



THE CANADIAN  
BAR ASSOCIATION  
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## Addressing Corporate Wrongdoing in Canada

**CANADIAN BAR ASSOCIATION**  
**BUSINESS LAW, COMMODITY TAX, CUSTOMS AND TRADE, COMPETITION LAW, CRIMINAL JUSTICE,**  
**INTERNATIONAL LAW SECTIONS AND ANTI-CORRUPTION TEAM**  
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## **PREFACE**

The Canadian Bar Association is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the Business Law, Commodity Tax, Customs and Trade, Competition Law, Criminal Justice and International Law Sections and the Anti-Corruption Team (collectively, the CBA Sections), with assistance from the Legislation and Law Reform Directorate at the CBA office. The submission has been reviewed by the Law Reform committee and approved as a public statement of the CBA Sections.

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# Addressing Corporate Wrongdoing in Canada

## I. INTRODUCTION

The CBA Business Law, Commodity Tax, Customs and Trade, Competition Law, Criminal Justice, International Law Sections and Anti-Corruption Team, (collectively, the CBA Sections) welcome the opportunity to comment on a possible Deferred Prosecution Agreement (DPA) regime and enhancements to the Integrity Regime as part of the government's consultation on expanding Canada's toolkit to address corporate wrongdoing.

The CBA is a national association representing over 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. We promote the rule of law, access to justice, effective law reform and provide expertise on how the law touches the lives of Canadians every day.

## II. DPA REGIME

**Question 1: In your view, what are the key advantages and disadvantages of DPAs as a tool to address corporate criminal liability in Canada?**

Key advantages

DPAs encourage voluntary disclosure, foster a compliance culture and can provide a more effective way of holding organizations accountable without the cost, time and uncertainty associated with criminal trials. They offer more flexibility to prosecutors.

Corporate wrongdoing cases are often complex, taking time and resources to work their way through the court system. This new tool would alleviate some of the pressure Canada's courts are facing, brought to light in the Supreme Court of Canada judgment in *R. v. Jordan*.<sup>1</sup>

DPAs can reduce the negative consequences for blameless employees, shareholders, customers, pensioners, suppliers and investors. They may also enhance the prospects for prosecuting the actual individuals who were responsible for the wrongdoing.

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<sup>1</sup> R. v. Jordan [2016] 1 S.C.R. 631

They can also encourage cooperation from a corporation to gather evidence for investigations. These investigations are particularly difficult in foreign anti-corruption cases and criminal activity involving non-Canadian parties.

DPA's negotiated in the United States and recently in the United Kingdom have highlighted the importance of transparency and meaningful cooperation. Without DPA's, far fewer cases of wrongdoing would be brought to the public's attention.

For competition matters, DPA's would complement the Competition Bureau's existing Immunity Program<sup>2</sup> and Leniency Program.<sup>3</sup> Depending on how the DPA regime is structured, the availability of a DPA could offer an alternative for cooperating with the Crown, particularly since participation in the Leniency Program requires an applicant to plead guilty to an offence (and debarment under the current Integrity Regime).

#### Key disadvantages

Common concerns are that DPA's can weaken the deterrent effect of a prosecution. There may also be a perception that DPA's allow companies to "buy their way out of trouble" and are just the cost of doing business. This perception can lead to lack of respect for the administration of justice and erode public confidence.

These concerns should be put in context. The same concerns are present in many other situations, not just economic crime, and have not deterred other Canadian law enforcement agencies from offering remedial tools short of prosecution. Where a corporation displays this attitude, it can be addressed by prosecutorial discretion in deciding whether to offer or accept a DPA.

#### **Question 2: For which offences do you think DPA's should be available and why?**

DPA's should be available in cases of economic crime. This includes offences such as fraud, false accounting, corruption, foreign bribery and money laundering (or dealing with the proceeds of crime), exportation and/or importation of prohibited or restricted goods and related offences.

DPA's should be available for all offences which can result in debarment under the Integrity Regime. A key motivation for an organization to seek a DPA would be to avoid debarment.

