UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Guidance on Evaluating a Violator's Ability to Pay a Civil Penalty in an Administrative Enforcement Action

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Since the early days of the U.S. Environmental Protection Agency's (the EPA or the Agency) enforcement program, it has been fundamental that the Agency's enforcement actions deter violators and the regulated community from failing to comply with environmental requirements. To achieve this deterrence, EPA's enforcement actions should, at a minimum, recover any economic benefit gained by the violator as a result of its noncompliance and a gravity-based penalty to account for the seriousness and duration of the violation.[1] While the Agency seeks to obtain civil penalties that provide for both specific and general deterrence, the EPA may reduce the civil penalty sought if the violator produces information demonstrating its inability to pay the proposed penalty.

I. Purpose and Scope

This guidance supplements existing guidance issued by the Office of Enforcement and Compliance Assurance (OECA) on how to assess a violator's claim that it lacks the ability to pay all or part of a civil penalty to be assessed as part of an enforcement action. Specifically, this guidance builds upon and does not supersede the 1986 guidance on *Determining a Violator's*

[1] *See Policy on Civil Penalties*, EPA General Enforcement Policy GM-21 (Feb. 16, 1984)(GM-21); *A Framework for Statute-Specific Approaches to Penalty Assessments*, EPA General Enforcement Policy GM-22 (Feb. 16, 1984) (GM-22).

Ability to Pay a Civil Penalty, Thomas L. Adams, Jr. (Dec. 16, 1986), or the *General Policy on Superfund Ability to Pay Determinations*, Barry Breen (Sept. 30, 1997)(1997 Superfund Policy).[2]

This 2015 guidance describes the steps case teams should follow in evaluating ability-to-pay (ATP) claims, and provides an overview of the Agency's tools to assist practitioners in ATP evaluations. It also provides guidance on the type of documentation to consider when determining whether the EPA may accept extended payment plans for administrative penalties. Moreover, the guidance describes, where appropriate, how to structure extended payments.

This guidance applies to EPA administrative enforcement matters involving ATP claims raised by individuals, for-profit entities (including sole proprietorships, corporations, partnerships, limited liability companies (LLCs), and for-profit utilities), governmental entities, federally recognized Indian tribal entities, and not-for-profit entities. This guidance does not apply to federal agencies.[3]

The tools and approaches discussed here may also be useful for civil judicial cases referred by the EPA to the U.S. Department of Justice (DOJ). After a case has been referred, the EPA and the DOJ will work together to determine whether additional information should be collected. The DOJ may rely on EPA's financial analyst,[4] either internal or retained by the Agency, or the DOJ may engage its own analyst.

II. Burden of Proof

A. Where ATP is a Statutory Factor for the EPA to Consider in Determining the Appropriate Penalty

Pursuant to 40 C.F.R. § 22.24, the EPA, as the complainant, "has the burden of going forward with and of proving that the violation occurred as set forth in the complaint and that the proposed penalty . . . is appropriate." As to the appropriateness of a proposed penalty, the burden is on the EPA to prove that it has taken into account the applicable statutory penalty factors. Under many of the environmental statutes administered by the EPA, a violator's ability to pay is one of the factors to be considered in determining the appropriateness of a civil penalty.[5]

[2] This 2015 guidance is intended to apply to administrative civil penalties assessed under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) as well as all other EPA civil penalty authorities. In addition, the 1997 Superfund Policy, which is directly applicable to ability-to-pay determinations in the context of Superfund cost recovery enforcement actions, may also provide a helpful framework for case teams to evaluate ability-to-pay claims concerning civil penalties, in both Superfund and non-Superfund cases.
[3] Because the United States is covered by the Full Faith and Credit Clause of the United States Constitution, federal agencies are excluded from ATP considerations when calculating civil penalties.
[4] If the EPA case team needs more support to conduct financial analysis, please refer to the list of financial analysts and OCE contracting officer representatives on the "Ability to Pay" document library located on EPA Region 5, Office of Regional Counsel's SharePoint site.
[5] *See, e.g.*, Clean Water Act (CWA), § 309(g)(3), 33 U.S.C. § 1319(g)(3); CERCLA, § 109(a)(3), 42 U.S.C. § 9609(a)(3); Emergency Planning and Community Right-to-Know Act (EPCRA), § 325(b)(1)(C), 42 U.S.C. § 11045(b)(1)(C); Act to Prevent Pollution from Ships (APPS), § 9(b), 33 U.S.C. § 1908(b); and the Toxic Substances Control Act (TSCA), §§ 16(a)(2)(B), 207(c)(1)(C), 15 U.S.C. §§ 2615(a)(2)(B), 2647(c)(1)(C). Other statutes direct the EPA to "take into consideration" *inter alia* "the economic impact" or "effect" of the penalty on "the violator." *See, e.g.*, Clean Air Act (CAA), §§ 113(e)(1), 205(c)(2), 42 U.S.C. §§ 7413(e)(1), 7524(c)(2);

Since the Environmental Appeals Board's (EAB or Board) decision in *In re New Waterbury, Ltd.*, it has been a well-settled principle that the EPA needs only to prove that it has considered each of the statutory factors and that its proposed penalty is supported by EPA's analysis of those factors.[6] As concluded by the EAB in *New Waterbury*, "this does not mean that there is any specific burden of proof with respect to any individual factor; rather the burden of proof goes to the Region's consideration of all of the factors."[7]

To meet this burden,[8] the EPA must come forward with evidence to show that it considered the factors and that the penalty is appropriate. This does not require the EPA to establish that "the respondent can, in fact, pay a penalty, but whether a penalty is *appropriate*."[9] In *New Waterbury*, the EAB rejected the respondent's claim that, at a penalty hearing, the EPA must, as part of its prima facie case, "introduce *specific* evidence to show that a respondent has the ability to pay a penalty."[10] Rather, the EPA needs only to "produce some evidence regarding the respondent's *general* financial status from which it can be *inferred* that the respondent's ability to pay should not affect the penalty amount."[11]

Typically, it is sufficient to obtain general financial information directly from the respondent or from publicly available records. For example, administrative law judges (ALJs) have held that the EPA has satisfied its burden of production upon submitting information such as a Dun & Bradstreet report, respondent's credit risk score, and/or documentation of multiple attempts to contact the respondent.[12] Where the EPA has limited information about the respondent's

CWA, §§ 309(d), 311(b)(8), 33 U.S.C. §§ 1319(d), 1321(b)(8); Certain Alaskan Cruise Ship Operations Act (CACSO), 33 U.S.C. § 1901 note (*see* § 1409(c)); Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), § 14(a)(4), 7 U.S.C. § 136*l*(a)(4); and the Safe Drinking Water Act (SDWA), § 1423(c)(4)(B)(v), 42 U.S.C. § 300h-2(c)(4)(B)(v). Although the statutes differ somewhat in the terms that are used, the EPA has read these terms to be analogous to "ability to pay." *See, e.g.,* 45 Fed. Reg. 59770, 59771 (Sept. 10, 1980)(The EPA has "combined the concepts involved in these factors into one 'ability to pay' factor."); *see In re Commercial Cartage Co.,* 7 E.A.D. 784, 807 (EAB 1998)(concluding that "the 'ability to continue in business' factor from section 205(c)(2) of the Clean Air Act is analogous to the 'ability to pay' factor found in other statutory penalty provisions").

