scholars and policy makers have focused on how to obtain cooperation from the corporation when prosecuting individual actors within the corporation. However, if insufficient liability is imposed, corporate misconduct can be jointly profitable for both employees and shareholders.[9] In this paper, I put the agency conflict aside, and instead focus

---

[7] Steven Shavell, *The optimal structure of law enforcement*, 36 J. L. ECON. 1, 255 (1993).

[8] Alan O. Sykes, *The economics of vicarious liability*, YALE L. J. 93, 1231 (1983); Harry A. Newman & David W. Wright, *Strict liability in a principal-agent model*, 10 INT'L REV. L. ECON., 219 (1990); A. Mitchell Polinsky & Steven Shavell, *Should employers be subject to fines and imprisonment given the existence of corporate liability?*, 13 INT'L REV. L. ECON. 3, 239 (1993); Steven Shavell, *The optimal level of corporate liability given the limited ability of corporations to penalize their employees*, 17 INT'L REV. L. ECON. 2, 203 (1997); Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 NYU L. REV.4, 687 (1997);); Nuno Garoupa, *Corporate Criminal Law and Organization Incentives: A Managerial Perspective*, 21(6) MANAGERIAL & DECISION ECON. 243 (2000).

[9] Roy Shapira & Luigi Zingales, *Is Pollution Value-Maximizing? The DuPont Case*, NAT'L BUREAU ECON. RSCH. 23866 (2017); Nathan Atkinson, *Do Corporations Profit from Breaking the Law? Evidence from Environmental Violations*, https://www.nathanatkinson.com/wp-content/uploads/2020/08/Atkinson-2020-Corporate-Environmental-Violations-1.pdf (2020).

on the corporation as the primary actor.[10] Notably, even if the manager-shareholder agency conflict is resolved, managers and shareholders can profit from misconduct under the current liability regime, undermining deterrence.

The central insight of deterrence theory—whether civil or criminal—is that the punishment imposed should induce wrongdoers to internalize the harm that they cause, which extends to employees subject to personal liability for wrongdoing performed on the job.[11] However, because many employees are shielded from liability, and because few employees have the financial resources to compensate victims of corporate malfeasance, most employees are not incentivized to fully internalize the social costs of the harms they cause,[12] and personal liability is insufficient to deter corporate malfeasance. Optimal deterrence and compensation both therefore require imposing liability on the corporation.[13]

However, while there are clear benefits to imposing liability on corporations, fines may lead to financial distress, insolvency, and an attendant variety of collateral consequences. Financial distress occurs when a company struggles to pay its financial obligations. While there is no systematic evidence of fines leading to job losses, there is a substantial literature on the employment effects of financial distress in general. Employment decreases substantially around a bankruptcy filing,[14] and remains significantly lower for years following both Chapter 11 reorganization and Chapter 7 liquidation.[15] Both debt defaults and covenant violations cause firms to cut employees.[16] Moreover, while some employees retain their jobs at reorganized or

---

[10] Nonetheless, if the goal is to induce cooperation, then a high base-fine (i.e. not reducing liability because of concerns about collateral consequences) can improve corporate cooperation with individual prosecutions.

[11] Jeremy Bentham, *An introduction to the principles of morals and legiskation*, CLARENDON PRESS (1789); [11] Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 2, 169 (1968).

[12] Steven Shavell, *The judgement proof problem*, INT'L REV. L. & ECON. 6(1), 45 (1986).

[13] Jennifer Arlen, *The potentially perverse effects of corporate criminal liability*, J. LEGAL STUDIES 23(2), 833 (1994); Nuno Garoupa, *Corporate Criminal Law and Organization Incentives: A Managerial Perspective*, 21(6) MANAGERIAL & DECISION ECON. 243 (2000).

[14] Edith Shwalb Hotchkiss, *Postbankruptcy Performance and Management Turnover*, L J. FIN. 1 (Mar. 1995).

[15] Shai Bernstein et. al., *Asset allocation in bankruptcy*, 74 J. FIN. 1, 5 (2019).

[16] Ashwini Agrawal & David A. Matsa, *Labor unemployment risk and corporate financing decisions*, 108. J. FIN. ECON. 2, 449 (2013); Antonio Falato & Nellie Liang, *Do creditor rights increase employment risk: Evidence from loan covenants*, 71 J. FIN. 6, 2545 (2016).

liquidated establishments, these employees see significant earnings losses.[17] Furthermore, employment declines substantially in other firms in the immediate neighborhood of liquidated establishments.[18] Far from those that work at or near the firm, financial distress and insolvency can lead to antitrust concerns and may carry costs for industry concentration, competition, and consumer welfare.[19] With fewer firms in competition, the remaining firms see higher profits[20] and consumers face higher prices.[21] The potential for collateral consequences can loom large for officials contemplating imposing liability on corporations.

The remainder of the article is structured as follows. In Section II I show that there is currently an expansive legal basis for considering collateral consequences when imposing corporate liability. In Section III I show that government officials do reduce corporate liability because of concerns about collateral consequences—often because of misplaced concerns. In Section IV I discuss how government officials should better approach the decision of whether, and how, to take collateral consequences into account. I conclude in Section V, while Appendix I provides detailed case studies and Appendix II contains a list of federal policies on collateral consequences.

II THE EXPANSIVE LEGAL BASIS FOR CONSIDERING COLLATERAL CONSEQUENCES IN CRIMINAL AND CIVIL CASES

In this section, I show that, in both criminal and civil contexts, the law allows—or even requires—government officials to consider whether corporate liability would result in collateral consequences or financial distress.

The federal government is comprised of hundreds of departments, agencies, and commissions, each governed by unique statutes and regulations. In this section, I summarize the expansive legal basis for reducing corporate liability when decisionmakers are concerned about collateral consequences, and Appendix B contains a more extensive list of policies dealing with collateral

[17] John R. Graham et. al., *Employee costs of corporate bankruptcy*, NAT;L BUREAU ECON. RSCH., Tech. Rep. (2019).

[18] Shai Bernstein et. al., *Bankruptcy spillovers*, J. FIN. ECON., (2018).

[19] Tim C. Opler & Sheridan Titman, *Financial distress and corporate performance*, 49 J. FIN. 3, 1015 (1994) (showing that highly leveraged firms lose significant market share following financial distress, and the effect is even stronger in concentrated industries.).

[20] Gustavo Grullon, *Are US industries becoming more concentrated?*, 23 REV. FIN. 4, 697 (2019).

[21] Thomas Philippon, *The great reversal: How America Gave Up on Free Markets*, HARV. UNIV. PRESS, (2019).

consequences. The statutes and regulations covered in this section and in Appendix B cover departments, agencies, and commissions that impose over 96% of the monetary value of all corporate fines imposed by the federal government.[22]

In the criminal context, the explicit consideration of the collateral consequences arising from prosecutions of corporations dates back at least to a 1999 memorandum on corporate criminal liability by Deputy Attorney General Eric Holder (the "Holder Memorandum").[23] This memorandum is now codified in the United States Justice Manual:

> "In conducting an investigation, determining whether to bring charges, and negotiating plea or other agreements, prosecutors should consider the . . . collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution."[24]

The United States Sentencing Guidelines (USSG) further stress collateral consequences in criminal proceedings against corporations. In principle, the Organizational Guidelines are "designed so that the sanctions imposed upon organizations and their agents, taken together, will provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct."[25] However, the USSG explicitly instruct prosecutors to consider collateral consequences, providing mechanisms to adjust sanctions downward to "avoid substantially jeopardizing the continued viability of the organization."[26] The Federal Rules of Criminal Procedure further provide that "[i]n determining whether to impose a fine, and the amount, time for payment, and method of payment of a fine, the court shall consider . . . the defendant's income, earning capacity, and financial resources . . . [and] whether the defendant can pass on to consumers or other persons the expense of the fine."[27]

There is ample scope to consider collateral consequences when imposing corporate criminal liability.[28] However, while the Holder Memorandum and

---

[22] See Appendix B.

[23] Memorandum from Deputy Att'y Gen. Eric H. Holder, Jr. to Heads of Dep't Components and U.S. Att'ys (June 16, 1999) ("The Holder Memorandum," *Bringing Criminal Charges Against Corporations*).

[24] The Justice Manual *supra* note 2.

[25] U.S. Sent'g Guidelines Manual § 8 (U.S. Sent'g Comm'n 2018).

[26] U.S. Sent'g Guidelines Manual § 8C3.3(b) (U.S. Sent'g Comm'n 2018).

[27] 18 U.S.C. § 3572(a).

[28] To my knowledge, there are no court cases challenging the legality of reducing

the sentencing guidelines provide a framework for thinking about collateral consequences, the vast majority of corporate-liability cases are fully or partially civil in nature. Under many civil statutes, a violator's ability to pay is one of the factors to weigh when determining a penalty.[29] Under other statutes, agencies are directed to take into consideration "the economic impact" or "effect" of the penalty on the violator.[30] In the following pages, I illustrate the broad scope of concerns about collateral consequences across the federal government.

Attorneys prosecuting civil cases at the Department of Justice can settle with defendants for a fine no less than 85% of the original claim,[31] or when "a qualified expert has determined that the amount is likely the maximum that the offeror has the ability to pay."[32] Furthermore the Justice Manual specifies that civil cases may be compromised if "[t]he United States Attorney believes

---

corporate liability in response to fear of collateral consequences. However, some courts have been receptive to reductions in sanctions against individual business owners for fear of collateral consequences to employees. In *United States v. Milikowsky*, the Second Circuit Court of Appeals supported the district court's downward departure because of the "destructive effects that incarceration of a defendant may have on innocent third parties." *United States v. Milikowsky*, 65 F.3d 4 (1995). The First Circuit has also allowed considerations of job losses when contemplating downward departures. *United States v. Olbres*, 99 F.3d 28, 34, (1996). Other Circuits have resisted down- ward departures because "when a district court varies downward on the basis of the collateral consequences of the defendant's prosecution and conviction, the defendant's sentence will not reflect the seriousness of the offense, nor will it provide just punishment." *US v. Musgrave*, 761 F.3d 602 (2014). The lack of jurisprudence on downward departures in corporate cases is likely due to the fact that, unlike the sentencing of individuals, guidelines on the sentencing of organizations explicitly allow the consideration of collateral consequences. And given that most corporate prosecutions end in settlements, and that district and appellate courts alike are generally deferential to agencies that craft settlement agreements, *Rita v. United States*, there is little likelihood of a challenge to penalties being reduced because of concerns about collateral consequences. *Rita v. United States*, 551 US 338 (2007).

[29] *See* Clean Water Act, § 309(g)(3), 33 U.S.C. § 1319(g)(3); Toxic Substances Control Act, §§ 16(a)(2)(B), 207(c)(1)(C), 15 U.S.C. §§ 2615(a)(2)(B), 2647(c)(1)(C); Comprehensive Environmental Response, Compensation, and Liability Act, §109(a)(3), 42 U.S.C. §9609(a)(3); Emergency Planning and Community Right-to-Know Act, § 325(b)(1)(C), 42 U.S.C. §11045(b)(1)(C); and the Act to Prevent Pollution from Ships, § 9(b), 33 U.S.C. § 1908(b).

[30] *See* Clean Air Act, §§ 113(e)(1), 205(c)(2), 42 U.S.C. §§ 7413(e)(1), 7524(c)(2); Clean Water Act, §§ 309(d), 311(b)(8), 33 U.S.C. §§ 1319(d), 1321(b)(8); Federal Insecticide, Fungicide, and Rodenticide Act, § 14(a)(4), 7 U.S.C. § 136l(a)(4); Safe Drinking Water Act, § 1423(c)(4)(B)(v), 42 U.S.C. § 300h-2(c)(4)(B)(v).

[31] 28 C.F.R. §§ 0.160(a)(1).