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<sup>2</sup> Competition Bureau, [Bulletin – Immunity Program under the Competition Act](http://ow.ly/1byV30gEF2B) (June 7, 2010). (<http://ow.ly/1byV30gEF2B>)

<sup>3</sup> Competition Bureau, [Bulletin – Leniency Program](http://ow.ly/MiQd30gEEWe) (September 29, 2010). (<http://ow.ly/MiQd30gEEWe>)

Debarment can lead to the kinds of harm to blameless persons that DPAs are intended to avoid. Excluding some debarment offences from DPA eligibility would leave litigation as the only option (unless the Integrity Regime allows for discretion for the debarment period).

DPAs should be available for offences under the *Competition Act*, including offences of coordinated conduct. While cooperation programs exist at the Competition Bureau, DPAs would complement those programs – particularly if an organization doesn't qualify for a Bureau program or is otherwise reluctant to come forward given the onerous requirements of these programs. The US Antitrust Division operates a Leniency Program<sup>4</sup> similar to the Competition Bureau's Immunity and Leniency Programs, but the US Antitrust Division is nonetheless willing to enter into DPAs in appropriate cases.

As Canada becomes more comfortable and experienced with this new tool, the government could expand the scope of DPAs to include more offences.<sup>5</sup>

**Death or serious injury:** A DPA should not be available in situations of permanent serious bodily injury or death. A DPA would not be appropriate and, in some cases, could bring disrepute to the criminal justice system.

**Individuals and corporations:** The DPA Discussion Paper suggests that DPAs would be available to corporations. For greater certainty, we suggest that all entities doing business with the government (e.g. companies, firms, partnerships, etc.) be eligible for DPAs. DPAs should be available to an "organization" as defined in section 2 of the *Criminal Code*. Generally, DPAs should not be available to individuals. Entities seeking DPAs should be required to cooperate fully with authorities to bring the individuals who engaged in misconduct to justice.

### **Question 3: What role do you think the courts should play with respect to DPAs?**

One option is that the court could approve the DPA (similar to the UK regime). Another option is that a court could provide independent "judicial scrutiny" of the proposed DPA but it would ultimately be approved by the prosecutor and the organization. For example, a court could offer its views on whether the proposed DPA is fair and proportionate to the parties.

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<sup>4</sup> See [US Department of Justice, Antitrust Division, Leniency Program \(www.justice.gov/atr/leniency-program\)](http://www.justice.gov/atr/leniency-program).

<sup>5</sup> The DPA Discussion Paper points out that in some jurisdictions where DPAs are available only for certain specified offences, the use of DPAs seems to be more limited. For example, DPAs are not as broadly available in the UK as they are in the US and, to date, the UK DPA regime has been used only three times. However, the limited use of UK DPAs may also relate to some of its other characteristics, such as the role of the courts, publication of the terms of the DPA, etc.

The fundamental determination for the court would be whether the proposed DPA brought the administration of justice into disrepute. For example, some US courts have rejected DPAs where the organization was to pay a fine but there were no consequences for the employees who conducted the wrongdoing. The court found that letting these individuals escape justice was unacceptable.

However, some lawyers suggest that DPAs should not be conditional on court approval as they represent an exercise of prosecutorial discretion. A court approval process could involve multiple court appearances, create significant uncertainty and undermine the attractiveness of the DPA process.<sup>6</sup> Moreover, court approval may create additional risks and exposure for the organization, when it is otherwise willing to reach a resolution with the Crown in Canada.

If court filings were required, one model to consider is, where a DPA is filed with the court, it is open for public comment for the prosecutor's consideration for a set period (e.g. 30 days). After the consultation period, the DPA becomes binding. This approach is used with some antitrust settlements in the US.

Another option would be to enter into Non Prosecution Agreements (NPA). In short, an NPA is similar to a DPA but does not result in laying any charges or any agreement. Again, the US Department of Justice (Antitrust Division) has used NPAs in certain cases to achieve the goals of effective law enforcement.

#### **Question 4: What factors should be taken into account in offering a DPA?**

First, to maintain and uphold independence, the offer to enter into DPA discussions should be at the discretion of the prosecutor.

However, an organization should also be able to proactively submit a DPA proposal without prejudice to any future proceeding or to the independence of the prosecutor. DPAs should be available to an organization that wants to cooperate with the authorities and approaches the Crown with a hypothetical set of circumstances<sup>7</sup>.

The following factors should be considered:

- Has the organization accepted responsibility for the conduct?