[6] 5 E.A.D. 529, 538 (EAB 1994); *see also In re Spitzer Great Lakes, Ltd*., 9 E.A.D. 302, 320 (EAB 2000); *In re JHNY, Inc*., 12 E.A.D. 372, 398 (EAB 2005); and *In re United Global Trading, Inc.*, No. FIFRA-04-2011-3020 EPA at 20 (ALJ Feb. 28, 2014).

[7] *In re New Waterbury* at 539.

[8] *See id.* at 536, n.16 ("The term 'burden of proof' in this context encompasses two concepts: the burden of production, and the burden of persuasion. 4 Stein, *et al., Administrative Law* 24-2 (1994). The first of these to come into play is the burden of production-that is, the 'duty of going forward with the introduction of evidence.' *Id.* at 24-9. This burden may shift during the course of litigation; if a complainant satisfies its burden of production, the burden then shifts to the respondent to produce, or go forward with the introduction of, rebuttal evidence. *Id.* The burden of persuasion comes into play only 'if the parties have sustained their burdens of producing evidence and only when all of the evidence has been introduced.' 2 *McCormick on Evidence* at 426 (Strong, ed. 1992). This burden refers to what a 'litigating proponent must establish in order to persuade the trier of facts of the validity of his claim.' *Administrative Law* at 24-5. Importantly, this burden does not shift between the parties during the course of litigation. *Id.* at 24-8.")

[9] *Id.* at 539.

[10] *Id.* at 541.

[11] *Id*.

[12] *See In re United Global Trading, Inc.* at 19-21 (whereby the ALJ held that the EPA satisfied the relatively low burden of proof when it provided a Dun & Bradstreet report, a locations sales report from American Business Directory, and an annual sales report from Demographics Now).

financial condition when the complaint is filed, "a respondent's ability to pay may be *presumed* until it is put at issue by a respondent."[13]

B. The Respondent Has the Burden of Proving Inability to Pay

If the respondent puts its ability to pay the penalty at issue, the respondent has the burden of proof to show that (1) the EPA failed to consider all of the statutory factors[14] in determining the appropriateness of the penalty, or (2) "through the introduction of additional evidence that despite consideration of all the factors the recommended penalty calculation is not supported and thus is not 'appropriate'."[15]

For the respondent to prove its inability to pay the penalty, it must establish that paying the penalty would cause it to suffer an undue financial hardship and prevent it from paying its ordinary and necessary business expenses.[16] If the respondent fails to proffer specific evidence or does offer evidence but cannot demonstrate its inability to pay, it has failed to meet its burden.[17]

It is not sufficient for the respondent to offer only tax returns with no explanation or supporting documentation of how it cannot pay the penalty. In *In re Bil-Dry Corp.*, the EAB found that the respondent failed to meet its burden of proof.[18] The respondent submitted four years of federal tax returns and testimony from its president, but offered only "conclusory comments that a full penalty assessment would put Respondent out of business [and] failed to provide the type of detailed analysis required to establish Respondent's inability to pay claim."[19] The Board found persuasive testimony from EPA's financial expert, stating that the respondent could have submitted evidence "such as examples of austere measures being taken at the business because of hard times, loan extensions obtained, or statements of back taxes owed."[20]

[13] *In re New Waterbury* at 541; *see also In re Spitzer Great Lakes* at 321.
[14] Under Section 3008 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6928, the ability of a violator to pay a proposed penalty is *not* a factor that the Agency must consider in assessing a civil penalty. However, because ability to pay is considered to be a mitigating factor in EPA's *RCRA Civil Penalty Policy* (June 2003), enforcement personnel should be generally aware of the financial status of the respondent in the event that its ability to pay the proposed penalty is raised as an issue in settlement or at a hearing. As with any mitigating factor or circumstance, the burden to demonstrate inability to pay rests on the respondent. Therefore, in enforcement cases initiated, *e.g.*, under Sections 3008(a) and (g) of RCRA, 42 U.S.C. § 6928(a) and (g), the respondent has the burden of persuasion on its alleged inability to pay. *See In re Bil-Dry Corp.,* 9 E.A.D. 575, 611-12 (EAB 2001). In such cases, however, a respondent's inability to pay usually will be considered *only if* the issue is raised by the respondent. *Id.*
[15] *In re Waterbury* at 539.
[16] *In re Bil-Dry Corp.* at 614.
[17] *See In re JHNY, Inc*. at 383 ("Even financially challenged entities need to toe the line of compliance, and only those entities demonstrating a genuine inability to pay should be removed from the compliance-inducing influence that civil penalty assessment affords."
[18] *In re Bil-Dry Corp.* at 612-13.
[19] *Id*.
[20] *Id*. at 613.

III. Evaluating an Ability to Pay Claim

Once the respondent has raised its ATP claim, the EPA will evaluate whether the respondent has funds that could be applied to a penalty payment while covering its ordinary and necessary business expenses. There are several steps to this process, including: (a) requesting federal tax returns and other pertinent financial information and documentation; (b) selecting the applicable financial computer model and interpreting the results; (c) handling, as appropriate, information claimed by the submitter to be confidential business information; (d) evaluating and resolving the ATP claim; and, in some instances, (e) litigating the claim.

A. Documents Needed for ATP Analysis

Obtaining the respondent's pertinent financial documents is the first step in evaluating its financial condition and ability to pay the proposed penalty. Additionally, EPA's financial computer models require certain numerical inputs from these documents. A for-profit respondent will need to proffer the three to five most recent consecutive years of its federal tax returns filed with the Internal Revenue Service (IRS),[21] together with all schedules and attachments. Individuals and municipalities that do not file federal tax returns or have other relevant financial documents to submit to the EPA will need to fill out the applicable EPA financial data request form.[22]

For-profit businesses generally file the following documents:

- Sole proprietorship or one-member LLCs/partnerships file IRS Form 1040 ("U.S. Individual Income Tax Return") and Schedule C;
- S-corporations file IRS Form 1120S ("U.S. Income Tax Return for an S Corporation") and Schedule K-1;
- C-corporations file IRS Form 1120 ("U.S. Corporation Income Tax Return");
- Multi-member LLCs file IRS Form 8832 ("Entity Classification Election") and can elect to be treated as either an S- or C-corporation; and
- Multi-member partnerships file IRS Form 1065 ("U.S. Return of Partnership Income") and Schedule K-1.