[32] 28 C.F.R. §§ 0.160(a)(2).

that the full amount of a claim of the United States cannot be collected in full due to the financial condition of the debtor."[33]

The Environmental Protection Agency, which imposes the next highest total monetary value of fines after the Department of Justice, has in place several policies allowing for fines to be mitigated in response to concerns for the payer's financial distress and the collateral consequences that might result. Despite its general policy that "penalties generally should, at a minimum, remove any significant benefits resulting from failure to comply with the law,"[34] the EPA will reduce liability when penalties would "result in plant closings, bankruptcy, or other extreme financial burden, and there is an important public interest in allowing the firm to continue in business."[35] The Agency further will "generally not request penalties that are clearly beyond the means of the violator. Therefore, EPA should consider the ability to pay a penalty in arriving at a specific final penalty assessment."[36]

Various financial agencies also consider the effects that their fines potentially will cause on the solvency of penalized business. The Consumer Financial Protection Bureau stipulates that any penalty amount should "take into account the appropriateness of the penalty with respect to . . . the size of financial resources and good faith of the person charged."[37] While the Bureau requires firms to compensate consumers ("an adjustment") for willful violations intended to mislead,[38] the statute clarifies that "no adjustment shall be ordered . . . if it would have a significantly adverse impact upon the safety or soundness of the creditor."[39] Other financial agencies that consider a violator's financial resources include: the Federal Housing Finance Agency, which takes into account "the effect of the penalty on the safety and soundness of the regulated entity;"[40] the Federal Deposit Insurance Corporation, which mitigates penalties based on "the size of financial resources ...of the insured depository institution or other person charged;"[41] and the Federal Reserve Board, which gives parties "the opportunity to provide Board staff with any evidence, including financial factors, that would

---

[33] U.S. Dep't of Justice, Justice Manual, Title 4: Civil, 4-3.200(D) (Bases for the Compromising or Closing of Claims Involving the United States).

[34] U.S. Environmental Protection Agency, *Policy on Civil Penalties*, EPA GENERAL ENFORCEMENT POLICY (1991), (https://www.epa.gov/enforcement/policy-civil-penalities-epa-general-enforcement-policy-gm-21).

[35] *Id*. § I(D)(2).

[36] *Id*. at 23.

[37] 12 U.S.C. § 5565(3).

[38] 15 U.S.C. § 1607(2).

[39] 15 U.S.C. § 1607(3).

[40] 12 U.S.C. § 4636(c)(2).

[41] 12 U.S.C. § 1818(i)(2)(G).

either weigh against assessment or mitigate the amount of the proposed penalty."[42] Likewise the Federal Trade Commission, when determining penalties for unfair competition, takes into account factors including a corporation's "ability to pay [and the penalty's] effect on [the corporation's] ability to continue to do business."[43]

Agencies and commissions that are meant to protect the bodily safety of workers, consumers, and the general public also allow for concerns about a corporations' finances to impact the fines they levy. The Mining Safety and Health Administration stipulates that the determination of whether to impose a penalty should take into account the "appropriateness of such penalty to the size of the business . . . [and] the effect on the operator's ability to continue in business."[44] Furthermore, "if the penalty will adversely affect the operator's ability to continue in business, the penalty may be reduced."[45] The Consumer Product Safety Commission takes into account "the appropriateness of such penalty in relation to the size of the business of the person charged, including how to mitigate undue adverse economic impacts on small businesses."[46] Similarly, the National Highway Transportation Administration "may consider a person's ability to pay, including in installments over time, any effect of a penalty on the respondent's ability to continue to do business, and relevant financial factors such as liquidity, solvency, and profitability."[47] The concern for collateral consequences even extends to penalizing corporations for violating the nuclear non-proliferation treaty and the chemical weapons convention.[48]

The Securities and Exchange Commission and the Commodity Futures Trading Commission, which oversee securities and derivatives markets, also take into account the violator's ability to pay. The Securities and Exchange Commission allows respondents to "present evidence of the respondent's ability to pay such penalty," and may consider "such evidence in determining whether such penalty is in the public interest. Such evidence may relate to the

---

[42] Letter from Bd. of Governors of the Fed. Rsrv. Sys., Div. Banking Supervision, to the Off. in charge of Supervision at each Fed. Rsrv. Bank (June 3, 1991), SR 91-13, (Civil Money Penalties and the Use of the Civil Money Penalty Assessment Matrix) (https://www.federalreserve.gov/boarddocs/srletters/1991/sr9113.htm).

[43] 15 U.S.C. § 45(m)(1)(C).

[44] 30 C.F.R. § 100.3(a)(vi).

[45] 30 C.F.R. § 100.3(h).

[46] 15 U.S.C. § 2069(b).

[47] 49 C.F.R. § 578.8(b)(7); 49 U.S.C. §§ 30161–30172; Interestingly, this is the only regulation that I have found that discusses the potential for deliberate undercapitalization of a corporation: "NHTSA may also consider whether the business has been deliberately undercapitalized."

[48] 22 U.S.C. § 8142(a)(2)(D).

extent of such person's ability to continue in business."[49] The Commodity Futures Trading Commission "may settle claims ...at less than the principal amount of the claim if . . . [t]he debtor shows an inability to pay the full amount within a reasonable period of time; . . . or [t]he Commission's enforcement policy would be served by settlement of the claim for less than the full amount."[50]

Even departments that are not generally associated with enforcement actions have policies regarding the collateral consequences of the penalties they issue. The Department of Health and Human Services considers "[t]he financial condition of the covered entity or business associate, [including whether] the imposition of a civil money penalty would jeopardize the ability of the covered entity or business associate to continue to provide, or to pay for, health care;"[51] the Department of Defense takes into account "financial information relevant to a respondent's ability to pay [including] the value of respondent's cash and liquid assets and non-liquid assets, ability to borrow, net worth, liabilities, income, prior and anticipated profits, expected cash flow, and the respondent's ability to pay in installments over time;"[52] the Department of Homeland Security considers "the economic impact of the penalty on the violator;"[53] and the Department of Energy states that "[r]egarding the factor of ability of DOE contractors to pay the civil penalties, it is not DOE's intention that the economic impact of a civil penalty is such that it puts a DOE contractor out of business."[54]

Statutes also allow for officials concerned about collateral consequences to anticipate the effects of decreased competition on consumer welfare. For instance, when considering judgments regarding monopolization and restraints on trade, the Department of Justice considers "the impact of entry of such judgment upon competition in the relevant market or markets [and] upon the public generally."[55] And concerns about penalties adversely affecting competition are not restricted to the United States. The European Commission takes into account a corporation's "inability to pay" in competition proceedings,[56] and a survey by the Organisation for Economic Co-operation and Development of competition authorities in twenty-one

---

[49] 15 U.S.C. § 78u-2(d).
[50] 17 C.F.R. § 143.5.
[51] 45 C.F.R. § 160.408(d).
[52] 32 C.F.R. § 767.25.
[53] 33 C.F.R. § 159.321(c).
[54] 10 C.F.R. § 824, App. A (VII)(2)(d).
[55] 15 U.S.C. § 16(e)(1).
[56] *Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003*, 210 OFF. J. EUR. UNION 2 (Sept. 1, 2009).

countries and the European Union finds that "[s]ome competition authorities believe that the fine cannot be as high as to put a company out of business," and that "the inability to pay a fine is a factor that is generally considered in all jurisdictions in one way or another."[57]

This expansive legal basis shows that officials have the authority to reduce liability when concerned about collateral consequences that might arise from full enforcement of the allowable fine. In the next section, I show that reductions do in fact occur in practice.

III REDUCTIONS IN CORPORATE LIABILITY IN PRACTICE

A. Empirical Evidence on Reductions of Corporate Criminal Penalties

The full degree to which fines are reduced because of fears about collateral consequences is unknowable. For criminal cases, the Sentencing Commission collects data on whether fine was reduced according to USSG §8C3.3. However, for civil cases, there is no equivalent reporting mechanism. This section uses data from the United States Sentencing Commission (USSC) to provide evidence that reductions occur in criminal cases. However, because of data issues, the USSC data provides only limited insight into the characteristics of these reductions. Section 3.2 provides qualitative evidence to understand the mechanics of these reductions.

The federal sentencing of organizations is guided by Chapter 8 of the United States Sentencing Guidelines (USSG), which establishes a uniform sentencing policy across departments. Importantly, the sentencing guidelines provide an avenue for a reduction of the fine based on a defendant's inability to pay:

> "The court may impose a fine below that otherwise required by [the guidelines] if the court finds that the organization is not able and, even with the use of a reasonable installment schedule, is not likely to become able to pay the minimum fine required by [the guidelines]. Provided, that the reduction under this subsection shall not be more than necessary to avoid substantially jeopardizing the continued viability of the organization."[58]

---

[57] Simon Roberts, *Economic Analysis and Evidence in Abuse Cases*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (Mar. 23, 2022).

[58] U.S. Sent'g Guidelines Manual § 8C3.3(b). The application note to the section clarifies that "[f]or purposes of this section, an organization is not able to pay the minimum fine if, even with an installment schedule under § 8C3.2 (Payment of the Fine – Organizations), the payment of that fine would substantially jeopardize the continued existence of the organization." What constitutes "substantially jeopardizing" is not explicitly

Using the USSC data on business offenders from 2002 through 2020 I examine how frequently reductions are given. Because the focus of my analysis is on business firms, I drop non-profits and governmental organizations. I further drop observations with missing data on the firm's financial condition, leaving a sample of 1,911 observations. Table 1 gives summary statistics for the data.

The variable of interest is whether particular fines were reduced, as authorized by USSG § 8C3.3, because of a defendant's perceived inability to pay all or a portion of the fine.

I find at the time of sentencing, 55.2% of firms were "Solvent and Operating," 11.8% of firms showed "Evidence of Substantial Distress," and 27.6% of firms were defunct. Among these, 20.5% of solvent and operating firms received a reduction and 54.2% of distressed firms received a reduction. In absolute numbers, 338 solvent and distressed firms had fines reduced between 2002 and 2020 because of a perceived inability to pay. This evidence, like other papers that have explored reductions in fines, is likely under-representative of the true frequency of reductions. Alexander et al.[59] show that the U.S.S.C. data is missing a significant number of observations, and like my results, other studies that rely on this data will likely have attenuated counts.[60]

Variable	**Mean**
Guilty Plea	91.3%
Financial Status at Sentencing	
Solvent and Operating	55.2%
Evidence of Substantial Distress	11.8%
Defunct	27.6%

stated.

[59] Cindy R. Alexander et. al., *Regulating corporate criminal sanctions: Federal guidelines and the sentencing of public firms*, 42 J. L. ECON. S1, 393 (1999); Cindy R. Alexander et. al., *Evaluating trends in corporate sentencing: How reliable are the US sentencing commission's data,* FED. SENT'G REP. 13, 108 (2000).

[60] J. Arlen, *Corporate Criminal Liability: Theory and evidence*, RSCH. HANDBOOK ON THE ECON. OF CRIM. L., 144, 152 (2012); It is well-known that many firms that are criminally prosecuted are small or owner-operated. However, many firms are quite large. The USSC data includes the employment level at 106 firms that were either "solvent" or "distressed" and has their fines reduced. Among these firms, the average number of employees was 206.

Other	5.4%
Base Fine	$11.2 million
Fine Reduced Because Inability to Pay	39.5%
Among Solvent Firms	20.5%
Among Distressed Firms	54.2%
Among Defunct Firms	69.1%
Final Sentence Below Guideline Range*	10%
Observations	1911
* *Notes: Because of data-availability issues, it is not possible in some observations to determine whether a sentence is below the guideline range, so the reported statistic accounts only for the 71% of observations for which this determination is possible.*	

To account for this, Alexander and Cohen conduct an exhaustive effort to identify all NPAs, DPAs, and plea agreements entered into by public corporations between 1997 and 2011 and find 486 agreements.[61] While not the focus of their study, the authors find that 20 firms had their criminal fines reduced. However, this too is likely an under-count, due to the difficulty of observing whether the fine was reduced. While some plea agreements explicitly reference the Sentencing Guidelines, other agreements consider ability to pay without explicitly referencing the guidelines.[62] Moreover, while the number of firms identified by Alexander and Cohen is small, the total reduction in liability is not. The authors identified 13 firms for which fines were reduced because of inability to pay and where the authors were able to calculate the guideline ranges under the USSG. Summing these 13 firms, the total that was paid in liability was only $1.08 billion, despite a guideline range of $9.2 billion to $10.8 billion. Therefore, even if the number of cases is small, the economic impact can be large.

---

[61] Cindy R. Alexander & Mark A. Cohen, *The evolution of corporate criminal settlements: An empirical perspective on non-prosecution, deferred prosecution, and plea agreements*, AM. CRIM. L. REV 52, 537 (2015).

[62] For example, the Beazer Homes' settlement agreement which is discussed in the next section does not include a reference to U.S.S.G. § 8C3.3(b), and is not included in Alexander and Cohen's count of firms that had fines reduced.