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<sup>6</sup> In the US, it appears that DPAs are registered with courts only in cases where prosecution is resumed. The courts generally do not play a role in approving or in overseeing DPAs.

<sup>7</sup> This process is part of the US DPA regime.



- Has the organization demonstrated that it genuinely seeks to reform its practices and corporate culture?
- Has the organization mitigated the damage caused by the conduct?
- Does the offending conduct represent the actions of individuals or is it sanctioned by company policies and practice and are those individuals still with the organization?
- Is a criminal conviction likely to have disproportionate negative impacts on innocent people (e.g. shareholders, pension plan holders, employees, suppliers)?
- Is the organization a repeat offender?

**Reasonable prospect of conviction:** DPAs should not be the default option for a questionable or borderline case. A DPA should be considered only if it otherwise meets the prosecution<sup>8</sup> threshold of a reasonable prospect of conviction. The Crown must know its case and have evidence on the material elements of the offence.

We offer the following comments on some of the factors listed in the DPA Discussion Paper:

**Seriousness of the offence and collateral impact on third parties:** It is not clear how the seriousness of the offence and impact on third parties may factor in the decision to offer a DPA. All offences warranting consideration for prosecution, potential debarment under the Integrity Regime and a DPA would presumably be serious. In addition, the impact on victims and third parties is a matter that could be addressed through restitution obligations in the DPA. An implication that the government may deem some offences or the impact on third parties as too serious for a DPA could undermine the predictability or certainty required for organizations to come forward and propose a DPA.

**Level of involvement by senior management:** Involvement by senior management should not necessarily disqualify an organization for DPA consideration. The level of involvement by senior management would drive the degree of remedial measures required by the organization to demonstrate that it genuinely seeks to reform its business practices and corporate culture. Deliberate and harmful actions from the organization's directing minds would be aggravating factors that may lead the Crown to not offer a DPA.

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<sup>8</sup> The Public Prosecution Service of Canada (PPSC) and provincial Crown Attorneys would work with DPAs.

**Reporting:** The factor of reporting wrongdoing without undue delay should be qualified to give an organization reasonable time to conduct an internal investigation after the matter comes to its attention.

**Identification of implicated individuals:** The government should recognize that, in some cases, despite an organization's willingness to cooperate, it may be difficult to identify implicated individuals.

**Question 5: When would a DPA not be appropriate?**

It would not be appropriate to offer a DPA when:

- a) the conduct raises national security or foreign affairs issues, or where the DPA would not be in the public interest generally;
- b) the corporate wrongdoing led to death or permanent serious bodily injury;
- c) the organization is not a bona fide business, exists only for the purposes of illegal conduct or is part of, or associated with, a criminal enterprise;
- d) the organization has been previously warned or sanctioned, or criminal charges have been laid with no substantial changes to prevent such conduct in the future.

**Question 6: What terms should be included in a DPA?**

The DPA Discussion Paper notes that DPA terms would be customized to fit each case. That said, most DPAs should include the following:

- statement of facts relating to the offence;
- acknowledgement of responsibility for the conduct;
- implementation of applicable compliance programs (e.g. addressing anti-corruption, respect for human rights, or environmental requirements);
- where appropriate, a period of supervision by a monitor and funding of independent monitor by the organization;
- payment of fines, disgorgement of profits made from the misconduct;
- where applicable, restitution and compensation of victims;
- expiry date.

DPAs should not be a cost of doing business and they need to reflect true contrition from the organization. However, insisting on an express admission of guilt – which could be quickly used by class action plaintiffs – would likely have a chilling effect on DPAs and undermine

their very purpose. We suggest a regime similar to the UK where no express admission of guilt is required, though agreement on fundamental facts, compensation of victims and a commitment to remediation is required.

Again, the flexibility to tailor the terms of a DPA would allow the Crown to negotiate an agreement that achieves the goals of law enforcement while recognizing an organization's potential exposure to civil litigation.

**Accuracy of information:** The suggested warranty in the DPA Discussion Paper on the accuracy of the information provided during negotiations should be qualified as to the "best of the organization's knowledge after due inquiry."

**Guidance material:** In the interests of transparency and promoting certainty, the government should issue and regularly update a policy statement on DPAs similar to the Competition Bureau's Leniency Program Bulletin. Similarly, once the government has experience with DPAs, it should issue a template DPA to give potential applicants a sense of what to expect.