Governmental entities[23] do not file tax forms with the IRS, but generally have the following documents:

- Annual financial reports, bond prospectuses, and budgets, which typically are publicly available on the entity's website or from commercial providers.

[21] The respondent should certify that all responses and information are complete and accurate. The EPA may consider requesting all audit assessments or adjustments along with accompanying notes from the IRS and the respondent's responses to the IRS subsequent to the initial filing for the case team's consideration.
[22] EPA's financial data request forms for individuals and municipalities are available at: http://www2.epa.gov/enforcement/penalty-and-financial-models.
[23] Governmental entities include special districts that are a form of local government created by a local community to meet a specific public need and may be supported by taxes and user fees. Examples include airports, cemeteries, community services, drainage/flood control/water conservation, fire protection, healthcare/hospitals, harbors/ports, irrigation, libraries, police protection, recreation and parks, resource conservation, sanitation/sewer, transit, utility, water, and waste management agencies.

Not-for-profit entities generally file the following documents:

- IRS Form 990 if gross receipts are more than $200,000 or assets greater than $500,000; and
- Annual financial reports.

The case team generally requests the tax returns and other relevant financial reports through correspondence or via initial pre-filing notices with the respondent. To the extent that the EPA requests financial documentation through informal conversations, it is important to memorialize such requests in writing to respondent so that the case team can introduce such written requests before the ALJ if the respondent fails to provide documents in support of its ATP claim.

B. Which EPA Financial Model to Use and When

The EPA has developed a series of financial computer models[24] – ABEL, INDIPAY, and MUNIPAY – designed to estimate a violator's ability to pay. ABEL estimates a company's future cash flow based on past performance, and should be used for S- or C-corporations or multi-member LLC/partnerships. INDIPAY estimates the amount an individual can afford to pay based on excess cash flow and debt capacity, and should be used for individuals, sole proprietorships or one-member LLC/partnerships. MUNIPAY estimates a non-federal governmental entity's level of affordable expenditures based on its available funds, debt capacity, and demographic characteristics (*e.g.*, average annual income). Annual financial reports, bond prospectuses, budgets, or the EPA financial data request form for governmental entities are to be used with the MUNIPAY[25] model. The EPA does not have a corresponding model for not-for-profit entities.

The financial computer models are generally only used for settlement purposes, and the case team is not required to use the models. However, it is advised that EPA staff run the applicable model because it provides a quick estimate of ability to pay. The models also provide a baseline of financial documents to request from the respondent and can deter frivolous ATP claims. The case team also may find the models helpful as a starting point in discussing ability to pay and, oftentimes, use of the models can result in a quick settlement, especially when the penalty is too small to warrant the expense of retaining financial experts.

For cases involving large penalties, complex corporate structures, federally recognized tribal entities, and not-for-profit entities, the case team is advised to contact a financial analyst for assistance.

[24] These models are located at: http://www2.epa.gov/enforcement/penalty-and-financial-models.

[25] Governmental entities can be evaluated with the basic MUNIPAY principles of looking at the non-restricted fund balances and assessing the entity's capacity to assume additional debt. If there are concerns about the interpretation of financial data, the case team generally should consult with a financial analyst. Also, if MUNIPAY produces inconclusive results or if a governmental entity submits documentation of a unique financial condition, the case team generally should consult with a financial analyst and request that the governmental entity to provide additional information, if needed.

C. Conducting the ATP Analysis

1. Evaluating the Model Result

When the model concludes that the respondent can pay the penalty, the case team can be reasonably assured that, based on the available financial documentation, the penalty will not burden the respondent with an undue financial hardship. If the respondent continues to claim an undue financial hardship, it should provide further documentation of the circumstances upon which that assertion is based (*e.g.*, job loss, fire at facility, loss of major client, substantial outstanding debt with burdensome debt service payments, default on debt payments or financial covenant agreements, bankruptcy,[26] no assets,[27] significant unpaid tax liens and liabilities,[28] and/or other significant change in financial status). The case team may consult a financial analyst or expert to review the documentation provided and evaluate the validity of the respondent's assertions.

Conversely, the model could provide a result indicating a low, or zero,[29] probability that the respondent can pay the penalty. In many cases, the case team should be able to rely on this result and adjust the penalty accordingly. However, there may be certain scenarios that suggest further analysis beyond the model results may be needed. For example:

- ***Models Generate Flags Warranting Further Inquiry*****:** The models may generate a flag or message when certain inconsistencies are identified from the inputs (*e.g.*, "the most recent year's cash flow is significantly worse than its historic average, which could mean that ABEL's future cash flow projections are overstated."). A financial analyst can evaluate such model flags to determine whether additional information should be requested, and to more accurately assess the respondent's ability to pay the penalty.

- ***Respondent's Cash Flow Is Understated*****:** The model does not capture potential sources of funds beyond the reported financial data. The respondent's cash flow could be understated if it has been depleted through nonessential or excessive business expenses (*e.g.*, officer compensation, travel and entertainment expenses, charitable contributions, cash dividends paid to shareholders, and expensive cars and homes). In these scenarios, the respondent may have money to pay the penalty, and it must decide how to make this money available by reducing other costs. The respondent may liquidate certain nonessential assets, call in loans made to officers, acquire additional loans (if it has

[26] A bankruptcy filing will not involve an ATP analysis because any penalties assessed can only be collected pursuant to the Bankruptcy Code. Before bringing an enforcement action against a debtor in bankruptcy, the regional legal bankruptcy coordinator should be consulted. *See* *Guidance on EPA Participation in Bankruptcy Cases*, Steven A. Herman (Sept. 30, 1997).
[27] If the respondent has no assets, it is not necessarily indicative of an inability to pay. For example, in the service industries where equipment is leased, the balance sheet may not reflect any assets.
[28] This can be verified through credit reports or Dunn & Bradstreet reports.
[29] Even where the economic model generates a zero ATP result, it is not inappropriate for the EPA to seek and accept a nominal penalty in settlement. For example the *Lead-Based Paint Consolidated ERPP* at p. 22, fn. 31 states that: "[e]ach financial analysis of a respondent's ability to pay should assume an ability to pay at least a small penalty to acknowledge and reinforce the respondent's obligations to comply with the regulatory requirements cited as violations in the civil administrative complaint."

sufficient debt capacity), or borrow money from its parent company or subsidiaries. The case team may find it useful to obtain a financial analyst or investigator to help identify other sources of funds or conduct a trend analysis of historical expenses to identify excessive expenses made out of line with historical patterns, such as an accelerated rate of paying back long-term debt.