Unfortunately, there is no clean way to estimate the extent to which the fines in the USSC sample were reduced, or how significant a reduction was necessary to maintain the solvency of the firm.[63] Moreover, while it is not possible to determine from the data whether or not victims received adequate restitution, the cases studies in the next section show that reductions can be coupled with incomplete restitution.[64] That 338 solvent and distressed firms had fines reduced between 2002 and 2020 because of a perceived inability to pay provides support for the proposition that reductions for fear of collateral consequences are not an uncommon event, but are instead a regular component of the corporate-liability decision.

The evidence on reductions from the Sentencing Commission data restricts attention to criminal fines. However, the vast majority of corporate fines are wholly or partially civil in nature. Moreover, the total monetary value of corporate civil fines far outstrips the total monetary value of all corporate criminal fines. According to data from the Corporate Research Project of Good Jobs First's Violation Tracker,[65] eighty-three of the largest one hundred fines imposed on corporations since 2000 are wholly or partially civil in nature. Aggregating across all violations, only 0.3% are criminal, with the rest being civil. The total monetary value of corporate civil fines is also far greater than corporate criminal fines. Approximately 80% of the monetary value of all fines at the federal level are civil, 13% are criminal, and 7% are a combination of civil and criminal. Given the size and scope of civil fines, coupled with the legal basis for reducing these fines presented in Section 2, the number of reductions in corporate liability is likely to be considerably higher than what is presented here. While I cannot present statistical evidence on reductions in civil fines, the case studies in the next section include reductions in both civil and criminal liability.

B. What is Driving Reductions?

The data on corporate criminal penalties illustrate that reductions on account of corporations' financial conditions are a regular part of the corporate-liability decision. However, the data do not indicate which factors shape the decision. In this section, I present case studies to explore how officials think about the potential for financial distress. Consider the following examples:

---

[63] A small minority of observations have a text field explaining the financial condition of the firm at the time of sentencing. Examples include: "seizure of assets put company in jeopardy," "lost revenue since instant offense," "very few assets," and "active but no longer viable."

[64] Of the solvent and distressed firms that received reductions, 212 paid $0-$99.999 in restitution, 81 paid $100,000-$1 million in restitution, and 35 paid more than $1 million in restitution.

[65] Good Jobs First, *Violation Tracker*, https://www.goodjobsfirst.org/violation-tracker

- In 2005, Hynix Semiconductor pled guilty to price-fixing. The settlement agreement states that even after having adjusted the fine downward for "substantial assistance," the fine still "would have exceeded Defendant's ability to pay." The fine was therefore reduced further "due to the inability of the Defendant to make restitution to victims and pay a fine greater than that recommended without substantially jeopardizing its continued viability."[66]

- In 2009, the Department of Justice settled charges of fraudulent lending practices with Beazer Homes. The settlement agreement states that "the imposition of additional criminal penalties or the requirement of additional payment at this time would jeopardize the solvency of Beazer and put at risk the employment of approximately 15,000 employees and full-time contractors not involved in the criminal wrongdoing."[67]

- In 2014, Alcoa settled with the Department of Justice and the Securities and Exchange Commission following twenty years of bribery charges in violation of the Foreign Corrupt Practices Act. Prosecutors allowed for a final penalty significantly less than the amount Alcoa profited from its illegal activity, because a heftier fine would have "substantially jeopardiz[ed] Alcoa's ability to compete… including, but not limited to, its ability to fund its sustaining and improving capital expenditures, its ability to invest in research and development, its ability to fund its pension obligations, and its ability to maintain necessary cash reserves to fund its operations and meet its liabilities."[68]

- In 2012, the European Commission reduced by 85% the fine imposed on Techni- color for anticompetitive behavior, from €275.5 million to €38.6 million, because of Technicolor's perceived inability to pay the larger amount.[69]

- In 2018, IAV GmbH pled guilty to working with Volkswagen to design, test, and implement software to cheat the U.S. emissions testing process. Prosecutors ultimately set the fine at $35 million, an amount far below the USSG guideline range, following their

[66] *U.S. v. Hynix Semiconductor Inc.*, No. CR 05-249 PJH, Plea Agreement (N.D. Cal.)..

[67] *U.S. v. Beazer Homes USA, Inc.*, No. 3:09cr113-w Deferred Prosecution Agreement (W.D.N.C. Jul. 1, 2009).

[68] *U.S. v. Alcoa World Alumina LLC*, No. 2:14-cr-00007-DWA (W.D. Pa. Jan. 9, 2014).

[69] Commission Decision of 5 December 2012 (Case COMP/39.437 — TV and computer monitor tubes), available at https://ec.europa.eu/competition/elojade/isef/case details.cfm?proc code=1 39437.

determination that "the Defendant cannot and is not likely to become able (even on an installment schedule) to pay the minimum guideline fine."[70]

- In 2003, the Olympic Pipeline Company entered into a consent decree to pay civil penalties arising from a pipeline explosion that killed three children. According to the decree: "[t]he United States has substantially reduced Olympic's civil penalty and agreed to a payment schedule based on financial information that Olympic provided during settlement discussions demonstrating that Olympic lacks the economic ability to pay a larger penalty."[71]

In Appendix A, I explore these cases in considerable detail. For each case, I consider the fine imposed, the government's reasons for reducing liability, and the corporation's financial condition at the time. In this section, I discuss which aspects of the corporations' finances appear to have driven the decisions to reduce liability.

A corporation's financial position depends largely on its assets and liabilities. An asset is any resource a corporation owns that is expected to generate future value. Assets may be tangible or intangible, and can include land, inventory, cash, investment securities, intellectual property, and goodwill. A liability is any debt that a corporation owes. Liabilities are usually represented as a sum of money, and can include loans, mortgages, and accounts payable. The corporation's book value is the net value of its assets minus its liabilities.[72] In theory, the book value is the corporation's total present-day value if all assets were liquidated and all liabilities were repaid.

All the firms profiled above (or their parent companies) had book values well in excess of the fines imposed. At the lowest end, Beazer's book value was four times greater than its fine; at the highest end, Alcoa's book value exceeded its fine by a multiple of seventeen. These ratios indicate that each of the firms could have liquidated their assets and used the proceeds to pay fines considerably higher than those imposed. But even in the event of more substantial fines, liquidation would have been unnecessary to satisfy the penalties. Corporations with positive book values can generally borrow against their assets and future earnings. The amount that a firm can borrow and the interest rate imposed on that loan will generally depend in part on the

---

[70] *U.S. v. IAV GmbH*, No. 16-CR-20394, Plea Agreement (E.D. Mich. Dec. 18, 2018).

[71] *U.S. v. Shell Pipeline Company*, No. CV-02-1178R, Consent Decree (W.D. Wa.).

[72] Traditionally, book value does not include intangible assets. However, in today's practice these assets might be included.

firm's existing assets and liabilities. In the cases considered above, only Olympic Pipeline appears to have faced an imminent threat of insolvency.

Not all assets and liabilities are the same. Assets and liabilities are considered *current* if they are short-term. Current assets are assets that are easily convertible into cash within one year, including cash and its equivalents, marketable securities, and accounts receivable. Likewise, current liabilities are debts that are due within one year, including accounts payable, short-term debt, and maturing long-term debt. Net current assets represent the difference between current assets and current liabilities. If a corporation's net current assets are positive, the corporation can be expected to pay its financial obligations without raising external capital. If, however, the corporation has negative net current assets, it may need to raise capital to meet its debts.

Low or negative net current assets appear to drive officials' fears of collateral consequences and the resultant reductions in corporate liability. Of the firms above, only one had net current assets significantly greater than their originally calculated fine. The others had low or even negative net current assets. Furthermore, all the firms owed more in the next year than they had in cash on hand. This shortfall likely lent support to arguments about their inability to meet their upcoming obligations, and led officials to conclude that increased liabilities would "jeopardize [their] solvency"[73] or their "ability to maintain necessary cash reserves to fund [their] obligations and meet [their] liabilities."[74]

Negative current assets, however, should not be confused with financial distress. For example, at the time of its settlement with California prosecutors, Hynix had only $343 million cash on hand yet owed $1.6 billion that was due to be paid within one year. One might be excused, knowing only these two figures, for concluding that a greater fine could not be imposed without "substantially jeopardizing Hynix's continued viability."[75] But this oversimplified analysis would overlook that Hynix's book value (total assets minus total liabilities) was $3 billion. Therefore, while Hynix's liquid assets were few, the firm was profitable and had considerable total assets. There is little reason to believe that Hynix could not have borrowed against its long-term assets to cover the immediate shortfall caused by the penalty.[76]

---

[73] *U.S. v. Beazer Homes USA, Inc.*, No. 3:09cr113-w, Deferred Prosecution Agreement (W.D.N.C. Jul. 1, 2009).

[74] *U.S. v. Alcoa World Alumina LLC*, No. 2:14-cr-00007-DWA, (W.D. Pa. Jan. 9, 2014).

[75] *U.S. v. Hynix Semiconductor Inc.*, No. CR 05-249 PJH, Plea Agreement (N.D. Cal.)..

[76] Compare Hynix's position, for example, to a reckless driver protesting that they cannot afford to pay a speeding ticket because they have no income, no money in the bank, and a $10,000 credit card bill that comes due next month. Now suppose that the driver is

Furthermore, concerns over sending these corporations further into financial distress overlook their market capitalization. Market capitalization is the total market value of the company's outstanding shares of stock, and it captures the value of a corporation as perceived by the wider market. Each of the above firms' market capitalization (or that of a parent firm) was greater than the fine imposed. For example, Beazer's market capitalization of $71.8 million was 40% higher than the fine imposed, Technicolor's €415 million valuation was ten times greater than the fine imposed, Hynix's market capitalization of $2.1 billion was eleven times greater than the fine imposed, and Alcoa's $8 billion market capitalization was a full twenty-one times greater than the fine imposed by prosecutors concerned for their financial well-being. With market capitalization comes the ability to raise debt or equity, as explained in Section IV.

These case studies suggest that officials see low cash and negative net current assets as signs of inability to pay. As Section IV shows, this is an incorrect conclusion—firms can be cash-poor but can have ample ability to pay large fines without financial distress. That firms can generally pay liability without reduction is supported beyond these case studies. Alexander and Cohen[77] identified twenty public firms in that had their liability reduced because of concerns about their inability to pay. Using the authors' data, I have identified financial characteristics of the firms at the time liability was imposed.[78] Four of the firms were in insolvency proceedings, so I focus on the remaining sixteen.

As in the case studies above, these firms are cash-poor relative to current liabilities. Fifteen of the sixteen (93.75%) firms had current liabilities in excess of cash on hand and marketable securities before the fine was imposed, with all having current liabilities in excess of cash on hand and marketable securities after the fine was imposed. Looking beyond just cash and marketable securities to all current assets, seven firms (43.75%) had negative net current assets—that is, current liabilities in excess of current assets at the time the fine was imposed. But again, while these numbers are an indication of a firm's short-term liquidity, they should not be the final step in analyzing

---

voluntarily on sabbatical from a high-paying job and owns a $5 million home outright. Regardless of their bank account, income, and credit card bill, it's plain that the driver can comfortably afford their speeding ticket, even if it requires accruing additional interest on a credit card until they are back at work.

[77] Cindy R. Alexander & Mark A. Cohen, *The evolution of corporate criminal settlements: An empirical perspective on non-prosecution, deferred prosecution, and plea agreements*, AM. CRIM. L. REV. 52, 537 (2015).

[78] Firm financials are taken from the most recent annual/quarterly report that the firm filed before liability was imposed.

a firm's ability to pay. In fact, when we move towards more comprehensive measures of firm value, these firms look less-troubled.

Only three of the sixteen firms (18.75%) had negative book values at the time the fine was imposed, with 25% having negative book values after the fine was imposed. So, while some could not afford to liquidate and pay the fine, most could. Moreover, after the fine was imposed, the mean (median) book value of these firms was a full $363 million ($1.3 billion). Restricting attention to the firms for which the authors were able to calculate the maximum guideline range, 55% would still have had a positive book value after paying the maximum fine, including four firms that would still have book values in excess of $1 billion. For these firms, claims of financial distress are dubious given their strong book values.