**Question 7: What factors should be taken into account in setting the duration of a DPA?**

The duration of a DPA will turn on the circumstances of each case. We recommend that each DPA should have an expiry date and the following factors should be taken into account in setting its duration:

- duration of the underlying wrongful conduct;
- if the organization made a good faith attempt to reform its business practices (as evidenced by corrective actions);
- if the organization is a repeat offender.

The presumption of innocence is suspended during the negotiation of a DPA. A DPA involves an acknowledgement of responsibility (or an agreement not to contest the Crown's allegations) and a formal commitment to rectify the action that caused the wrong in the first place. As such, the "suspension" of a prosecution while the DPA takes effect cannot be for a prolonged period and a party wishing to use a DPA must do so expeditiously. Therefore, we recommend that a time period for the negotiation of a DPA be established up front.

**Question 8: Under what circumstances should publication be waived or delayed?**

A careful balance needs to be maintained between ensuring public confidence in DPAs as a tool to combat economic crime and giving organizations certainty and confidentiality to negotiate the DPA. Organizations are less likely to come forward if their position might be compromised with early publication of facts, etc. Therefore, there should be no publication in the initial stages of the DPA negotiation. Moreover, the process should respect settlement privilege that applies in negotiating pleas or alternative resolutions with the Crown.

It would generally be appropriate for the government to announce when it has entered into a DPA and indicate the relevant conduct and key terms, but not necessarily file the entire DPA (as some terms may be commercially confidential)<sup>9</sup>.

This would provide a degree of transparency, enable victims to seek redress and allow customers, suppliers and potential business partners to make their own decisions on whether to deal with the organization.

Ultimately, the prosecution should have the flexibility to waive or delay publication and publish selected parts of the DPA.

**Question 9: How should non-compliance be addressed?**

Generally, there should be flexibility to address the specific circumstances of non-compliance. Serious instances of non-compliance demonstrating lack of corporate resolution to comply with the DPA may warrant criminal charges, or extension or termination of the DPA. On the other hand, isolated or technical violations may warrant less onerous measures, such as warnings or renegotiated terms of the DPA.

The prosecutor should give the organization an opportunity to address allegations of non-compliance. If repeated incidents are beyond the organization's control, it may be useful to renegotiate some terms of the DPA.

Given that the Crown best knows its case and the chief issues, we recommend that a determination of non-compliance be made by a prosecutor in consultation with any compliance monitors. The Crown is in a good position to know if a proposed compliance plan is in earnest and if it will address the issue that caused the wrongdoing in the first place.

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<sup>9</sup> This could be similar to the model in France under La loi sur la transparence, la lutte contre la corruption et la modernisation de la vie économique, commonly referred to as Sapin 2.

When it appears that a DPA will not be successfully negotiated, we recommend that new Crown counsel be appointed to alleviate concerns of bias and that the prosecution move swiftly to trial.

**Question 10: When should facts disclosed during DPA negotiation be admissible in a prosecution against a company?**

Prosecution against the cooperating organization

An accused person has a right to silence pursuant to section 11(c) of the *Charter of Rights and Freedoms* and the right to a fair trial pursuant to section 7. Relevant cases<sup>10</sup> confirm that a person or a corporation<sup>11</sup> cannot be compelled to incriminate themselves and that settlement privilege applies in negotiations with the Crown relating to a potential resolution.<sup>12</sup> As such, any information gleaned in the course of a DPA negotiation should never be used in subsequent proceedings against the organization.

The government should provide assurances to this effect, similar to those in the Competition Bureau's Leniency Program Bulletin.<sup>13</sup>

Should a DPA negotiation fail, we also recommend that new Crown counsel be appointed to ensure that any information communicated during the course of the negotiations remain outside the scope of the prosecution. However, if charges are laid against individuals responsible for the wrongdoing, then this material may be relevant and admissible.

Prosecution against another organization

Facts disclosed during DPA negotiations could be admissible in a prosecution against another company or rogue employees for other crimes, subject to the law on settlement privilege and any necessary measures to protect the credibility and proceedings against the “confessing” corporation.