- ***Related Corporate Entities*****:** In addition to reviewing the liable party's tax returns and related financial information, the case team should request information on the respondent's relationship with affiliated corporations, partnerships, and other business enterprises. Examples of such a relationship may include: related party transactions (including rent below market value), loan or security agreements, coinsurance, equity and debt participation, intermingling of property or funds, and/or officer and shareholder compensation. The case team may find that it is appropriate to look to the assets of the related business enterprise to pay a penalty when the liable party does not have the resources to pay the penalty on its own.[30] In the event that the case team's investigation reveals that the liable party has been intentionally undercapitalized, has engaged in profit sharing, or has acted at variance with its official corporate form, the case team should evaluate veil piercing and alter ego theories. Similarly, the case team should be alert to fact patterns that may give rise to a fraudulent conveyance claim under the Federal Debt Collection Procedures Act.[31]

  Regardless of the model results, the case team may follow up with clarifying questions to the respondent after the initial data request. If the respondent does not provide sufficient financial information and support that it lacks the financial resources to pay the civil penalty, the case team should presume that the respondent is able to pay the proposed penalty in full.

- ***Evaluating Real Estate Assets*****:** Real estate is a significant asset for many respondents, including companies and individuals, and has the potential to contribute to a penalty payment. In the case of companies, investigating real estate assets can help identify significant discrepancies between the real estate's reported book value on the balance sheet and the actual current market value. The case team may also determine the value of the mortgages or liens secured by the real estate. When the market value is much higher than the mortgage balance, there may be potential for opening an equity line or obtaining additional debt secured by the real estate to support a penalty payment.

  In cases involving individuals and sole proprietors, the respondent may own real estate, including rental or other commercial property that generates income. The INDIPAY model considers whether the individual has the cash flow to pay for a loan that could be applied to the penalty payment. That is, the model calculates the maximum affordable annual debt carried by the respondent, including credit card and mortgage debt, as compared to the respondent's total income. For example, under the INDIPAY model, an

[30] *See*, *e.g.*, *In re New Waterbury* at 547-50.
[31] 28 U.S.C. §§ 3301-3308.

individual lacks ability to pay if it carries more than 36 percent[32] of its average income in debt. Assuming the respondent has the capacity to assume additional debt to finance the payment of a penalty, the respondent can work with a lender to determine whether such a loan is feasible, considering the respondent's total assets.

- ***Other Entities*:** If the respondent is organized as a governmental entity, a federally recognized Indian tribe or related tribal entity, or a not-for profit entity, a traditional ATP analysis may not be appropriate.

  - **Governmental Entities:** Some governmental entities, particularly small municipalities or utility districts, may have unique financial conditions. If there are concerns about the interpretation of financial data, the case team should consult with a financial analyst. For cases against governmental entities that will involve extensive and costly injunctive relief (*e.g.*, cases involving significant violations of the Clean Water Act or Safe Drinking Water Act), it is recommended that the case team consult with a financial analyst.[33]

  - **Federally Recognized Indian Tribal Entities and Related Entities:** Unique and complicated legal and financial issues arise in the context of federally recognized Indian tribes and related entities.[34] These include issues affected by federal law, such as treaties, tribal and state laws, judicial decisions, federal government assistance, Executive Orders, and Executive Branch policies and guidance.[35] Our experience has been that some tribes have neither the kinds of financial documentation necessary for EPA to evaluate an ATP claim nor adequate revenue sources, although they may own and operate both for-profit and not-for-profit businesses. The case team should, in all cases, seek the advice and expertise of a financial analyst and contact OECA and its Office of Regional Counsel (ORC) Indian law attorneys on all ATP issues involving tribes and related entities. These offices can coordinate with other EPA tribal experts in the Office of International and Tribal Affairs, the Office of General Counsel, and the regions, who can provide advice on the intricacies of federal Indian law and policy, such as tribal sovereign immunity, tribal corporate liability, and tribal consultation and coordination.[36]

[32] The 36-percent default value in the INDIPAY model for the maximum debt payments as a percent of income is based upon the criteria that commercial lenders commonly employ.
[33] Nothing in this guidance is meant to serve as an Agency interpretation of Clean Water Act § 309(e), 33 U.S.C. § 1319(e). For further guidance on calculating penalties in municipal cases, practitioners may refer to the National Municipal Litigation Consideration section of the *Interim Clean Water Act Settlement Penalty Policy* at 17-20 (Mar. 1, 1995).
[34] The Bureau of Indian Affairs within the U.S. Department of the Interior maintains and updates a list of federally recognized Indian tribes. Related tribal entities can include, but are not limited to, corporations that are related to or part of a tribe, and independent or semi-independent boards operated by a tribe or other entity.
[35] State laws are normally inapplicable within areas of "Indian country," as defined in 18 U.S.C. § 1151, absent special circumstances. Consult Indian law experts on the specific facts to determine whether federal, tribal, or state law is applicable in a given situation.
[36] *See* *Guidance on the Enforcement Principles Outlined in the 1984 Indian Policy*, Steven A. Herman (Jan. 17, 2001), and *Questions and Answers on the Tribal Enforcement Process*, Walker B. Smith (Apr. 17, 2007), which address civil administrative and judicial actions involving tribes and implement the *EPA Policy for the*

- **Not-for-Profit Entities:** Not-for-profit or charitable entities can include a wide range of entities, including schools and universities, housing, medical care, and churches or other religious institutions. Not-for-profit entities may own real estate and operate facilities that could be involved in environmental violations. Income for non-profits may come from fees charged for services, grants, and donations. In the context of an ATP analysis, a not-for-profit entity will be asked to provide the last three years of IRS Form 990 filings, if such a filing was made, and also the last three years of financial statements, including statements of receipts and expenses, assets and liabilities, and any related fund accounting. The ATP evaluation will depend on the size, nature, and stability of the not-for-profit entity. For example, a college may have fairly steady revenue sources (tuition, donations) and also relatively consistent expenses, but an entity supported entirely by donations may be far less stable. The analyst generally may consider trends in the entity's performance, the size of the entity, whether fund balances are growing or declining, the reasonableness of expenditures and salaries for managers, and other line items that appear to be unusual or one-time in nature. The entity's ability to pay will depend, in part, on whether excess funds are being generated from the entity's activities, and whether there is an excess amount available in unrestricted funds, similar to the government evaluation.