For public firms, the market capitalization gives the best picture of the firm's ability to pay. I was able to calculate the market capitalization at the time liability was imposed for fourteen of the Alexander and Cohen firms.[79] Of these firms, the fine as a percentage of the corporation's market capitalization ranged from a high of 31% to a low of less than 1%, meaning that each corporation had the capacity to pay the fine imposed through borrowing or issuing equity. Moreover, restricting attention to the thirteen firms for which the authors were able to calculate the maximum guideline range, ten of those firms had a market capitalization greater than the maximum guideline range, indicating that these firms could have paid substantially more in liability. Taken together the difference between the fine imposed and the maximum guideline fine for these firms was $8.7 billion.

So, there were many cash-poor firms that appear to have had ample means to pay much larger fines. However, were there in fact firms who truly could not pay liability? It appears so, but even then, it is not clear that officials should have reduced liability. Four of the firms were in the midst of insolvency proceedings, suggesting that they already failed to meet debt payments—but that doesn't mean that the government should give up a claim on the firm's assets in favor of the other creditors. Of the solvent firms, there were those that had negative book values despite having a positive market capitalization. Moreover, while negative net current assets or depleted cash stores are not in and of themselves cause for alarm, some of these firms may genuinely have had limited access to capital. It is conceivable that there was a genuine threat of collateral consequences from a small minority of the firms.

[79] Of the remaining six firms, four were insolvent or in the midst of bankruptcy proceedings, the other two firms were solvent but I could not find their market capitalization at the time that fines were imposed.

A careful examination of the case studies along with the Alexander and Cohen data shows that, while fears of collateral consequences are sometimes well-founded, in many other cases these fears appear to be misplaced, due to misconceptions of corporate finance. Officials who are unsure whether imposing liability will lead to collateral consequences may deem it safer to reduce liability and not risk disastrous consequences. In a 2012 speech, the head of DOJ's Criminal Division, Assistant Attorney General Lanny Breuer, said of the difficult decision:

> "To be clear, the decision of whether to indict a corporation, defer prosecution, or decline altogether is not one that I, or anyone in the Criminal Division, take lightly. We are frequently on the receiving end of presentations from defense counsel, CEOs, and economists who argue that the collateral consequences of an indictment would be devastating for their client. In my conference room, over the years, I have heard sober predictions that a company or bank might fail if we indict, that innocent employees could lose their jobs, that entire industries may be affected, and even that global markets will feel the effects.
>
> Sometimes—though, let me stress, not always—these presentations are compelling. In reaching every charging decision, we must take into account the effect of an indictment on innocent employees and shareholders, just as we must take into account the nature of the crimes committed and the pervasive- ness of the misconduct. I personally feel that it's my duty to consider whether individual employees with no responsibility for, or knowledge of, misconduct committed by others in the same company are going to lose their livelihood if we indict the corporation. In large multi-national companies, the jobs of tens of thousands of employees can be at stake. And, in some cases, the health of an industry or the markets are a real factor. Those are the kinds of considerations in white collar crime cases that literally keep me up at night, and which must play a role in responsible enforcement."[80]

There can be real costs to imposing monetary liability on corporations. When reducing fines to preempt a larger judgment's collateral consequences,

[80] News Release, Assistant Attorney General Breuer Speaks at the New York City Bar Association (Sept. 13, 2012), available at https://www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-speaks-new-york-city-bar-association.

however, public officials generally make two conceptual failures that undermine the laudable goal of protecting third parties.

The first conceptual failure is a misunderstanding of corporate governance. Officials too often treat shareholders as another set of victims who need to be protected from a firm's distress or insolvency.[81] But the American system of corporate governance is firmly rooted in the idea that firms are run in the interest of shareholders. Shareholders are compensated for the risks that they bear, and shareholders who profit from malfeasance should not be protected from the liability arising from that malfeasance. When corporate liability is reduced to protect shareholders, there is little incentive for shareholders, directors, and managers not to engage in malfeasance. In our shareholder-focused system of corporate governance, we as society should want shareholders to bear the costs.

The second conceptual failure is a misunderstanding of corporate finance. Assistant Attorney General Breuer's remarks, the Holder Memorandum, and the many statutes addressed in Section II all implicitly assume that corporate liability can result in collateral consequences. But officials are failing to carefully consider the mechanisms through which collateral consequences arise—or the circumstances in which they don't. As a result, officials mistakenly reduce liability in cases where collateral consequences are unlikely to occur. In the next section, I make the corporate-finance framework more explicit, and show how concerns about financial distress and the associated collateral consequences can be mitigated or dismissed entirely.

IV Imposing Liability Without Collateral Consequences

A. Determining Whether Collateral Consequences Will Occur

Officials can and do lower liability to avoid potential collateral consequences. However, in many cases fears of collateral consequences are misplaced. In these cases, the goals of corporate liability would be better served by not reducing liability. Before allowing for reductions, officials must place more scrutiny on the target firm's financials. In this section, I consider how to impose liability in the shadow of potential collateral consequences.

The myriad federal policies on collateral consequences work though an assumption that a fine will lead to financial distress or insolvency and thereby

[81] However, with this being said, of all the statutes, regulations, and policies analyzed in Section 2, the Justice Manual is the only policy that explicitly states that officials should take shareholder interests into account.

to associated costs for third parties. An official concerned about collateral consequences should ask the question: can the target firm pay the fine without becoming distressed or insolvent? For this purpose, it is helpful to distinguish three types of firms. First are those firms for which insolvency is already likely—even before any fines are imposed. These firms may be either financially or economically distressed, and their prospective profits are insufficient to cover their costs. A second type of firm is one that is financially distressed but is otherwise viable as a going concern. These are firms that, in the absence of any additional liabilities, are likely to remain viable but are facing difficulties. The third type of firm is one that is generally healthy. Absent a significant shock, these firms can be expected to remain viable. An official concerned with collateral consequences should first figure out which type of firm they are dealing with.

When looking at a firm's ability to pay, a natural starting point is to ask whether the firm has enough cash to pay a given fine. *Quick Assets* are assets that easily convertible into cash within 90 days. This includes cash, marketable securities, accounts receivable, and other liquid assets. Financial analysts frequently use the *Quick Ratio* or the *Acid Test Ratio* to determine whether a company can meet its short-term obligations. This can be defined in various ways, but a common formulation is: Quick Ratio = (Cash + Marketable Securities + Accounts Receivable)/(Current Liabilities). A high ratio means that a firm is liquid and can pay its short-term debts, whereas a low ratio indicates a firm may struggle to pay debts. As a rule of thumb, analysts look for a ratio at or above 1, which indicates that the company is fully able to pay its short-term liabilities. Utilizing this test, a decision maker can simply add the fine imposed to the denominator (current liabilities) and check the Quick Ratio. If the value is above 1, that is strong evidence that the firm can afford to pay the fine without facing short-term financial distress.

The Quick Ratio is very conservative, as it only considers assets that can be converted to cash within 90 days, but includes all current liabilities (those due within the next year). Quick Assets thereby excludes inventory and other current assets that the firm could liquidate in order to pay a fine. A less stringent test is the *Current Ratio*, which is the ratio of all current assets to current liabilities. The Current Ratio gives a better picture of the firm's financial state over the coming year. So even if the Quick Ratio is less than 1, indicating that the firm may not have the ability to pay the fine in the next 90 days, the Current Ratio may be greater than 1, indicating that the firm does have the liquidity to pay the fine within the next year.

If a firm has a Current Ratio that is greater than 1 after paying the fine, officials should not look further into the firm's finances. While it is possible that a firm may have a Current Ratio greater than 1 while having distressed longer-term finances, the Quick Ratio and Current Ratio give an indication of whether the firm can pay the fine without additional short-term financing, and officials should stop there. Recall that most of the public firms covered in Section IIIB had low Quick/Current ratios. However, a ratio below 1 does not in and of itself indicate that the firm is facing financial distress. A low Quick/Current Ratio can be an indicator of efficient supply chains and financing. For example, Walmart, in the decade from 2010-2020 had a Quick Ratio that generally averaged between 0.2 to 0.3 and a Current Ratio that averaged between 0.8 and 0.9. All the while Walmart was in a strong financial position. Officials should proceed to look at other aspects of the firm's financing only in those cases where the target firm has a low Quick/Current Ratio.

If the firm does not have sufficient cash on hand to pay the fine, the question then becomes whether the firm can raise the funds to pay the fine. There are three fundamental ways in which a firm can quickly raise money: equity financing, debt financing, and asset sales. In most cases, officials should not dwell on how the firm will raise the funds, but rather whether the firm can raise funds. To do this, we want to understand the underlying value of the firm.

For public firms, this is a relatively straightforward task. Officials should focus on the firm's market capitalization, which captures the total market value of the company's outstanding shares of stock, and thereby the value of the corporation as perceived by the wider market. Market capitalization captures the expected discounted future stream of income to shareholders. A firm with positive market capitalization has scope to raise money to pay a fine by borrowing money or issuing equity. In this sense, a fine paid to the government can be thought of as a diversion of the discounted cash flows away from current shareholders and towards the government. By borrowing money to pay the fine, the firm diverts future cash flows away from current shareholders to new creditors and uses that influx of cash to pay the fine. By issuing new equity to pay the fine, the firm diverts future cash flows away from current shareholders to new shareholders and uses that influx of cash to pay the fine. In either case, the fine will divert cash flows away from current shareholders, and for the most part, officials do not need to question which option the firm will choose.[82] How much money can be diverted away from

[82] F. Modigliani & M. H. Miller, *The cost of capital, corporation finance and the theory of investment*, THE AMERICAN ECONOMIC REVIEW (1958) (showing that in the absence of frictions, firms will be indifferent about how to raise funds); Anat Admati et al., *The leverage ratchet effect*, J. OF FINANCE, 449-470 (2018) (showing that indebted firms

shareholders without threatening the solvency of the firm is captured in the firm's *market capitalization*.[83]

While market capitalization is the most useful element when looking at a public firm's ability to pay, it is more difficult to determine the market value of private firms whose shares are not actively traded. Officials can approximate a private firm's ability to pay by looking at its book value. *Book value* is a firm's total assets minus total liabilities, and in principle, the book value is the firm's total present-day value if all assets were liquidated and all liabilities were repaid.[84] Of course, officials' fears of collateral consequences are largely predicated on fears of liquidation and associated job losses, so they would want actual liquidation to be avoided. But companies with positive book values can generally borrow against their assets and future earnings, because lenders know that the firm could be liquidated to pay back the loan if necessary. The amount that a firm can borrow, and the interest rate imposed, will depend on the firm's existing assets and liabilities. If a firm has a book value well in excess of the fine imposed, the firm should be able to divert future earnings away from shareholders by borrowing money or bringing on new equity investors, and officials should be skeptical about claims of collateral consequences.

If the firm has a market capitalization or book value well in excess of the contemplated fine, officials should be skeptical of claims of collateral consequences, and should simply impose the desired fine. The case studies in Section IIIB coupled with the Alexander and Cohen[85] data show that many public companies had market capitalizations and book values that were hundreds of millions or even billions of dollars in excess of the imposed fine. When officials lower liability on these firms, they are effectively subsidizing

---

will be biased towards debt issuances); Nathan Atkinson, *Avoiding Corporate Liability Through Strategic Capital Structure*, https://www.nathanatkinson.com/wp-content/uploads/2020/09/Atkinson-Avoiding-Liability-June-14-2020.pdf (2020) (showing how the choice can, in some cases, have an effect of prospective collateral consequences).

[83] B. E. Eckbo & M. Kisser, *Tradeoff theory and leverage dynamics of high frequency debt issuers*, Rev. of Fin., 25(2), 275-324 (2021) (showing that instead of issuing debt or equity, firms frequently raise money by selling assets); in particular, non-core asset sales can be particularly appealing in the presence of information asymmetries); A. Edmans & W. Mann, *Financing through asset sales*, MGMT. SCI., 65(7), 3043-3060 (2019) (showing that firms may choose to raise funds through asset sales, but t would be difficult for an official to accurately predict which assets a firm would sell, and for how much).

[84] In many cases, a firm's book value will be an underestimate of its true value because the book value may not accurately reflect the value of intangible assets.

[85] Cindy R. Alexander & Mark A. Cohen, *The evolution of corporate criminal settlements: An empirical perspective on non-prosecution, deferred prosecution, and plea agreements*, AM. CRIM. L. REV. 52, 537 (2015).

corporate misconduct. Moreover, firms may be able to exploit officials' reticence to impose fines through strategic financing. Nonetheless, some firms covered in Section IIIB were financially distressed and others were already in the midst of insolvency proceedings. The next section considers how to deal with these firms.