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<sup>10</sup> R. v. White [1999] 2 S.C.R. 417; R. v. Nedelcu [2012] 3 S.C.R.311

<sup>11</sup> Section 2 of the *Criminal Code* defines a “person” to include an “organization”. The definition of “person” is included under the definition of “everyone”. The definition of “organization” includes a company, firm or corporate body.

<sup>12</sup> R. v. Delchev, 2012 ONSC 2094, at para. 19.

<sup>13</sup> Where a leniency applicant withdraws from the Leniency Program at any time before concluding a plea agreement, the applicant is assured that the information provided under the Leniency Program will not be used directly against it and will be treated as either confidential or settlement privileged. See Competition Bureau Bulletin – The Leniency Program (September 29, 2010) para. 34.

**Question 11: How should compliance monitors be selected and governed?**

Where compliance monitoring is required, the selection of independent monitors should be based on agreed criteria. Independent compliance monitors should report directly to the prosecutor but be engaged and compensated by the organization. The selection process used in the Integrity Regime by Public Services and Procurement Canada (PSPC) could serve as a model. Independent compliance monitors could be of great assistance to the DPA process and would relieve the already large burden put on Crown counsel.

However, active compliance monitors may not always be required and periodic certified reports subject to audit may be sufficient. Again, there should be flexibility to fit the particular circumstances.

**Question 12: What use should be made of compliance monitoring reports?**

Compliance monitoring reports provide an effective review of implementation programs. However, they should not form part of the DPA.

If court oversight is part of Canada's DPA regime, these reports could be used in the same way a probation report is used in sentencing – to inform the court of the organization's compliance and appropriateness of remedial measures. These reports should not inhibit the efforts of an organization trying to right a wrong.

**Question 13: Under what circumstances should victim compensation (i.e. anticipatory restitution) be included as a DPA term?**

As a general principle, it is appropriate to include victim compensation where applicable.

It may be appropriate to limit victim compensation under a DPA to persons who suffered direct harm (e.g., the customer whose contract was subject to a bribe), but not to shareholders of the organization entering into the DPA.

Any anticipatory restitution should take into account other actions and proceedings before the courts (to the extent possible where multiple jurisdictions are involved). For example, if the government imposes a material fine, such as a penalty fully reflecting the profit earned from the misconduct, in some cases, it may not be appropriate to impose further restitution.

The DPA regime should be flexible enough to allow for charitable donations but not establish an expectation or bias towards them. The selection of the charity and use of the funds by the recipients are often problematic.

### III. INTEGRITY REGIME

**Question 1: To what extent, if any, should the duration of ineligibility and/or suspension be modified to ensure appropriateness while continuing to mitigate risk?**

In general, we recommend building more flexibility into the regime. The duration of ineligibility and suspension should be commensurate with the public interest, the seriousness of the misconduct and the organization's willingness to redress the misconduct. To this end, the factors considered when deciding to offer a DPA to an organization would also be relevant to its debarment (see question 4 of the DPA regime above).

An automatic five to ten year debarment carries significant consequences and may effectively dissolve a firm that is highly dependent on government contracts. Discretion to modify the term of ineligibility (and even waive debarment) could avoid overly punitive outcomes negatively impacting blameless persons.

Imposing a fixed temporal ban also departs from the approach taken by most other countries and organizations, including the World Bank, which uses discretionary and criteria-guided policies in assessing debarment periods. Since the existing Integrity Regime does not consider mitigating factors or remedial measures when assessing a debarment period, the regime does not encourage companies to cooperate. This is contrary to approaches taken by many regulators (including the Ontario Securities Commission and the U.S. Department of Justice) in formalizing credit for cooperation policies.<sup>14</sup>

For example, an automatic ten year suspension currently applies if a supplier provides a false or misleading certification or declaration. A more practical approach could be to limit the automatic suspension to failures to disclose charges or convictions for *specified offences* by the supplier or its *controlled* subsidiaries. Suspension for failures to disclose charges or convictions for a *broader category of offences* or a *broader category of affiliates* would be a discretionary decision. In those cases, PSPC could evaluate all the circumstances and have the option to not disqualify the supplier or to reduce the period of ineligibility.

This flexibility would be even more important if the government does not proceed with DPAs, which presumably are intended, in part, to offer an opportunity to negotiate a resolution that addresses criminal conduct but avoids application of the Integrity Regime.

