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# Expanding Canada's Toolkit to Address Corporate Wrongdoing

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## What we heard

February 22, 2018

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# Public Consultation on Expanding Canada's Toolkit to Address Corporate Wrongdoing

## EXECUTIVE SUMMARY

Between September 25 and December 8, 2017, the Government of Canada conducted a public consultation to seek input on potential enhancements to the Integrity Regime and on a possible Canadian deferred prosecution agreement (DPA) regime. The views of interested parties were collected in a number of ways, including through a dedicated website for Canadians to submit feedback, as well as through face-to-face meetings and teleconferences. Since September 25, 2017, government officials met with over 370 participants and received 75 written submissions. In keeping with the Government of Canada's commitment to transparency, this report summarizes the views of those that participated in this consultation process.

Generally, participants told us that they are supportive of fair, proportional and transparent measures that enable the Government to take action against corporate wrongdoing and to hold companies accountable for such misconduct.

With respect to the Integrity Regime, participants expressed support for the Regime's objective of ensuring that the Government of Canada does business with ethical suppliers. The majority of participants stated that additional discretion and flexibility needed to be built into the Integrity Regime to take into account aggravating and mitigating factors in the determination of an appropriate period of debarment. Factors that were identified included the seriousness of the offence, whether the individual or company was a repeat offender, self-reporting, cooperation with law enforcement, taking corrective actions, and efforts at restitution. This theme garnered the most comments and strongest views.

Participants expressed a range of views on whether the Government of Canada should expand the grounds for triggering debarment and the scope of application of the Regime. Many business participants felt that any expansion of the Regime should only be considered in conjunction with added flexibility in terms of debarment time period, while most non-governmental organizations supported a broader use of the Regime including adding additional offences and the inclusion of new policy objectives. A small number wished to see a reduction in the Integrity Regime's grounds for triggering debarment and shorter debarment time periods. Some of those who commented on the issue of expansion underlined the importance of having a transparent and administratively fair process in place. Most participants argued against the use of allegations and investigations of wrongdoing as basis for debarment decisions in the absence of a criminal charge or conviction.

The majority of participants supported having a Canadian DPA regime, as they were of the view that DPAs could be a useful additional tool for prosecutors to use at their discretion in appropriate circumstances to address corporate criminal wrongdoing. They were of the view that DPAs could result in effective, proportionate and dissuasive sanctions, while also meeting other objectives, such as helping to identify corporate and individual criminal liability (for example, by encouraging self-reporting and requiring corporate accused to identify implicated individuals for prosecution purposes); enhancing compliance and improving corporate culture; and reducing the potential negative impact of a conviction on innocent third parties. Some, however, did not think that there is a demonstrable need for DPAs. They and others were concerned that DPAs could be viewed as favouring large companies over small companies and individual offenders.

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While the majority of responses addressed this initial question, participants also provided input on details of a possible DPA regime, including with respect to which offences could be covered by such a regime (with most supporting limiting a regime to serious economic crimes, at least initially), what eligibility criteria would be appropriate, what could be possible DPA terms and what should be the role of the court. Along with the need for flexibility, to take into account the specific circumstances of the case, the importance of transparency and fairness was an overarching theme. Many participants stated that a possible Canadian regime should be modeled on the UK legislated regime, with clear prosecution guidelines and the mandatory publication of DPAs (redacted as necessary to guard against interference with the presumption of innocence).

While this public consultation has ended, the Government of Canada remains committed to hearing from interested parties regarding both the Integrity Regime and DPAs.

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## INTRODUCTION

Corporate wrongdoing<sup>1</sup> imposes significant economic, political and social costs. It undermines fair competition, threatens the integrity of markets, constitutes barriers to economic growth, increases the cost and risk of doing business, and undermines public and investor confidence.

Many governments, including the Government of Canada, are committed to taking action against improper, unethical and illegal business practices and holding companies criminally liable for such conduct. This is achieved through a framework of laws, regulations, governance frameworks, and policies and programs that seek to detect, prevent and address such practices. Companies are also playing a critical role by implementing strong internal controls, governance structures, codes of conduct and compliance regimes. Taken together, these efforts support a vigorous corporate compliance culture which in turn supports an ethical and competitive Canadian marketplace.

The Government of Canada has a number of measures to deter companies from participating in corporate misconduct, including [Criminal Code](#) offences and other legislation including the:

- [Corruption of Foreign Public Officials Act](#)
- [Competition Act](#)
- [Proceeds of Crime \(Money Laundering\) and Terrorist Financing Act](#)

In addition to conducting investigations and initiating prosecutions of those companies that are alleged to have committed a criminal offence, there are non-legislative initiatives such as Public Services and Procurement Canada's (PSPC) Code of Conduct for Procurement, Fairness Monitoring Program, the [Federal Contracting Fraud Tip Line](#) (joint initiative of the Royal Canadian Mounted Police, Competition Bureau and PSPC), and the government-wide Integrity Regime.

After introducing a government-wide Integrity Regime over two years ago, the consultation provided an opportunity to consider whether the Regime is achieving its objectives and its efficiency in doing so. Within the context of the Government's procurement modernization commitment, the consultation also allowed an assessment of whether and how the Regime should address trends and risks in a constantly changing marketplace.