B. The Government's Options to Impose Fines

In many cases, officials can simply impose the full fine without worrying about collateral consequences. Applying the framework in the previous section to the firms covered in Section 3.2 shows that the firms generally could have paid liability without jeopardizing their solvency—while almost all of them had limited cash on hand, most of them had market capitalizations and book values well above the fine imposed. However, in some cases, fears of financial distress may be real: Beazer Homes' market capitalization was not much more than the fine imposed, and Olympic Pipeline did subsequently file for bankruptcy. So, when a fine will potentially lead to financial distress or insolvency, what steps should officials take?

Begin with the cases where—even in the absence of a fine—insolvency is probable or even a foregone conclusion. While there is empirical evidence on third-party costs of corporate bankruptcies, what is the effect of lowering liability on a firm that is already facing insolvency? Take for example Olympic Pipeline, where the government reduced Olympic's civil liability following a deadly pipeline explosion in 2003 after determining that "Olympic lack[ed] the economic ability to pay a larger penalty."[86] Olympic was entirely owned by Royal Dutch Shell and British Petroleum, at that time the eighth and ninth most valuable publicly traded corporations in the world.[87] Olympic filed for bankruptcy shortly after the settlement, listing assets of $106 million and liabilities of $401 million. In this case, the reduction in liability had no effect on Olympic's prospective solvency. Moreover, because substantially all of Olympic's debts were owed to these two parent companies, the ultimate effect of reducing Olympic's fine was to allow Shell and BP to recover more in bankruptcy, effectively reducing the fine on two multi-billion-dollar companies that had ample ability to pay.

---

[86] *U.S. v. Shell Pipeline Company*, No. CV-02-1178R, Consent Decree (W.D. Wa. Jan. 28, 2003).

[87] "Global 500 2003," Financial Times, available at https://web.archive.org/web/20080910101006/http://specials.ft.com/spdocs/global5002003.pdf.

However, even if a fine would lead to insolvency, that does not mean that there will be significant or undesirable collateral consequences. Olympic argued that its insolvency would inflict collateral consequences on its business partners and the region more broadly, claiming that its continued viability was "critical to Western Washington's economy, as it transports most of this region's retail gasoline and is the only method of transporting jet fuel to Seattle Tacoma International Airport." However, while the pipeline itself may have been critical, it was never under threat. As a fixed, revenue-generating asset, it is implausible that the pipeline would cease to operate as a result of Olympic shouldering full liability. In fact, when Olympic subsequently went bankrupt, the pipeline continued to provide fuel without delays.

The same reasoning should be applied to cases where the fine may lead to distress. The key question needs to be whether distress/insolvency will lead to collateral consequences, and, if so, are those prospective collateral consequences so dire that they should be avoided. Consider Beazer Homes' $50 million settlement, which was 70% of the firm's market capitalization and 25% of the firm's book value.[88] Given the housing market in 2009, it is entirely reasonable to expect that the fine could lead to Beazer's insolvency and subsequent collateral consequences. However, the DOJ's statement that a higher amount would "put at risk the employment of approximately 15,000 employees and full-time con- tractors not involved in the criminal wrongdoing" is almost certainly an overstatement of the prospective risk.[89] If Beazer were to file for bankruptcy, it, like most publicly-held firms, would likely file under Chapter 11 reorganization rather than Chapter 7 liquidation, meaning that many employees would stay in their jobs. And even if Beazer were to liquidate, divisions would be sold to new buyers and many employees would retain their jobs. Trying to protect employees is a laudable goal, and insolvencies will often lead to some job losses. But it is wrong to assume that insolvency will result in all a firm's employees losing their jobs.

Officials should be skeptical when claims of collateral consequences are brought: insolvency does carry costs, but the claims made by government officials are often conjectural and highly unlikely. The examples considered in Section IIIB illustrate that claims of collateral consequences are often

---

[88] In fact, as I discuss in Appendix A, Beazer was given a payment plan and ultimately paid only a fraction of this total. Moreover, this estimate of the firm's market capitalization likely took into account the liability anticipated of the settlement. Beazer's market capitalization increased following the announcement of liability and tripled within three months.

[89] *U.S. v. Beazer Homes USA, Inc.*, No. 3:09cr113-w Deferred Prosecution Agreement (W.D.N.C. Jul. 1, 2009).

spurious and officials should be reticent to reduce liability. However, suppose that there is a legitimate concern that a given fine will lead to financial distress and collateral consequences. The right answer in some cases is to simply impose the full fine and accept the collateral consequences—bankruptcy is a natural component of a functioning economy and propping up distressed firms can likewise lead to bad outcomes.[90] But what other options are there?

The two methods currently used are to reduce and/or delay the fine. Either of these methods will reduce the firm's financial burdens. However, reducing or delaying fines also undermines the deterrent and restitution goals of imposing liability in the first place.

Officials concerned about potential collateral consequences sometimes allow for firms to pay their penalties in installments over time. In most such cases, the settlement agreement will fix a payment schedule. However, because none of the cases that I profile in Section IIIB imposed interest on its outstanding fines, these plans were even less costly to the defendants than their pure dollar amounts would suggest. And even without charging interest, delayed payments are generally less expensive to firms than immediate payments, because firms can either put their money to productive use in the short-term or, in some cases, reduce the amount they need to borrow at any one time to afford the penalty.

While a payment schedule reduces a firm's financial burden, it does not eliminate it. Under the terms of its settlement agreement Hynix owed $35 million per year for five years, a fairly manageable liability compared to the firm's large asset base and positive revenues. However, for other firms a recurring liability could lead to financial distress. At the time of its settlement agreement, Beazer Homes was in a more precarious financial position than Hynix had been. To avoid distress, Beazer's 2009 settlement agreement with the Department of Justice required that the company make restitution payments equal to 4% of its adjusted *EBITDA* until it had paid $48 million or through 2016.[91] This framework was so effective at not adding to Beazer's financial distress that, due to Beazer's low EBITDA over the lifetime of the agreement, the firm only ended up paying $28.1 million in restitution to its victims. Anticipating this possibility of underpayment, the Justice Manual states that "[t]he United States Attorney should not accept a percentage of net profits in settlement or partial settlement of a claim. Such arrangements are

[90] Ricardo J. Caballero, *Zombie lending and depressed restructuring in Japan*, 98 AM. ECON. REV. 5, 1943 (2008).

[91] EBITDA (earnings before interest, tax, depreciation, and amortization) is a common measure of a firm's financial performance.

speculative at best; policing is difficult; and there are too many ways in which the affairs of the debtor concern can be manipulated to avoid, minimize, or postpone realization of a net profit."[92]

Simply reducing the fine or allowing it to be paid over time can lessen financial distress, but both will also undermine the goals of imposing liability in the first place. Officials can do better. One option is that officials issue "equity fines"—that is, force the corporation to issue new shares in the company to pay the fine.[93] These equity fines would impose the full incidence of liability on shareholders, and thereby would avoid collateral consequences. However, these equity fines would also face practical barriers, and may be unnecessary in many cases. Instead, officials can impose regular monetary liability subject to some well-chosen stipulations to limit collateral consequences and to maximize the amount actually paid by the firm.

Officials with legitimate concerns about collateral consequences could impose liability subject to three conditions. First, the fine does not have any set payment schedule—that is, the firm can pay the fine whenever it wishes.[94] The absence of fixed payments means that a distressed firm can pay other debts and avoid covenant violations. Second, because the fine is not paid immediately, the outstanding liability would continually accrue interest. This means that the firm is not saving money by paying a discounted fine in the future. Third, the firm cannot pay dividends or repurchase shares until liability is fully repaid. This ensures that the government's claim is higher in priority than those of shareholders. Taken together, this effectively structures liability akin to a callable preferred share of stock. There are obviously other considerations that would go into structuring the liability payment,[95] and

---

[92] U.S. Dep't of Justice, Justice Manual, Title 4: Civil, 4-3.210 (Compromising Claims Against a Going Business Concern).

[93] J. C. J. Coffee, *Making the punishment fit the corporation: The problems of finding an optimal corporate criminal sanction*, N. ILL. U. L. Rev., 1, 3 (1980); Nathan Atkinson, *Avoiding Corporate Liability Through Strategic Capital Structure*, https://www.nathanatkinson.com/wp-content/uploads/2020/09/Atkinson-Avoiding-Liability-June-14-2020.pdf (2020) (analyzing capital structure and corporate malfeasance decisions in a rational expectations model); Because officials cannot commit to a fine schedule ex ante, they may ex post reduce liability because of collateral consequences, This has the effect of firms over-borrowing in order to exploit fears of collateral consequences. I show how mandatory equity issuances can overcome officials' inability to commit and thereby lead to the first best.

[94] For administrative reasons, it may make sense to set a maximum time limit (e.g. 10 years) so that the government does not have to oversee the fine for an indefinite period.

[95] S. C. Myers & N. S. Majluf, *Corporate financing and investment decisions when firms have information that investors do not have*, J. FIN. ECON., 13(2), 187-221 (1984); M. C. Jensen & W. H. Meckling, *Theory of the firm: Managerial behavior, agency cost and ownership structure*, 3(4), 305-360 (1976); Structuring liability in this manner would be an

other innovations that could be made. But key here is that there are clear improvements that can be made over simply reducing or delaying liability payments.

Regardless of how officials proceed in terms of structuring or reducing liability, disclosure must be improved. A unifying theme in every case considered in Section III is the lack of effective disclosure by officials. In most of the cases where penalties imposed un public corporations were reduced, there is little indication that the firms faced true financial distress. Vague statements that higher fines would jeopardize a firm's "solvency", "ability to compete", "ability to fund its pension obligations", "continued viability", or its "ability to make restitution to victims" are not enough. Neither are unsubstantiated claims about prospective job losses, inability to invest, or a more general inability to pay.

If an official is going to reduce liability because of collateral consequences, that official should provide detailed evidence supporting that claim. Moreover, settlement agreements do not generally make it possible to know how much a fine has been reduced by. This means that we simply do not know whether full liability would have led to collateral consequences. Hundreds of firms have had liability reduced under federal guidelines that permit reductions because of collateral consequences or inability to pay. Focusing on just the small number of public firms, the total penalties imposed are billions of dollars below guideline ranges. And in most cases, it appears that the reductions were unnecessary. However, because of poor disclosure, it is hard to even identify all the cases where liability was reduced—or by how much. Increasing disclosure is an important first step in ensuring that firms are not unduly profiting from claims of collateral consequences.

V CONCLUSION

Corporate liability is meant to deter illegal behavior and to compensate victims of corporate misconduct. However, the imposition of civil or criminal liability can lead to a variety of collateral consequences that will ultimately be borne not only by the malfeasant corporation but also by its employees and society more broadly. In this paper, I have explored how concerns about collateral consequences affect officials' decisions around corporate liability.

The primary contributions of this article are: (1) that there is an expansive legal basis for reducing liability in the shadow of prospective collateral

improvement, but would not be perfect. By changing the firm's capital structure, this liability may change its risk profile and actions.

consequences; (2) that reductions do occur; (3) that reductions often appear unwarranted; and (4) to provide a framework for thinking more carefully about imposing liability in the presence of prospective collateral consequences.

When liability is erroneously reduced, it undermines the deterrent and compensatory goals, effectively subsidizing corporate misconduct. In light of this article, officials should be skeptical of any claims that defendants make about collateral consequences. If officials are going to entertain a reduction they should be careful to establish that liability will truly be the cause of substantial collateral consequences. And in that case, they should then structure liability in a manner that maximizes the fine imposed on the firm, subject to the constraint of avoiding collateral consequences. But perhaps most importantly of all, these officials should carefully detail the reasoning behind the reductions given rather than making vague claims about inability to pay, so that future officials and researchers can judge whether the myriad federal policies on collateral consequences and their application are in fact worthwhile.

APPENDIX I. CASE STUDIES

This appendix contains seven case studies of firms that received reductions in their fines because of perceptions of collateral consequences or inability to pay. These cases were chosen to highlight variation in fine amounts; civil and criminal fines; large and small firms; foreign and domestic firms; and public and private firms.