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<sup>14</sup> See CBA [Letter](http://ow.ly/beqn30gElXp) to Minister Diane Finlay of PWGSC dated April 9, 2015. (<http://ow.ly/beqn30gElXp>)

We suggest that the government align its procurement ineligibility and suspension guidelines to that of its major trading partners and specifically to the US.

In addition, we recommend that the government incorporate an exemption to align the Integrity Regime with pre-existing cooperation programs, particularly in the competition area. From October 2010 to November 2012, an express exemption under the Integrity Regime provided that participants in a “leniency program” were not subject to debarment. This exemption served an important public policy goal as it preserved the strong incentive for organizations to cooperate with the Competition Bureau.<sup>15</sup> However, in November 2012, the government, without significant consultation, removed this exemption from the regime.

This 2012 policy change discouraged many companies from cooperating with the Competition Bureau, since it could result in debarment from federal contracting for a long time. Competition counsel now regularly advise clients about the risks and benefits of applying for immunity or leniency, including the fact that cooperation with the Bureau and participation in the Leniency Program may subject them to a lengthy debarment. An organization may decide not to cooperate with the Bureau and assume the risk of defending criminal charges merely to avoid the potentially devastating consequences of debarment.

The Immunity and Leniency Programs are some of the Competition Bureau’s most important and effective tools for discovering, investigating and prosecuting criminal anti-competitive conduct. We encourage the government to reinstate the exemption that existed prior to 2012 to exempt participants in the Competition Bureau’s Immunity and Leniency Programs from debarment.

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<sup>15</sup> These concerns arises largely in connection with a voluntarily plea by a participant the Leniency Program, since a participant in the Immunity Program is not required to plead to an offence under the *Competition Act*. In a 2013 Memorandum of Understanding, PWSGC agreed it would not disqualify a party under the Integrity Regime that had been granted immunity under the Bureau’s Immunity Program. See MOU between Competition Bureau and PWSGC regarding the Prevention, Detection, Reporting and Investigation of possible Cartel Activity (May 30, 2013), s. 4.

However, with subsequent amendments to the Integrity Regime, PWSGC may now temporarily suspend any party that “admits guilt” to a listed offence for 18 months, and a participant under the Immunity Program is generally required to admit the underlying elements of the offence to participate in the program. As a result, it is unclear whether the earlier 2013 MOU would preclude a suspension based on an immunity applicant’s admission of guilt in accordance with existing and future requirements of the Immunity Program, particularly since the Immunity Program is currently under review by the Bureau. We encourage the government to confirm that the policy embodied in the MOU 2013 continues to apply under the current regime, as well as to incorporate this understanding expressly in any revised policy.



**Question 2: How could the exercise of greater discretion be built into the Integrity Regime to address issues associated with periods of ineligibility? What factors should be considered in determining whether a supplier should benefit from discretion?**

Rendering an organization ineligible is a serious action and debarment should not be imposed unless it is clearly in the public interest. The following factors should be considered in determining whether a supplier should benefit from discretion to avoid debarment that the Integrity Regime would otherwise impose:

- Has the organization put in place appropriate standards of conduct and internal compliance controls, including review procedures as well as ethics and compliance training programs?
- Did the organization bring the misconduct to the attention of the government in a timely manner?
- Did the organization engage in a full investigation of the ineligibility?
- Has the organization agreed to an appropriate penalty and agreed to make restitution related to the offending activity?
- Has the organization taken appropriate action against the individuals responsible for the misconduct?
- Does the organization's senior management acknowledge the seriousness of the misconduct and have fully supported measures to prevent recurrence?
- Is the organization a repeat offender

In addition, the debarment regime should incorporate additional elements of due process. A debarment can have devastating consequences for a business, innocent employees and other stakeholders. PSPC should incorporate the following enhanced procedural protections:

- An opportunity to make submissions as to whether debarment is justified in the circumstances;
- A procedure to appeal the debarment;
- A procedure to revise or modify the debarment terms;
- Under certain circumstances, a procedure to seek to have the debarment lifted following a set period where the entity has demonstrated rehabilitation and a strong record of compliance;
- The publication of additional enforcement guidelines that govern PWGSC's discretion, such as the factors considered in imposing a debarment based on the existence of charges alone, and the factors considered in negotiating an "administrative agreement".