Although the ATP models are useful financial analysis tools, the financial model used may not yield a conclusive result in some cases. Many factors must be weighed in determining whether to rely on the model result or to engage in further financial analysis. For example, a high-penalty case or a particularly complex corporate respondent may warrant expending the resources to retain a financial analyst. In contrast, the case team may rely on the model result and less extensive documentation in a case involving straightforward facts and/or a low penalty amount.

2. Gathering and Evaluating Financial Information Beyond Federal Tax Returns

In general, the ATP evaluation will be an iterative process. In determining whether to ask for more information and conduct further analysis, the case team may assess the significance of the uncertainty and the importance of missing information to the ultimate inability to pay evaluation and overall case. In many situations, the case team will request additional financial documentation to fully evaluate the respondent's claim. The documentation that the team requests will depend on the issues or concerns that have been identified. At this stage, the case team may decide to seek advice from a financial analyst as to which documents would be most helpful to further evaluate the ATP claim.

Below is a chart delineating some of the most typically requested information, including a short description of each category's usefulness to the ATP analysis.

Administration of Environmental Programs on Indian Reservations, William D. Ruckelshaus (Nov. 8, 1984); *see also* *EPA Policy on Consultation and Coordination with Indian Tribes*, Lisa P. Jackson (May 4, 2011).

Financial Information	Basis for Requesting Financial Information
For Corporations and Multi-member LLCs/Partnerships	
Financial Statements Prepared by Outside Accounting Firm	• Financial statements contain additional information beyond tax returns, including a statement of cash flow and detailed notes and the auditor's opinion regarding the status of the company. • Financial statements may be based on a compilation, review, or audit.
Budgets and Year-to-Date Results	• Budgets and year-to-date results provide up-to-date information on performance and cash flow.
Asset Ledger	• An asset ledger provides the dates assets were placed into service, costs, and depreciation to date.
Loan and Mortgage Agreements	• Loan and mortgage agreements provide information on financial ratio requirements, guarantors and collateral or other security.
Federal Tax Returns of Related Financial Entities	• Federal tax returns of related financial entities may determine whether a related entity's assets can fund the penalty payment when respondent claims inability to pay.
SEC Filing DEF 14A Proxy Statements	• SEC Filing DEF 14A Proxy Statements may include a list of owners of more than 5% of the company, management salaries, members of the board of directors, and board compensation.
For Individuals, Sole Proprietorships, and One-member LLCs/Partnerships	
Individual Data Request Form	• Individual data request forms provide information on income, expenses, assets, liabilities, legal proceedings, and spousal holdings. • This data should be verified through documentation and independent research.
Real Estate Property Tax Records	• Real estate property tax records provide information on valuation, location, and nature of property.
W-2 Wage and Tax Statements	• W-2 statements can be used to verify income and related deductions.
Bank, Mortgage and Credit Card Statements	• Bank, mortgage, and credit card statements can be used to verify cash availability, level of expenditure and indebtedness.

In addition to requesting financial data, the case team is encouraged to conduct online searches of publicly available information related to the respondent's financial status. For example, credit reports include information on a company's financial condition, credit level, and credibility. A Dun & Bradstreet report may indicate gross sales revenue and number of employees, as well as identify the credit history, the corporate officers, and corporate address. Secretary of State websites provide a history of the entity's corporate filings and annual reports, and include

information about officers and basic financial data. A publicly traded company will publish annual and quarterly reports on its website as well as on the U.S. Securities and Exchange Commission's EDGAR system. In addition, investor presentations and transcripts of quarterly calls with analysts may be available for public companies.

3. Confidentiality of Financial Information[37]

The case team should be mindful of the sensitivity of a respondent's financial information as well as handling confidential business information (CBI). Publicly available information, including published annual reports, is not entitled to confidential treatment. However, if the respondent claims any information submitted as CBI, the case team should ask the respondent to identify CBI with specificity (rather than stamping each page as CBI).

The 40 C.F.R. Part 2, Subpart B, regulations set forth at 40 C.F.R. §§ 2.201 through 2.215 establish certain "basic rules" governing business confidentiality claims, the handling by the EPA of business information which is or may be entitled to confidential treatment, and determinations by the EPA of whether information is entitled to confidential treatment for reasons of business confidentiality.[38] The additional Subpart B regulations set forth at 40 C.F.R. §§ 2.301 through 2.311 provide "special rules" for treatment of certain categories of business information obtained under various statutory provisions.[39] The basic rules of §§ 2.201 through 2.215 govern, except to the extent that they are modified or supplanted by the special rules of §§ 2.301 through 2.311 or in the event of a conflict between the rules, in which case the special rule which is applicable to the particular information in question shall govern. For example, if a company voluntarily provides financial information claimed as "business confidential" to support the ATP claim or to show that it lacks financial resources to pay the penalty, the information submitted would be governed by the basic rules set forth in 40 C.F.R. §§ 2.201 through 2.215. In contrast, if a company submits financial information claimed as business confidential pursuant to an EPA request for information under a specific statute, then it may be likely that the special rules would apply to the submitted information.

The regulations in 40 C.F.R. Part 2, Subsection B also address specific requirements for overall handling of CBI. In accordance with 40 C.F.R. § 2.203, when requesting financial information, the EPA must give notice to a respondent that it may assert a business confidentiality claim, and that information covered by such a claim will be disclosed by the EPA only to the extent, and by means of the procedures, set forth in 40 C.F.R. Part 2, Subpart B. EPA's notice must contain a statement that, if the respondent submits financial information without a confidentiality claim,

[37] The EPA is governed by the Right to Financial Privacy Act of 1978, 12 U.S.C. §§ 3401-3422 (RFPA). This statute protects the confidentiality of personal financial records by requiring that federal government agencies provide individuals with notice and an opportunity to object before a bank or other specified institution can disclose personal financial information to a federal government agency. The RFPA creates a statutory right of privacy on behalf of a customer of a financial institution in the records of the institution pertaining to him or her. *See* 12 U.S.C. §§ 3403, 3410. Generally, the RFPA prohibits financial institutions from providing any governmental authority access to, or copies of, information in the financial records of any customer unless the customer has authorized such disclosure, 12 U.S.C. § 3404, or unless certain legal requirements—such as, for example, compliance with an administrative subpoena, search warrant or judicial subpoena—have been met. *See* 12 U.S.C. § 3402.