A. Hynix Semiconductor

In 2005, Hynix Semiconductor Inc. pled guilty to having engaged in price fixing for high- speed computer memory. The plea agreement with the Antitrust Division of the Department of Justice for $185 million stated that:

The United States and the Defendant agree that the applicable Guidelines fine range exceeds the fine contained in the recommended sentence set out [above]. The United States agrees that, based on Defendant's ongoing cooperation, the United States would have moved the court for a downward departure pursuant to U.S.S.G. §8C4.1, but for the fact that the amount of the fine that the United States would have recommended as a downward departure for substantial assistance provided still would have exceeded Defendant's ability to pay. The parties further agree that the recommended fine is appropriate, pursuant to U.S.S.G. §8C3.3(a) and (b), due to the inability of the Defendant to make restitution to victims and pay a fine greater than that recommended without substantially jeopardizing its continued viability.[96]

On first inspection, the fear of insolvency seems reasonable. As of January 1, 2005, Hynix had $1.66 billion in current liabilities that were due within one year. But Hynix only had $343 million in cash and cash equivalents and an additional $552 million in short term financial instruments (e.g. savings deposits and financial instruments maturing in less than one year). This meant that Hynix already had an expected shortfall of $765 million for the year. According to the Federal Sentencing Guidelines, the fine should have amounted to $265.5 million,[97] which would have added to this shortfall.

Hynix's short-term finances were not as dire as the balance sheet would make them appear. Included in the firm's current liabilities was an "allowance for the charges regarding the violation of antitrust laws currently being investigated by the U.S. Department of Justice." In effect, the imposition of liability was already factored into the company's short-term financial

[96] *U.S. v. Hynix Semiconductor Inc.*, No. CR 05-249 PJH, Plea Agreement (N.D. Cal.)..

[97] Semin Park, *Sanctions in Anti-trust cases*, OECD DIR. FOR FIN. AND ENT. AFFAIRS, Global Forum on Competition Session IV (Dec. 2, 2016).

calculus, and it would be incorrect to assume that imposing liability of $265.5 million would increase liabilities by the full $265.6 million.

Moreover, focusing on Hynix's short term financial position overlooks its relatively strong long-term financial position. The firm's total assets were reported at $6.7 billion and the firm's total liabilities were reported at $3.7 billion, for a book valuation of $3 billion. The market value of outstanding equity was $2.16 billion. So while the firm had current liabilities in excess of cur- rent liabilities, its balance sheet was firmly positive, and the firm should have been able to raise the full $265.5 billion without jeopardizing its continued viability.

In fact, while the DOJ imposed a fine of $185 million, the fine was payable over five years without interest.[98] Discounting the firm's payments to 2005 using the average U.S. firm's weighted average cost of capital, results in a cost of $143.8 million.[99]

In 2019 a complaint was once again filed against Hynix, Micron, and Samsung (two other firms that plead guilty in 2005) for a new round of price fixing.[100]

Hynix Semiconductor Balance Sheet (millions $)	
Current Assets	895
Total Assets	6,700

[98] *U.S. v. Hynix Semiconductor Inc.*, No. CR 05-249 PJH, Plea Agreement (N.D. Cal.) ("The United States and the Defendant agree to recommend, in the interest of justice pursuant to 18 U.S.C. § 3572(d)(1) and U.S.S.G. § 8C3.2(b), that the fine be paid in the following installments: within 30 days of imposition of sentence – $10 million; at the one-year anniversary of imposition of sentence ("anniversary") – $35 million; at the two-year anniversary – $35 million; at the three-year anniversary – $35 million; at the four-year anniversary – $35 million; and at the five-year anniversary – $35 million; provided, however, that the Defendant shall have the option at any time before the five-year anniversary of prepaying the remaining balance then owing on the fine.").

[99] *See* Nathan Atkinson, *Corporate Liability, Collateral Consequences, and Capital Structure*, https://www.nathanatkinson.com/wp-content/uploads/2020/10/Atkinson-Corporate-Liability.pdf (2020) (describing how federal agencies use the weighted average cost of capital to calculate the benefit from delayed payments of fines).

[100] *In re Dynamic Random Access Memory*, No. 4:18-cv-2518-JSW, Indirect Purchaser Antitrust Litigation (N.D. Cal. Oct. 28, 2019).

Current Liabilities	1,660
Total Liabilities	3,700
Net Current Assets	(765)
Total Equity (Book Value)	3,000
Market Capitalization	2,160
Penalty Imposed	185
Effective Penalty Paid	143.8

B. Technicolor

In 2012, the European Commission imposed a fine on several companies for participating in a cartel in the sector of cathode ray tubes (CRT). The companies shared markets, fixed prices, and restricted output. One of the cartel members, Technicolor, was reportedly assessed a fine of €257.5 million.[101] However, Technicolor invoked its inability to pay the fine, which the Commission assessed under point 35 of the 2006 fines Guidelines, which allows fines to be reduced for inability to pay.[102] The commission reduced Technicolor's fine by €219 million, or 85%, to €38.6 million that was reportedly reduced by €219 million from an initial fine of €257.5 million.

An assessment of Technicolor's financial position at the time lends some support to reduction. Technicolor had a number of difficult years in the lead up to the fine. In 2009, the company filed for bankruptcy and subsequently underwent a debt restructuring plan. Technicolor made net losses of €69 million and in 2010 and net losses of €324 million in 2011.[103] In 2012, Technicolor reported a net profit of €4 million, including the €38.6 million fine.

On December 31, 2012 (three weeks after the fine was announced), Technicolor reported €1.42 billion in current assets (assets that can be quickly liquidated for cash) and e1.29 billion in current liabilities (including the €38.6 million fine).[104] At the same time, Technicolor reported total assets of €3.24

[101] GCR, 18 December 2012, 'CRT cartelist obtains record inability-to-pay fine cut'.

[102] Commission Decision of 5 December 2012 (Case COMP/39.437 — TV and computer monitor tubes), available at https://ec.europa.eu/competition/elojade/isef/case details.cfm?proc code=1 39437.

[103] Technicolor SA, Annual Report (*Document de Référence*) (March 27, 2012).

[104] Technicolor SA, Annual Report (*Document de Référence*) (April 16, 2013).

billion and total liabilities of e2.99 billion. This resulted in a book value of equity of €241 million.

Applying a fine of €257.5 million (after a 10% reduction for cooperation) would in principle lead to insolvency by increasing the firm's liabilities above its assets.

However, focusing on the book value of equity obscures the higher market value of Technicolor. Technicolor's market capitalization on the day that the fine was imposed was €415 million, which quickly rose in the months following the fine and reached €1.3 billion one year later. So while Technicolor's book value was insufficient to pay the €257.5 million fine, its market value was high enough that it could have raised enough equity to pay the fine.[105]

Technicolor Balance Sheet (millions €)	
Current Assets	1,420
Total Assets	3,240
Current Liabilities	1,290
Total Liabilities	2,990
Net Current Assets	130
Total Equity (Book Value)	241
Market Capitalization	415
Penalty Imposed	257.5
Effective Penalty Paid	38.6

[105] At market capitalization of €415 million, raising €257.5 million from new shareholders would have reduced the value of the initial shares by 62% to €157.5 million.

C. Beazer Homes

In 2009, Beazer Homes, one of the country's largest home builders, settled civil and criminal charges with several state and federal agencies for a reported $50 million. The U.S. Attorney's Office justified the $50 million settlement by stating that:

"the imposition of additional criminal penalties or the requirement of additional payment at this time would jeopardize the solvency of Beazer and put at risk the employment of approximately 15,000 employees and full-time contractors not involved in the criminal wrongdoing."[106]

On June 30 (the day before the settlement agreement), Beazer had total assets of $2.1 billion and total liabilities of $1.94 billion. The book value of equity was $196 million. So while this indicates that it could have paid more than $50 million, doing so may have threatened its continued viability. While Beazer had substantial long-term liabilities, it had only $76 million of current liabilities, which could easily be covered by its $495 million of cash and short term investments. Beazer's long-term liabilities were staggered with some not falling due until 2036.[107]

On the day that the settlement agreement was announced, Beazer had a market capitalization of $71.8 million. However, this valuation likely factored in expectations about liability. Following the imposition of liability, Beazer's market capitalization doubled by early August and tripled by mid-October 2008.

The settlement agreement with Beazer was in fact, not for an immediate $50 million cash payment. Approximately $2 million was paid to the North Carolina Commissioner of Banks, with the remaining $48 million to be potentially contributed to a restitution fund:

under these agreements, we were obligated to make payments equal to 4% of "adjusted EBITDA," as defined in the agreements, until the earlier of (a) September 30, 2016 or (b) the date that a cumulative $48.0 million had been paid pursuant to the DPA and the HUD Agreement. Accordingly, after making the fiscal year 2016 payments described below, our obligations under the HUD Agreement will expire. As of September 30, 2016, we have paid a cumulative $28.1 million related to the DPA and the HUD Agreement.[108]

---

[106] *U.S. v. Beazer Homes USA, Inc.*, No. 3:09cr113-w Deferred Prosecution Agreement (W.D.N.C. Jul. 1, 2009).

[107] Beazer Homes, Quarterly Report (2009).

[108] Beazer Homes, Annual Report (2017).

EBITDA (Earnings before interest, tax, depreciation and amortization) is a measure of a company's operating performance. The settlement agreement meant that Beazer would only pay the full $50 million if it had a cumulative EBITDA of at least $950 million over the period.[109] Due to the financial difficulties that home-builders faced following the financial crisis, Beazer had a negative EBITDA for a number of years, so only paid 56% of the reported liability.

Beazer Homes Balance Sheet (millions $)	
Current Assets	495
Total Assets	2,100
Current Liabilities	76
Total Liabilities	1,940
Net Current Assets	495
Total Equity (Book Value)	196
Market Capitalization	71.8
Penalty Imposed	50
Effective Penalty Paid	28.1

D. Alcoa

For 20 years beginning in 1989, Alcoa and a subsidiary company engaged in bribes in violation of the Foreign Corrupt Practices Act that generated substantial profits. From 2005 to 2009 alone, Alcoa World Alumina is estimated to have earned $446 million in gross profit "on the corruptly secured alumina-supply agreement."[110] In January 2014, Alcoa agreed to pay

[109] The payment schedule stipulated that an additional $10 million would be paid in the first year regardless of EBITDA, so after the first year, Beazer had potential payments of up to $38 million, and $\frac{\$38{,}000{,}000}{4\%} = \$950{,}000{,}000$.

[110] John W. Miller, *Alcoa Affiliate Pleads Guilty to Bribery*, WALL ST. J. (Jan. 9, 2014).

$384 million in settlement agreements with the Department of Justice and the Securities and Exchange Commission.

Department of Justice Settlement. Under a violation of 15 U.S.C. § 78dd-2, the statutory maximum sentence that the court could impose is $2 million or twice the pecuniary gain or gross pecuniary loss resulting from the offense, whichever is greatest.[111] The investigation further found that the benefit was received was more than $400 million. The guideline range for the violation was $446 million to $892 million. The fine was reduced to $209 million for a number of reasons including cooperation with the Department of Justice and a commitment to maintain an anti-corruption compliance program. The first justification for the reduction was that:

"[A] fine of $209,000,000 is the appropriate disposition based on . . . the impact of a penalty within the guidelines range on the financial condition of the Defendant's majority shareholder, Alcoa, and its potential to 'substantially jeopardiz[e]' Alcoa's ability to compete, see U.S.S.G. § 8C3.3(b), including, but not limited to, its ability to fund its sustaining and improving capital expenditures, its ability to invest in research and development, its ability to fund its pension obligations, and its ability to maintain necessary cash reserves to fund its operations and meet its liabilities."[112]

Furthermore, the settlement agreement stipulated that "[b]ecause the immediate payment of the entire fine 'would pose an undue burden on' the Defendant and Alcoa,"' the fine would be payable in five annual installments of $41,800,000. Discounting the firm's payments to 2014 using the average U.S. firm's weighted average cost of capital, results in a discounted value of $179.9 million—a full $30 million less than the already-discounted fine.[113]

To understand the fine and the reduction based on "the financial condition," we first need to understand the ownership structure of the defendant. The DOJ settlement was with Alcoa World Alumina LLC ("AWA") a limited liability company. It was wholly owned by Alcoa World Alumina and Chemicals ("AWAC"), which in turn was a joint venture between Alcoa Inc., which held a 60% stake, and Alcoa and Alumina Limited ("Alumina"), which

---

[111] 18 U.S.C. §§ 3571(c)(3), (d).

[112] *U.S. v. Alcoa World Alumina LLC*, No. 2:14-cr-00007-DWA, (W.D. Pa. Jan. 9, 2014).