**Question 3: Are there other offences that call into question the integrity of a supplier that should be considered for inclusion within the Ineligibility and Suspension Policy? If so, what are they?**

The government should be careful when adding offences to the Integrity Regime. An Integrity Regime that takes into account civil or provincial offences, other federal offences related to corporate wrongdoing, mere allegations or debarment decisions in other jurisdictions should not be made without full regard for the jurisprudence, leniency provisions and rules of other jurisdictions.

**Question 4: What factors should be considered in determining whether new offences should be included?**

The government should consider offences where the misconduct indicates a lack of integrity that directly impacts the responsibility of the government as a contractor.

**Question 5: At what point should the Government of Canada consider actions regarding corporate wrongdoing when making a determination of suspension or ineligibility? What wrongdoing or action would warrant a federal response?**

The government should not suspend or render ineligible an organization based only on allegations of corporate wrongdoing.

A determination of debarment (suspension or ineligibility) before charges or conviction may violate due process rights. However, if a disqualification is on the basis of a contractual violation (e.g., failure to perform) the government could take that into account.<sup>16</sup>

As noted above, the Integrity Regime should reinstate the exemption for competition leniency programs in existence from October 2010 to November 2012. The Integrity Policy should also expressly state that a corporation may not be debarred by virtue of entering into a DPA or applying for (or receiving) immunity or leniency under competition or antitrust laws. One reason for entering into a DPA, in particular, is to avoid debarment, but the Integrity Regime Discussion Paper suggests that the government might debar an organization even in the absence of a charge or conviction.

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<sup>16</sup> While some jurisdictions, such as the US, permit debarment before charges or convictions in specific circumstances, the regime requires adherence to a specific process (e.g., adequate evidence to support suspension).

Section 7(d) of the Integrity Regime raises a similar issue with its potential to suspend a supplier for admitting guilt. As noted above, it is not clear how this provision operates in light of PWGSC's 2013 Memorandum of Understanding with the Competition Bureau.

In addition, it should be expressly provided that a supplier is not required to advise PSPC that it admitted guilt to a *Competition Act* offence when applying for immunity or leniency under one of the Competition Bureau's programs. These admissions are made on a confidential basis and disclosure would undermine the Competition Bureau's cooperation policies.

**Question 6: How should Integrity Regime determinations of ineligibility be applied to non-procurement federal services?**

In our view, Integrity Regime determinations of ineligibility should not be applied to non-procurement federal services. A debarment determination is based on a myriad of factors and may be a nuanced decision. It would be inequitable to allow one unfavourable decision on public procurement to deny a Canadian company access to other government services.

**Question 7: What impact should a debarment decision made in another jurisdiction or by another organization have on a supplier's status under the Integrity Regime?**

Debarment decisions in other jurisdictions or by another organization should not have an automatic impact on a supplier's status under the Integrity Regime. It is crucial that PSPC retain discretion to make its own determination.

The Discussion Paper refers to the practice of cross debarment by the five multilateral development banks (MDBs). This is an especially questionable practice that would sacrifice the jurisdictional independence of Canadian federal agencies. It also results in *ad hoc* decision making that may be subject to the policy priorities of other governments.

Cross debarment can lead to confusion between jurisdictions who are parties to cross debarment agreements and those who are not party to the provisions in other jurisdictions. Further, the Government of Canada's criteria and process to determine eligibility will likely differ from those of MDBs.

If an organization is debarred by a provincial agency using similar criteria to the Government of Canada, it may make sense for the federal government to consider that decision. The reverse is also true. If a provincial agency, such as the Quebec's *Autorité des Marchés Financiers* does

not debar an organization, using its own criteria, the Government of Canada could consider this provincial decision as it relates to the supplier's status under the Integrity Regime.

**Question 8: What type of measures should be taken to preclude those with known membership in or associations with organized crime from being awarded a federal contract or real property agreement?**

We reiterate that the government should generally not take actions to preclude, suspend or debar on the basis of mere allegations.

**Question 9: Should application of the Integrity Regime be broadened to include federal entities beyond departments and agencies? What factors should be considered when determining what other organizations should be required to adopt the Integrity Regime?**

Provided the Integrity Regime itself has an appropriate balance, we have no objection to expanding the scope of government contracts subject to the Integrity Regime to other federal entities.