[38] *See* 40 C.F.R. § 2.202(a).

[39] *See* 40 C.F.R. § 2.202(b).

the EPA is permitted by applicable law to release the information without further notice to the respondent. It is important to note[40] that, if the respondent claims information submitted to the EPA as CBI, then the EPA must treat the information as CBI, unless the EPA makes an adverse determination that such claim is not entitled to confidential treatment. Where the EPA determines that information is not CBI, such information may be released in response to a request pursuant to the Freedom of Information Act.

Additionally, in cases involving individuals or small closely held businesses, financial information that a respondent submits may include personal information, the disclosure of which could constitute an unwarranted invasion of personal privacy.[41] In these instances, the EPA will carefully examine this information in order to protect against the public release of such information.[42]

4. Considerations Regarding the Administrative Penalty

Based on the financial analysis, the case team will determine if the respondent can pay the full or reduced penalty amount, but it is generally left to the respondent to decide how it will raise the funds. The respondent's funding options may include: using available cash; selling assets; increasing debt by personal or commercial borrowing; increasing equity by selling stock; delaying distribution of profits; and/or delaying planned future investments. When the respondent demonstrates that there is no or limited ability to pay or to borrow money for payment, the case team will typically work with the respondent to determine how much it can pay, and consider whether an extended payment plan is appropriate.[43] The case team has an obligation to support its conclusion with full documentation.[44]

In certain circumstances, a respondent claiming an inability to pay all of a civil penalty may propose to complete a supplemental environmental project (SEP) as part of the settlement. As with all SEPs, the case team will only consider SEPs in ATP settlements that conform to EPA's SEP Policy,[45] and acceptance of the proposed SEP is at EPA's discretion. In particular, note that the SEP Policy makes clear that an acceptable SEP must have a nexus to the underlying violations and that the violator must pay a minimum penalty in addition to implementing the SEP.

[40] If a CBI claim is received after the information itself is received, the EPA will make such efforts as are administratively practicable to associate the late claim with the previously submitted information in EPA files. However, the EPA cannot assure the effectiveness of such efforts, in light of the possibility of prior disclosure or widespread prior dissemination of information. *See* 40 C.F.R. § 2.203(c).
[41] *See* 5 U.S.C. § 552(b)(6).
[42] *See* 5 U.S.C. § 552(a).
[43] *See infra* section III, pp. 15-18 for guidance on when extended payment plans for administrative penalties are appropriate and how they should be structured.
[44] *See* GM-22 at 27 ("[T]o promote consistency, it is essential that each case file contain a complete description of how each penalty was developed."); *see also Documenting Penalty Calculations and Justifications in EPA Enforcement Actions*, James M. Strock (Aug. 9, 1990)(Strock Memo).
[45] The *2015 Update to the 1998 EPA SEP Policy* and any subsequent updates to the SEP Policy supersede "non-monetary alternatives" which are referenced in GM-22 at 23-24.

IV. Litigating an Ability-to-Pay Claim in Administrative Enforcement Actions

A. Pre-Filing Negotiations

Once the case team initiates discussions on the penalty amount with the respondent, the case team should make clear to the respondent that if the respondent believes it has an inability to pay the proposed penalty, it should explain why and also submit supporting documentation such as financial statements, balance sheets, and other pertinent financial information. The case team's request[46] for documentation should be stated in an email, informal correspondence, or a show cause letter. This approach allows the respondent to work with the case team early in the process to resolve any ATP issues. It also helps the case team to create a record early on so that the respondent cannot claim later that it was unaware of options to address its alleged inability to pay the penalty. During negotiations at settlement meetings, the case team should ask whether the respondent will submit supporting financial records. The request and response should be documented.

B. Prehearing Information Exchange

Pursuant to 40 C.F.R. § 22.19(a)(3), the respondent is obligated to "explain in its prehearing information exchange why the proposed penalty should be reduced or eliminated." If a respondent fails to raise an ATP claim after being notified of its burden, the presiding officer could deem the respondent to have waived any ATP objection to the penalty.[47] If ability to pay is raised after commencement of administrative litigation, the case team should generally consult with a financial analyst and list an expert witness who can testify to the respondent's financial capability in EPA's initial prehearing exchange.

After the prehearing information exchange, both parties can move for additional discovery, and the Presiding Officer may order such discovery only if it "seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily . . . ."[48] It is imperative that the case team establish a record of its repeated requests[49] as well as the respondent's repeated failures to produce requested financial

[46] Where the enforcement case team believes it is highly probable that the company has an ability to pay (*i.e.*, if the respondent is a large Fortune 500 company or where it should be readily discernable that ability to pay the penalty should not reasonably present an issue of concern, especially when considering the size of the penalty), then the case team need not initiate an ATP discussion and unnecessarily open a path that may also be used for purposes of delay or for other strategic advantage, such as causing the EPA case team to spend additional time and unwarranted resources exploring a non-existent fact when resources can be better directed towards the pursuit of settlement.
[47] *See In re New Waterbury* at 542 ("In this connection, where a respondent does not raise its ability to pay as an issue in its answer, or fails to produce any evidence to support an inability to pay claim after being apprised of that obligation during the pre-hearing process, the Region may properly argue and the presiding officer may conclude that any objection to the penalty based upon ability to pay has been waived under the Agency's procedural rules [footnote in opinion omitted] and thus this factor does not warrant a reduction of the proposed penalty.") *See also In re JHNY* at 399, where respondent submitted financial information supporting its ATP claim only during settlement negotiations but failed to comply with the prehearing exchange requirements to provide documentary evidence demonstrating its inability to pay the proposed penalty. Here, the respondent "waived its ability to contest the Region's penalty proposal on this basis."
[48] *See* 40 C.F.R. § 22.19(e)(ii).
[49] *See In re Chase,* RCRA (9006) Appeal No. 13-04, slip.op. at 27 (EAB Aug. 1, 2014).

documentation to the EPA, for expert witness review and analysis prior to hearing. The case team may seek to exclude, as prejudicial, the presentation and introduction of any required financial information that the respondent has failed to provide at least 15 days prior to the hearing, without good cause for such failure.[50]

It is equally important for the case team to establish any failure, by the respondent, to promptly supplement or correct financial information provided to the EPA in a prehearing information exchange, or in response to a request for information or a discovery order, upon learning that any of that information is incomplete, inaccurate, or outdated.[51] If the case team can establish any such failure, it may then move for an order to compel production of that information[52] and/or for an *in limine* order seeking to exclude the prior incomplete, inaccurate, or outdated information from presentation and introduction into evidence at the hearing. Even when financial documentation is provided, it should demonstrate how the penalty will cause the respondent to suffer an undue financial hardship.[53] Without proffering the necessary financial documentation as well as a showing of undue financial hardship, the respondent has not met its burden of proof and may be required to pay the penalty in full.