[113] *See* Nathan Atkinson, *Corporate Liability, Collateral Consequences, and Capital Structure*, https://www.nathanatkinson.com/wp-content/uploads/2020/10/Atkinson-Corporate-Liability.pdf (2020) (describing how federal agencies use the weighted average cost of capital to calculate the benefit from delayed payments of fines).

held a 40% stake. Alumina is a holding company with its only asset being its 40% stake in AWAC.

At the time of the settlement, AWAC had current assets of $1.79 billion and current liabilities of $1.77 billion, which meant that its net current assets were only $17 million—far less than the contemplated fine.[114] However, AWAC's total assets of $10 billion dwarfed its total liabilities of $3.2 billion, meaning that it had a book value of $6.8 billion. Therefore, while it may not have had the cash on hand to pay a fine in the guideline range, it could easily have tapped capital markets to pay the fine. Furthermore, because AWAC was a private company, it did not have an actively traded stock. However, because AWAC was the only investment of Alumina, we can impute the market value of AWAC from the market capitalization of Alumina. At the time of the fine, the imputed market capitalization of AWAC was approximately $7 billion.[115]

However, the DOJ settlement agreement was chiefly concerned with "the financial con- dition of the defendant's majority shareholder, Alcoa." At the time of the fine, Alcoa was in a much-diminished financial position. While Alcoa's stock was trading at less than one fifth of what it was trading at before the 2007-2009 financial crisis, the idea that Alcoa could not pay the entire fine strains credulity. At its most recent securities filing, Alcoa had current assets of $6.9 billion and current liabilities of $6.1 billion, so net current assets were a full $800 million.[116] Alcoa's total assets of $35.7 billion and total liabilities of $22.2 billion gave it a book value of $13.5 billion. This implies that the firm could have tapped credit markets to raise the contemplated fine. Finally, Alcoa had a market capitalization of approximately $8 billion, meaning that it had substantial scope to raise funds through equity issuances.

AWAC's minority shareholder, Alumina, was in an even stronger financial position. Because Alumina's only meaningful investment was AWAC, it had $2.9 billion in total assets and only $170 million in total liabilities, with a market capitalization of $2.8 billion.[117] Alumina could easily cover any shortfalls through an equity issuance or borrowing against AWAC's future dividends. However, Alumina's exposure was considerably less than Alcoa's

[114] Alumina, Annual Report, 10-K (2013).

[115] Alumina owner 40% of AWAC, and AWAC was Alumina's only meaningful investment. This implies that the imputed market valuation of AWAC is the market capitalization of Alumina ($2.8 billion) divided by 40%.

[116] Alcoa, Annual Report, 10-K (2013).

[117] Alumina, Annual Report, 10-K (2013).

because in a 2012 agreement, the owners agreed to split the costs with 85% payable by Alcoa and 15% payable by Alumina.[118]

SEC Action. A parallel SEC action fount that Alcoa violated Sections 30A, 13(b)(2)(A), and 13(b)(2)(B) of the Securities Exchange Act of 1934. Alcoa was required to disgorge $175 million of ill-gotten gains. The SEC settlement noted:

> [The] impact of the disgorgement payment upon Respondent's financial condition and its potential to substantially jeopardize Alcoa's ability to fund its sustaining and improving capital expenditures, its ability to invest in research and development, its ability to fund its pension obligations, and its ability to maintain necessary cash reserves to fund its operations and meet its liabilities.[119]

Because of this, the disgorgement payment was payable through five annual installments.[120] Discounting the firm's payments to 2014 using the average U.S. firm's weighted average cost of capital, results in a discounted value of $152.6 million, or a savings of roughly $22.4 million.

Together, the DOJ and SEC settlements collected far less from Alcoa than Alcoa's estimated profits from the bribery scheme.

Alcoa Inc. Balance Sheet (millions $)	
Current Assets	6,900
Total Assets	35,700
Current Liabilities	6,100
Total Liabilities	22,200
Net Current Assets	800
Total Equity (Book Value)	13,500

[118] Alumina, Annual Report, 10-K (2014).

[119] *In the Matter of Alcoa Inc.*, Securities and Exchange Act of 1934, Release No. 71261 (Jan. 9, 2014).

[120] $46.2 million was due immediately, with the remaining to be paid in four installments of $32.2 million.

Market Capitalization	8,00

Alumina Limited Balance Sheet (millions $)	
Current Assets	47.8
Total Assets	2,900
Current Liabilities	61.4
Total Liabilities	170
Net Current Assets	(13.6)
Total Equity (Book Value)	2,730
Market Capitalization	2,820

Alcoa World Alumina and Chemicals Ownership: 60% Alcoa, 40% Alumina Balance Sheet (millions $)	
Current Assets	1,790
Total Assets	10,072
Current Liabilities	1,773
Total Liabilities	3,211
Net Current Assets	13
Total Equity (Book Value)	6,861
Market Capitalization (imputed)	7,050

E. Olympic Pipeline

In 1999, a gas pipeline owned by Olympic Pipeline ruptured, killing three young people in a public park. In 2003 Olympic entered into a consent decree to pay $5 million in civil penalties (this was in addition to private settlements with the families of the children and other fines). The consent decree stated that:

"The United States has substantially reduced Olympic's civil penalty and agreed to a payment schedule based on financial information that Olympic provided during settlement discussions demonstrating that Olympic lacks the economic ability to pay a larger penalty."[121]

[121] *U.S. v. Shell Pipeline Company*, No. CV-02-1178R, Consent Decree (W.D. Wa. Jan. 28, 2003).

While not in the consent decree, Olympic's case may have been strengthened by claims that it was "critical to Western Washington's economy, as it transports most of this region's retail gasoline and is the only method of transporting jet fuel to Seattle Tacoma International Airport." and that Without bankruptcy protection, Olympic would have to barge its fuel products at a much greater environmental risk.[122]

The agreement further stipulated that the fine was payable in installments over five years.

The concerns about Olympic's financial position seem reasonable—less than three months later Olympic filed for Chapter 11 bankruptcy protection. Olympic's bankruptcy petition listed $106 million in assets and $401 million in liabilities. Under bankruptcy proceedings, prepetition regulatory fines are paid pro rata with other general unsecured creditors.

To properly understand the incidence of the liability, it is important to understand Olympic's financing. Olympic was a joint venture that at the time was entirely owned by British Petroleum (62.5% stake) and Shell (37.5% stake). Olympic's funding was also unique in that it was 100% funded through debt.[123] Of Olympic's liabilities, $148 were loans or loan guarantees from BP and Shell.[124] The vast majority of the remaining liabilities listed in the bankruptcy filing are claims made by oil companies for losses that they suffered when the pipeline shut down following the accident. Importantly, most of the claims come from a single company, Arco, which was a subsidiary of BP.

This financing structure meant that Olympic was entirely owned by BP and Shell. Furthermore, almost all of Olympic's debts were owed to BP and Shell. In a typical bankruptcy, shareholders lose their investments and the value of the remaining assets pass to creditors.

However, in this case, the shareholders and creditors are the same entities.[125] This means that the effect of reducing liability because "Olympic lack[ed]

---

[122] Steve Miletech, *Olympic Pipeline seeks bankruptcy*, SEATTLE TIMES (Maar. 28, 2003) (This claim conflates the financial distress with the firm ceasing all operations.).

[123] *Olympic Pipeline Co.*, WA. UTIL. & TRANSP. COMM'N, No. TO-011472, 7, Order Granting Interim Relief (Oct. 31, 2001).

[124] Steve Miletech, *Olympic Pipeline seeks bankruptcy*, SEATTLE TIMES (Maar. 28, 2003) (This claim conflates the financial distress with the firm ceasing all operations.).

[125] *Olympic Pipeline Co.*, WA. UTIL. & TRANSP. COMM'N, No. TO-011472, 7, Order Granting Interim Relief (Oct. 31, 2001) (noting that near-100% debt financing is not unusual in the pipeline industry); *see* L.M. LoPucki, *The death of liability*, YALE L. J. 106, 1 (1996) (describing the mechanics of near-100% debt financing is not unusual in the pipeline

the economic ability to pay a larger penalty," was to effectively reduce liability on Olympic's two multi-billion dollar parents. These companies were able to avoid liability by exploiting the government's perception that Olympic was unable to pay.

Olympic was a limited liability company. Since it was not publicly traded, an equity issuance would not have been an easy solution. However, the intuition of Section 4 still applies—the goal of the government should be to impose liability on the firm's shareholders. In this case, that is equivalent to imposing liability on the firm's creditors. The public interest would likely have been better served by not reducing Olympic's fine.

F. IAV GmbH

IAV GmbH is a German company that engineers and designs automotive systems. IAV worked with Volkswagen to design, test, and implement software to cheat the U.S. testing process.[126] On December 18, 2018 IAV plead guilty for its role in the Volkswagen emissions scandal and was fined $35 million. Under the sentencing guidelines the base fine is the maximum of the pecuniary gain, the pecuniary loss, and the offense level table.[127] However in the case of IAV, the government never even calculated the base fine, because prosecutors determined "the Guidelines fine range would still be well beyond the Defendant's ability to pay."[128]

The plea agreement explicitly states that the fine calculation should be based on the pecuniary loss caused by IAV's actions, but that amount is not included. However, the plea agreement does explain that IAV had an offense level of 41, yielding a base fine of $72,500,000. This means that the true pecuniary loss was more than this. Ultimately, the government determined that:

"It is readily ascertainable that the Defendant cannot and is not likely to become able (even on an installment schedule) to pay the minimum guideline fine. The Offices and the Defendant agree that, pursuant to U.S.S.G. §8C3.3(b), reducing the fine to $35,000,000.00 based on Defendant's inability to pay is not more than necessary to avoid substantially jeopardizing the continued viability of the Defendant."[129]

---

industry); 49 U.S.C. § 60111 (Federal law gives regulators power to demand alternative financing statements.).

[126] *U.S. v. IAV GmbH,* No. 16-CR-20394, Plea Agreement (E.D. Mich. Dec. 18, 2018).

[127] U.S.S.G. § 8C2.4.

[128] U.S.S.G. § 8C2.2 (stating no precise determination of the fine is required if it is clearly beyond the means of the defendant to pay).

[129] *U.S. v. IAV GmbH,* No. 16-CR-20394, Plea Agreement (E.D. Mich. Dec. 18, 2018).

Around the time of the fine, IAV had low earnings, making only $12.6 million in earnings after tax in 2018. At this rate it would take three years to pay the $35 mil- lion fine and could have taken considerably longer to pay a non-reduced fine from IAV's earnings.[130]

However, a closer look at IAV's financials draws into question the determination of inability to pay. At the end of 2018 (two weeks after the fine was imposed), IAV had current assets of $404.9 million and current liabilities of $345.6 million.[131] This $59.3 of net current assets meant that IAV did not have a very large asset buffer over the coming year. However, looking at total assets, IAV's financial position looks stronger, with the firm having a book valuation of $266.5 million. Therefore, the $35 million fine was a significant fraction of the firm's book value (13%), but may not have risen to the level where any additional fine would be "substantially jeopardizing the continued viability of the Defendant."

Looking at the value of IAV's equity makes it appear more likely that IAV could have paid a larger fine. IAV is a private limited company under German law and is jointly owned by five manufacturers and suppliers from the automotive industry.[132] Using the financial reports of these shareholders, it is possible to impute the market capitalization of IAV. At the end of 2018, Continental Automotive's 20% equity stake in IAV was valued at $188 million.[133] This means that the imputed value of IAV two weeks after the fine was imposed was over $944 million. This indicates that IAV could have paid a considerably larger fine.

IAV Balance Sheet (millions $)	
Current Assets	404.9
Total Assets	682.8
Current Liabilities	345.6

[130] IAV GmbH, Sustainability Report (2018).
[131] Continental Automotive GmbH, Sustainability Report (2018).
[132] The ownership is: Volkswagen AG 50%, Continental Automotive GmbH 20%, Schaeffler Technologies AG & Co. KG 10%, Freudenberg SE 10%, and SABIC Innovative Plastics B.V. 10%.
[133] Continental Automotive GmbH, Sustainability Report (2018).