The Integrity Regime Discussion Paper points to Crown corporations. As the Integrity Regime may impose significant burdens on some Crown corporations, we recommend that it be left to individual Crown corporations to decide whether to opt in to the Integrity Regime.

**Question 10: How could the Government of Canada use the Integrity Regime to achieve other social, economic or environmental policy objectives?**

To the extent that the scope of debarment offences moves away from offences directly relevant to government contracting, the rationale for debarment may become less clear.

While the goal is laudable, using debarment to achieve other social, economic and environmental policy objectives could create uncertainty and inadvertently limit the number of companies prepared to bid on government contracts. Broader debarment adversely affects not only the debarred company, its employees and shareholders, but also taxpayers who are left with a less competitive process and may pay more or receive lower quality services.

If the government wants to take a wider scope of offences into account, it should consider issuing guidance on the weight it will give to such offences, rather than rendering an organization completely ineligible regardless of the type of offence.

When making procurement decisions, the government could encourage the participation of corporations that adopt corporate social responsibility norms such as:

- well-funded enforceable programs that promote robust health and safety requirements, living wages and diversity in their warehouses, factories and offices around the world.
- taking an active role in tracking their own greenhouse gas emissions and looking for ways to reduce those emissions, and transition to renewable energy;
- corporate social responsibility certifications.

#### **IV. OTHER COMMENTS**

##### Importance of promoting cooperation

The existing Integrity Regime does not promote cooperation with authorities. Its punitive consequences – five to ten years debarment from bidding or working on federal contracts (with a potential cascading effect on provincial governments, foreign governments and private sector contracts) – preclude many companies from reporting misconduct.

By discouraging cooperation, the Integrity Regime makes it harder for companies to dismiss employees for misconduct: establishing employee misconduct publicly in court (where the employee opposes the “for cause” termination) exposes the company to potential debarment.

On the other hand, if the company quietly dismisses the employee and pays compensation rather than prove “cause” publicly in court – to minimize the debarment risk under the Integrity Regime, the company may appear to be rewarding an employee for the wrongdoing. Also, the absence of a safe-harbour for coming forward may expose companies to blackmail by current or former employees who are aware of misconduct – their own or that of other employees.

The Integrity Regime should have a safe-harbour provision for self-disclosure and should not punish companies that have disavowed their employee’s misconduct in ways that make it clear that no others in the company had any criminal intent to commit the misconduct.

##### Certificates of compliance

Given the significant consequences of debarment, the government should ensure that the Integrity Regime is clear and well defined. For example, it is difficult for corporations to provide the requisite certificates of compliance in the bidding and contracting process given

the open ended and unclear definitions of "affiliate" and foreign offences that are "similar" to the listed Canadian offences.<sup>17</sup>

#### Obligation to inform Registrar

The continuing obligation to inform the Registrar within ten working days of "any charge, conviction, or other circumstance relevant to the Policy with respect to itself, its affiliates and its first-tier subcontractors" is onerous, particularly for large multi-national companies. There seems to be a large scope for error, even by a company making diligent efforts to comply. Consideration should be given to revising this obligation to require notice within ten working days of the relevant entity *becoming aware of the conduct*.

## V. CONCLUSION

We thank the government for consulting on its plans to expand Canada's toolkit to address corporate wrongdoing, namely enhancements to the Integrity Regime and a possible Deferred Prosecution Agreement regime. These new tools are especially welcomed given the pressures that Canada's courts are facing, brought to light in the Supreme Court of Canada judgment in *R. v. Jordan*.

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<sup>17</sup> The definition of "affiliate" includes controlled persons, and the concept of "control" includes "deemed control". "Deemed control" has a non-inclusive and circular definition – section (b) of the definition essentially says that deemed control includes a situation where a person is deemed to be controlled by an entity. PSPC should amend this definition to make it meaningful, if only to say something like "deemed control" means a situation in which PSPC determines that an entity is controlled in fact by another entity. (A number of legislative schemes, such as the CRTC, have control in fact concepts that could be incorporated by reference.) In any event, section (c) of the definition of "affiliate" makes clear that affiliates might include entities with which a company shares facilities or employees, implying a potentially the very broad concept of "control" and "affiliate".