If the Presiding Officer issues an order to compel production and the respondent fails to comply with such order,[54] the case team should consider requesting that the Presiding Officer issue an order drawing an adverse inference to the respondent's ATP claim and/or precluding the respondent from presenting or introducing into evidence at hearing any documents or information pertaining to a claim of financial hardship or inability to pay.[55]

V. Extended Payments of Civil Penalties

As a general rule, the EPA requires respondents to pay civil administrative penalties in full within 30 days of the effective date of the final administrative order[56] or settlement agreement.[57] Allowing a respondent more than 30 days to pay civil penalties has the potential to undermine the deterrence value of penalties and may confer a benefit to the respondent because of the time value of money resulting from a delayed or extended payment schedule. In addition, the use of extended payment schedules increases the resources needed by the federal government to track when payments are due and ensure that they are paid in a timely manner.[58] Finally, allowing

[50] *See* 40 C.F.R. § 22.22(a)(1).
[51] *See* 40 C.F.R. § 22.19(f).
[52] *See In re Chase* at 28.
[53] *See In re Bil-Dry Corp.* at 610-12.
[54] *See In re Chase* at 29-30.
[55] *See* 40 C.F.R. § 22.19(g).
[56] Pursuant to 40 C.F.R. § 22.31(c), "The respondent shall pay the full amount of any civil penalty assessed in the final order within 30 days after the effective date of the final order unless otherwise ordered." A final order is effective upon filing with the Clerk. *See* 40 C.F.R. §§ 22.31(b), 22.5(a).
[57] The DOJ has a similar policy. In the context of civil judicial cases, the case team should consult its DOJ counterparts on how to respond to defendants' requests for extended payment plans.
[58] Payments over time have long been recognized under Agency policy as "a real burden on the Agency and should only be considered on rare occasions." *See* GM-22 at 23, and applicable statute-specific penalty policies (*e.g.*, *Clean Air Act Mobile Source Civil Penalty Policy – Vehicle and Engine Certification Requirements*, Granta Y. Nakayama (Jan. 16, 2009) at 28 ("[A]dministration of time-payments is a burden on the Agency, so that this option should be

extended payment schedules may increase the risk that the respondent will not pay the full penalty assessed (*e.g.*, the respondent may file for bankruptcy before the installment payments are fully paid). Accordingly, settlements should strive to require payment of the full penalty in a single payment within 30 days of the effective date of the enforcement settlement whenever practicable.

A limited exception to this practice may be acceptable if a respondent has demonstrated an inability to pay the entire penalty in a single payment within the 30-day period (*e.g.*, due to fluctuations in cash flow), and it is in the Agency's best interest to accept an extended payment plan.[59] But accepting penalty payments over time may not be in the Agency's best interest if it is only as a means to obtain a higher penalty. If a single, lesser penalty amount is appropriate based on the facts of the case, then no meaningful objective is served by taking on the additional and avoidable burdens associated with tracking payments over time. Here, the case team should balance the goal of obtaining a penalty sufficient to deter future violations against the possibility that the respondent will suffer new financial difficulties before it is able to pay off its penalty obligations. For purposes of this guidance, the term "extended payment" plan refers to one of two scenarios: (1) the respondent is required to pay the civil penalty in full as a single payment at a date that is beyond the 30-day effective date; or (2) the respondent is required to pay the penalty in installments.

A. Financial Documentation for Evaluating Requests for Extended Payments in Administrative Enforcement Actions

When evaluating a respondent's request for an extended payment plan in the context of an administrative enforcement action, the case team should require the respondent to submit documentation of its inability to pay the full civil penalty within 30 days. The level of documentation and degree of financial analysis needed will vary depending upon the length of the extended payment schedule sought and the amount of the civil penalty to be assessed. Consistent with longstanding EPA policy on the necessity of documenting the basis for the civil penalty, the case team should ensure that the case file contains documentation relied upon as support for agreeing to an extended payment schedule.[60]

The following scenarios are intended to guide the case team in administrative actions on the level of documentation that a respondent should be required to produce and the financial analysis the Agency should undertake before accepting an extended payment of a civil penalty.

- ***For payments up to 6 months from the effective date*:** If the case team deems the circumstances appropriate to facilitate a quick settlement without the excessive

considered only if the Agency is convinced it is not possible for the violator to obtain the funds necessary to pay the full penalty through borrowing money or the sale of assets.")).

[59] A determination of whether a respondent has demonstrated an inability to pay the full amount of a penalty is required as a condition for considering installment payments. *See* GM-22 at 23 and applicable statute-specific penalty policies (*e.g.*, *Clean Air Act Stationary Source Penalty Policy* at 20, William G. Rosenberg and Edward E. Reich (Oct. 25, 1991); *Interim Clean Water Act Settlement Penalty Policy* at 21 (Mar. 1, 1995); *RCRA Civil Penalty Policy* at 39-40, John P. Suarez (June 23, 2003)).

[60] *See* GM-22 at 27 ("[T]o promote consistency, it is essential that each case file contain a complete description of how each penalty was developed."); *see also* Strock Memo.

commitment of Agency resources for financial analysis (*e.g.*, small penalty assessed against a small business), the Agency will require the respondent to submit a signed, certified statement[61] of its current financial condition articulating a basis for its contention that it cannot pay the penalty within 30 days of the effective date without experiencing an undue financial hardship. The installment payment shall be sufficient in size and frequency to liquidate the debt in not more than six months, unless the EPA determines that a longer period is required.

- ***For payments of 6 to 12 months from the effective date*:** If the respondent's financial information has not already been submitted to the EPA, the case team should require the respondent to submit its most recent year's federal income tax return and/or financial statements. The respondent must submit a signed, certified statement of its current financial condition articulating a basis for its contention that it cannot pay the penalty within 30 days of the effective date without experiencing an undue financial hardship. The respondent should also submit any additional information that the EPA may require to be reviewed by the financial analyst. The installment payment shall be sufficient in size and frequency to liquidate the debt in not more than one year, unless the EPA determines that a longer period is required.