Total Liabilities	416.3
Net Current Assets	59.3
Total Equity (Book Value)	266.5
Market Capitalization	944.2
Penalty Imposed	35
Effective Penalty Paid	404.9

APPENDIX II. FEDERAL POLICIES ON COLLATERAL CONSEQUENCES

This appendix contains a sampling of policies that allow or mandate that officials take firms' financial conditions into account when assessing penalties. This list is far from comprehensive, as there are many laws and regulations that I have found that are not on the list. My goal in this appendix is to show that policies around firms' financial positions span a wide variety of federal departments and agencies.

To understand the coverage of the policies of the agencies and departments below, I collected data from Good Jobs First's Violation Tracker, which has data on fines imposed by governmental agencies. Examination reveals that most of the monetary value of fines are imposed by a small number of agencies. The one hundred largest fines imposed since 2000 were imposed by just 11 agencies.[134] Each of these 11 agencies has policies that allow or mandate that firms' financial positions are taken into account when imposing penalties.

Because the largest fines are outliers, I consider smaller fines as well. I therefore sum the monetary value of fines imposed by agency. I find that 94.7% of the monetary value of all fines imposed were imposed by just eleven agencies,[135] that have policies to take collateral consequences into account. Extending the analysis to all of the agencies on the list that follows, I find that over 96.3% of the total monetary value of all fines imposed at the federal level were imposed by agencies, departments, or commissions with policies in place to take into account collateral consequences.

---

[134] These agencies are Department of Justice, Environmental Protection Agency, Federal Housing Finance Agency, Federal Trade Commission, Food and Drug Administration, Office of the Comptroller of the Currency, Consumer Financial Protection Bureau, Bureau of Industry and Security, Commodity Futures Trading Commission, National Highway Traffic Safety Administration, and Securities and Exchange Commission.

[135] In descending order of the total monetary value of fines imposed: Department of Justice (48.6%), Environmental Protection Agency (15.3%), Federal Housing Finance Agency (8.9%), Securities and Exchange Commission (6%), Food and Drug Administration (4.3%), Office of the Comptroller of the Currency (2.8%), Commodity Futures Trading Commission (2.6%), Consumer Financial Protection Bureau (1.9%), Federal Trade Commission (1.8%), Federal Reserve (1.3%), and National Highway Traffic Safety Administration (0.7%). The data from violation tracker also includes fines levied by state governments, so these eleven agencies in fact make up more than 94.7% of total federal fines. The high proportion of fines attributed to the Department of Justice is in part explained by multiagency referrals.

This does not imply that all, or even the majority, of violations take collateral consequences into account. Agencies are vast enterprises, and different policies guide different aspects of agency decision making. Nonetheless, the list below indicates that the consideration of the financial consequences of imposing liability is widely spread throughout the federal government.

Agency	**Policy**
Department of Justice	In conducting an investigation, determining whether to bring charges, and negotiating plea or other agreements, prosecutors should consider the following factors in reaching a decision as to the proper treatment of a corporate target ...collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution.[136]
Department of Justice (Antitrust)	Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest. For the purpose of such determination, the court shall consider . . . (B) the impact of entry of such judgment upon competition in the relevant market or markets [and] upon the public generally.[137]
Department of Justice (Tax)	Job loss by innocent employees may justify downward departure in criminal tax evasion cases.[138]
Department of Justice (Civil)	Assistant Attorneys General are authorized [to] Accept offers in compromise of claims asserted by the United States in all cases in which a qualified financial expert has determined that the offer in compromise is likely the maximum that the offeror has the ability to pay.[139]

[136] U.S. Dep't of Justice, Justice Manual, Title 9: Criminal, 9-28.300 (Principles of Federal Prosecution of Business Organizations).
[137] 15 U.S.C. § 16(e)(1).
[138] U.S. Dep't of Justice, Justice Manual, Title 6: Tax, 6-4.000 (Criminal Tax Case Procedures).
[139] 28 C.F.R. § 0.160(a)(2).

United States Sentencing Commission	(a) The court shall reduce the fine below that otherwise re- quired . . . to the extent that imposition of such fine would impair its ability to make restitution to victims. (b) The court may impose a fine below that otherwise required ...if the court finds that the organization is not able and, even with the use of a reasonable installment sched- ule, is not likely to become able to pay the minimum fine required.[140]
Environmental Protection Agency	The economic benefit component may be mitigated where recovery would result in plant closings, bankruptcy, or other extreme financial burden.[141]
Environmental Protection Agency	The agency will generally not request penalties that are clearly beyond the means of the violator. Therefore, EPA should consider the ability to pay a penalty in adjusting the preliminary deterrence amount.[142]
Consumer Financial Protection Bureau	In determining the amount of any penalty assessed under para- graph (2), the Bureau or the court shall take into account the appropriateness of the penalty with respect to— (A) the size of financial resources and good faith of the per- son charged.[143]
Consumer Financial Protection Bureau	(3)Notwithstanding paragraph (2), no adjustment shall be ordered– (A)if it would have a significantly adverse im- pact upon the safety or soundness of the creditor, but in any such case, the agency may– (i) require a partial adjustment in an amount which does not have such an impact; or (ii) require the full adjustment, but permit the creditor to make the required adjustment in partial payments over an extended period of time which the agency considers to be reasonable, if (in the case of an agency referred to in paragraph (1), (2), or (3) of subsection (a)), the agency determines that a partial adjustment or making partial payments over an extended period is necessary to avoid causing the

[140] U.S.S.G. § 8C3.3

[141] U.S. Environmental Protection Agency, *Clean Air Act Stationary Source Civil Penalty Policy*, § II(A)(3)(b) (1991).

[142] U.S. Environmental Protection Agency, *Clean Air Act Stationary Source Civil Penalty Policy*, § II(A)(3)(b) (1991).

[143] 12 U.S.C. § 5565(3).

	creditor to become undercapitalized pursuant to section 38 of the Federal Deposit Insurance Act.[144]
Consumer Financial Protection Bureau	In determining the amount of a penalty under subsection (a), consideration shall be given to such factors as the gravity of the offense, any history of prior offenses (including offenses occurring before December 15, 1989), ability to pay the penalty, injury to the public, benefits received, deterrence of future violations, and such other factors as the Director may determine in regulations to be appropriate.[145]
Securities and Exchange Commission	Evidence concerning ability to pay. In any proceeding in which the Commission or the appropriate regulatory agency may impose a penalty under this section, a respondent may present evidence of the respondent's ability to pay such penalty. The Commission or the appropriate regulatory agency may, in its discretion, consider such evidence in determining whether such penalty is in the public interest. Such evidence may relate to the extent of such person's ability to continue in business and the collectability of a penalty, taking into ac- count any other claims of the United States or third parties upon such person's assets and the amount of such person's assets.[146]
Commodity Futures Trading Commission	The Commission may settle claims . . . at less than the principal amount of the claim if . . . [t]he debtor shows an inability to pay the full amount within a reasonable period of time; . . . or [t]he Commission's enforcement policy would be served by settlement of the claim for less than the full amount.[147]
Federal Reserve	Board procedures require that before the setting of any final penalty amount, the parties to be assessed be offered the opportunity to provide Board staff with any evidence, including financial factors, that would either

[144] 15 U.S.C. § 1607(3).
[145] 15 U.S.C. § 1717(a).
[146] 15 U.S.C. § 78u-2(d).
[147] 17 C.F.R. § 143.5.

	weigh against assessment or mitigate the amount of the proposed penalty.[148]
Federal Trade Commission	In determining the amount of such a civil penalty, the court shall take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.[149]
Federal Housing Finance Agency	In determining the amount of a penalty under this section, the Director shall give consideration to such factors as the gravity of the violation, any history of prior violations, the effect of the penalty on the safety and soundness of the regulated entity, any injury to the public, any benefits received, and deterrence of future violations, and any other factors the Director may determine by regulation to be appropriate.[150]
Federal Deposit Insurance Corporation	Mitigating factors.—In determining the amount of any penalty imposed under subparagraph (A), (B), or (C), the appropriate agency shall take into account the appropriateness of the penalty with respect to— (i) the size of financial resources and good faith of the insured depository institution or other person charged.[151]
Department of Health and Human Services	Factors considered in determining the amount of a civil money penalty . . . (d) The financial condition of the covered entity or business associate, consideration of which may include but is not limited to ...[w]hether the imposition of a civil money penalty would jeopardize the ability of the covered entity or business associate to continue to provide, or to pay for, health care.[152]

[148] Letter from Bd. of Governors of the Fed. Rsrv. Sys., Div. Banking Supervision, to the Off. in charge of Supervision at each Fed. Rsrv. Bank (June 3, 1991), SR 91-13, (Civil Money Penalties and the Use of the Civil Money Penalty Assessment Matrix) (https://www.federalreserve.gov/boarddocs/srletters/1991/sr9113.htm).

[149] 15 U.S.C. § 48(m)(1)(C).

[150] 12 U.S.C. § 4636(c)(2).

[151] 12 U.S.C. § 1818(i)(2)(G).

[152] 45 C.F.R. § 160.408(d).

Mining Safety and Health Administration	In determining whether to propose a penalty to be assessed un- der section 110(b), the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the opera- tor's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.[153]
Mining Safety and Health Administration	[If] the penalty will adversely affect the operator's ability to continue in business, the penalty may be reduced.[154]
Department of Defense	(a) Factors to be taken into account in assessing a penalty may include the nature, circumstances, extent, and gravity of the alleged violation; the respondent's degree of culpability; any history of prior offenses; ability to pay; and such other matters as justice may require ...(c)(1) Financial information relevant to a respondent's ability to pay includes, but is not limited to, the value of respondent's cash and liquid assets and non-liquid assets, ability to borrow, net worth, liabilities, income, prior and anticipated profits, expected cash flow, and the respondent's ability to pay in installments over time.[155]
Consumer Product Safety Commission	In determining the amount of any penalty to be sought upon commencing an action seeking to assess a penalty for a violation of section 2068(a) of this title, the Commission shall consider the nature, circumstances, extent, and gravity of the violation, including the nature of the product defect, the severity of the risk of injury, the occurrence or absence of injury, the number of defective products distributed, the appropriateness of such penalty in relation to the size of the business of the person charged, including how to mitigate undue

[153] 30 C.F.R. § 100.3(a)(vi).
[154] 30 C.F.R. § 100.3(h).
[155] 32 C.F.R. § 767.25.

	adverse economic impacts on small businesses, and such other fac- tors as appropriate.[156]
Department of Energy	Regarding the factor of ability of DOE contractors to pay the civil penalties, it is not DOE's intention that the economic impact of a civil penalty is such that it puts a DOE contractor out of business.[157]
Department of Homeland Security	In determining the amount of a civil penalty under paragraphs (a) or (b) of this section, the court or the Secretary or his delegatee shall consider . . . the economic impact of the penalty on the violator, and other such matters as justice may require.[158]
Food and Drug Administration	In determining the amount of a civil penalty under paragraph (1), the Secretary or the court shall take into account the nature, circumstances, extent, and gravity of the act subject to penalty, the person's ability to pay, the effect on the person's ability to continue to do business, any history of prior, similar acts, and such other matters as justice may require.[159]
Department of Transportation (National Highway Transportation Administration)	The appropriateness of such penalty in relation to the size of the business of the respondent, including the potential for undue adverse economic impacts . . . NHTSA may also consider the effect of the penalty on ability of the person to continue to operate. NHTSA may consider a person's ability to pay, including in installments over time, any effect of a penalty on the respondent's ability to continue to do business, and relevant financial factors such as liquidity, solvency, and profitability. NHTSA may also consider whether the business has been deliberately undercapitalized.[160]
Department of the Treasury (Office of the	Examiners should consider the . . . [p]otential adverse impact to bank customers, the Deposit Insurance Fund, or the public.[161]

[156] 15 U.S.C. § 2069(b).
[157] 10 C.F.R. § 824, App. A (VII)(2)(d).
[158] 33 C.F.R. § 159.321(c).
[159] 21 U.S.C. § 335(b)(2).
[160] 49 C.F.R. § 578.8(b)(7); 49 U.S.C. §§ 30161–30172
[161] Office of Comptroller of the Currency, *Bank Supervision; Bank Enforcement Actions*

Comptroller of the Currency)	
Department of Commerce (Bureau of Industry and Security)	In determining the amount of the penalty, the Secretary shall consider . . . the effect on ability to continue to do business, . . . ability to pay the penalty, and such other matters as justice may require.[162]

and Related Matters, POLICIES AND PROCEDURES MANUAL, 5310-3, 6 (Nov. 13, 2018).

[162] 15 U.S.C. § 5408(b)(2).