- ***For payments of more than 12 months from the effective date*:**[62] If the respondent's financial information has not already been submitted to the EPA, the case team should require the respondent to submit at least three years of income tax returns and financial statements. The respondent must submit a signed, certified statement of its current financial condition articulating a basis for its contention that it cannot pay the penalty within 30 days of the effective date without experiencing an undue financial hardship. The respondent should also submit any additional information that the EPA may require to be reviewed by the financial analyst. The installment payment shall be sufficient in size and frequency to liquidate the debt in not more than three years, unless the EPA determines that a longer period is required.[63]

B. Interest Rates to Be Assessed for Payments Made After 30 Days of the Effective Date

Interest should be assessed on all delayed single-payments or installment payments. For administrative enforcement cases, the EPA has discretion to charge an interest rate amount that is

[61] The statement should be signed by a responsible corporate officer who must certify, under penalty of law, that the information contained in such statement, and the accompanying documents, are true, accurate, and complete based upon personal knowledge or personal inquiry of the person or persons directly responsible for gathering the information, and that he/she is aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for knowing violations.
[62] The EPA prefers not to extend payment plans beyond three years. This preference for a general three-year limitation on length of installment payments is consistent with the EPA and the U.S. Treasury regulations governing the acceptance of installment payments. *Cf.* 40 C.F.R. § 13.18(a) and 31 C.F.R. § 901.8(b).
[63] *Cf.* 40 C.F.R. § 13.18(a).

necessary to protect the interest of the government.[64] It is recommended that the case team assess the IRS underpayment rate[65] or the prime rate set by the major banks, as these rates approximate the average interest rate at which the respondent is able to borrow money. Assessing the underpayment rate also reduces the likelihood that the respondent will opt to pay the penalty in installments rather than secure private financing of its penalty debt. Alternatively, if the case involves a small penalty and short payment plan (*i.e.*, presenting a greater likelihood that the penalty will be paid in full), the case team may assess a lower rate, such as the Treasury current value of funds rate.[66] In all cases, the team should consider the size of the penalty and length of the payment plan in determining the interest rate to be assessed, and should document the reasons for assessing the interest rate.

C. Provisions for Early and Late Payments

Even where the settlement allows the respondent to pay the civil penalty on an extended payment schedule, the settlement should provide incentives for the respondent to pay earlier than provided under the settlement. For example, the settlement should make clear that the respondent will be required to pay the interest only on the balance due and for the length of time beyond 30 days it takes the respondent to pay the civil penalty in full.

Any settlement requiring the payment of a civil penalty, whether within 30 days or under an extended schedule, should specifically state the consequences if the respondent fails to make a timely penalty payment, including interest to be charged, stipulated penalties that may be assessed and administrative costs to be incurred. In determining the interest and administrative costs to be assessed, the case team is advised to check the language of the underlying penalty authority. For example, where a respondent fails to pay administrative penalties assessed under section 113(d) of the Clean Air Act, 42 U.S.C. § 7413(d), section 113(d)(5) requires the application of the IRS underpayment rate established pursuant to 26 U.S.C. § 6221(a)(2).[67]

In addition, the case team should generally include stipulated penalties for late or non-payments and/or an acceleration clause whereby the full amount of the penalty is immediately due and

[64] 31 U.S.C. § 3717, and implementing EPA and U.S. Treasury regulations, also provide flexibility in assessing a higher interest rate when accepting installment payments in the collections context if the Agency determines that a higher interest is necessary to protect the interests of the United States. *Cf.* 40 C.F.R. § 13.11(a)(1) and 31 C.F.R. § 901.9(b)(2). In civil judicial cases, in contrast, interest is generally charged pursuant to 28 U.S.C. § 1961.
[65] 26 U.S.C. § 6621(a)(2) states that the underpayment rate established under this section shall be the sum of the federal short-term rate determined under subsection (b), plus 3 percentage points. The IRS determines this rate on a quarterly basis. Entering "underpayment rate" into the search engine on the IRS website should provide the latest press release with a link to the current Revenue Ruling specifying the underpayment rate.
[66] *Cf.* 40 C.F.R. § 13.11(a)(1)(which provides for assessing an annual rate of interest that is equal to the rate of the current value of funds to the United States Treasury (*i.e.,* the Treasury tax and loan account rate) on installment payments in the collection context); *cf.* 31 C.F.R. § 901.9(b)(3)(which provides for assessing the current value of funds to the Treasury when a debtor defaults on a repayment agreement and seeks to enter into a new agreement).
[67] Section 113(d)(5) of the Clean Air Act, 42 U.S.C. § 7413(d)(5), also provides that "[a]ny person who fails to pay [the civil penalty] on a timely basis . . . shall be required to pay . . . the United States enforcement expenses, including but not limited to attorney fees and costs incurred by the United States for collection proceedings and a quarterly nonpayment penalty for each such quarter during which such failure to pay persists. *Such nonpayment penalty shall be 10 percent of the aggregate amount of such person's outstanding penalties and nonpayment penalties accrued as of the beginning of such quarter*." [Emphasis added.]

owing upon a late or non-payment.[68] It may also be appropriate to include a surety bond (if applicable to certain industries),[69] letter of credit, or some other form of guarantee for payment of the penalty to protect the Agency's interest in collecting the full amount of the assessed penalty. Such provisions may be particularly appropriate where the case involves a large penalty, where the settlement agreement or consent decree contains lengthy payment schedules, and where the long-term financial viability of the respondent is uncertain.

VI. Conclusion

This guidance is intended to assist case teams in evaluating a respondent's ability to pay a civil penalty. The guidance does not prescribe the amount by which the EPA may reduce a civil penalty if the respondent supports its ATP claim. Rather, this document provides a roadmap of the financial information the EPA should seek from a respondent to conduct an ATP analysis and how to use EPA's financial models. In addition, the guidance describes considerations for when additional financial information and/or the input from a financial analyst may be appropriate.

This memorandum is not a final agency action, and is intended solely as guidance for use by EPA personnel in the settlement of enforcement actions. It is not intended to, nor can it be relied upon, to create any rights enforceable by any party in litigation with the EPA or the United States. Furthermore, the EPA reserves the discretion to act at variance with this guidance in appropriate circumstances, taking into account all relevant case-specific facts and circumstances. The Agency also reserves the right to change this guidance at any time without public notice.

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[68] An example of such an acceleration clause would be as follows: In the event of respondent's failure to make any payment of a civil penalty when due, the EPA may, without notice or demand, declare the entire unpaid balance due and any accrued interest and stipulated penalties then unpaid immediately due and payable.

[69] *See, e.g.*, *In re American Lifan Industry, Inc.*, CAA No. 14-02C (EAB Feb. 24, 2014)(requiring a surety bond to ensure that there will be money available for certain future penalty assessments in accordance with 40 C.F.R. § 1054.690).