The consultation included a discussion on the possibility of introducing a Canadian DPA regime as an additional tool for prosecutors, to be used in appropriate circumstances, to address corporate crime. Under a DPA, criminal prosecution is suspended if the accused agrees to fulfil certain requirements including admitting to facts that would support a conviction and cooperating with authorities throughout the lifetime of the DPA, paying a significant financial penalty and implementing or enhancing compliance measures. The charges will be withdrawn upon the successful completion of the DPA. DPAs are intended to ensure that corporate criminal conduct is subject to effective, proportionate and dissuasive penalties and to assist in meeting other objectives, including increasing detection and improving compliance and corporate culture. At the same time, a DPA regime may also help to mitigate unintended consequences associated with a criminal conviction for blameless employees, customers, pensioners, suppliers and investors, as well as the potential for job losses and wider negative implications for the economy.

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<sup>1</sup> Refers to the behaviours of companies or other business related legal entities.

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This report summarizes views of those that participated either through formal submissions or during meetings and teleconferences in the context of the public consultation that took place between September 25 and December 8, 2017.

## **PUBLIC CONSULTATION**

The public consultation methodology was to seek feedback from Canadians and organizations through a dedicated website and in the course of meetings and teleconferences with a broad range of interested parties.

Discussion guides on potential enhancements to the Integrity Regime and on a potential DPA regime were developed to provide context and to facilitate feedback. Each guide outlined key considerations and policy proposals, and posed a series of questions for response. Interested parties were encouraged to provide feedback through an online form, by email, or by sending their submission by mail. Individual submissions were not posted online or included in this report. Any personal information included in a submission or in a record of a meeting or teleconference that is collected by the Government will be governed by the [Privacy Act](#) and all records related to the consultation that are under the control of the Government are subject to the [Access to Information Act](#).

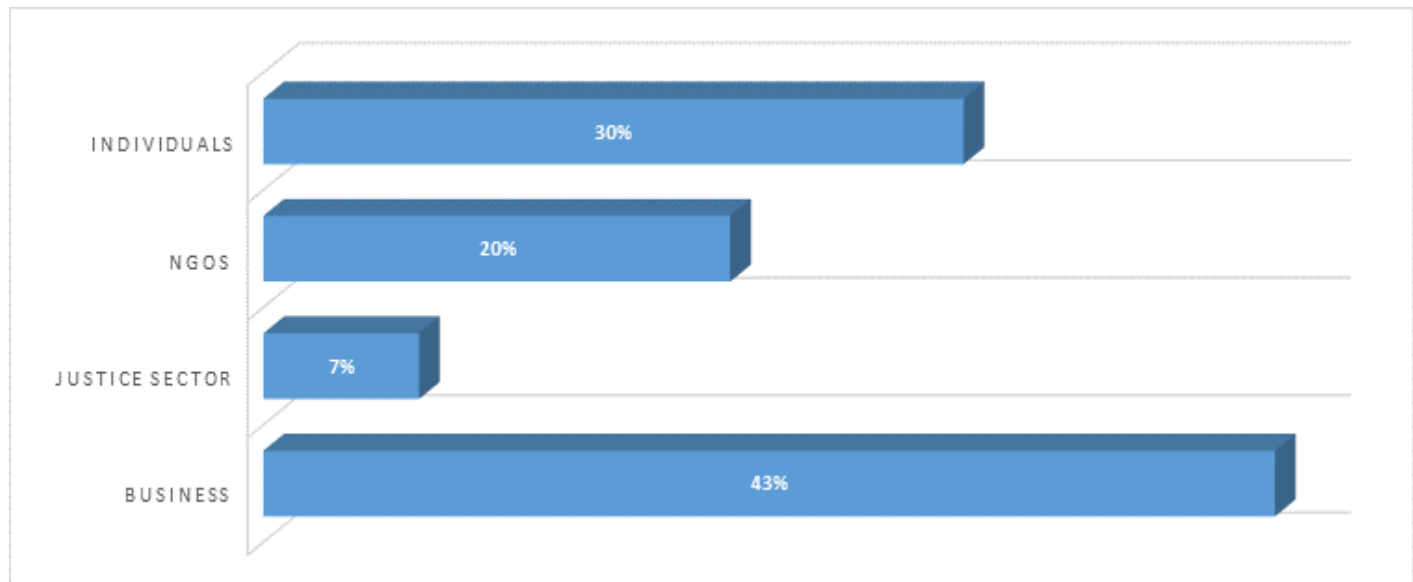
Participation in the consultation was open to all Canadians and other interested parties. General notifications signaling the launch of the consultation, and follow-up reminders were posted in various public fora through the use of social media (such as, Facebook, Twitter), on the Government of Canada's Buy & Sell website and on the Consulting with Canadians website. Stakeholders with a possible interest in federal procurement and approaches to addressing corporate wrongdoing were also identified and informed of the launch of the consultation and of the opportunity to provide input.

## **WHO WE HEARD FROM**

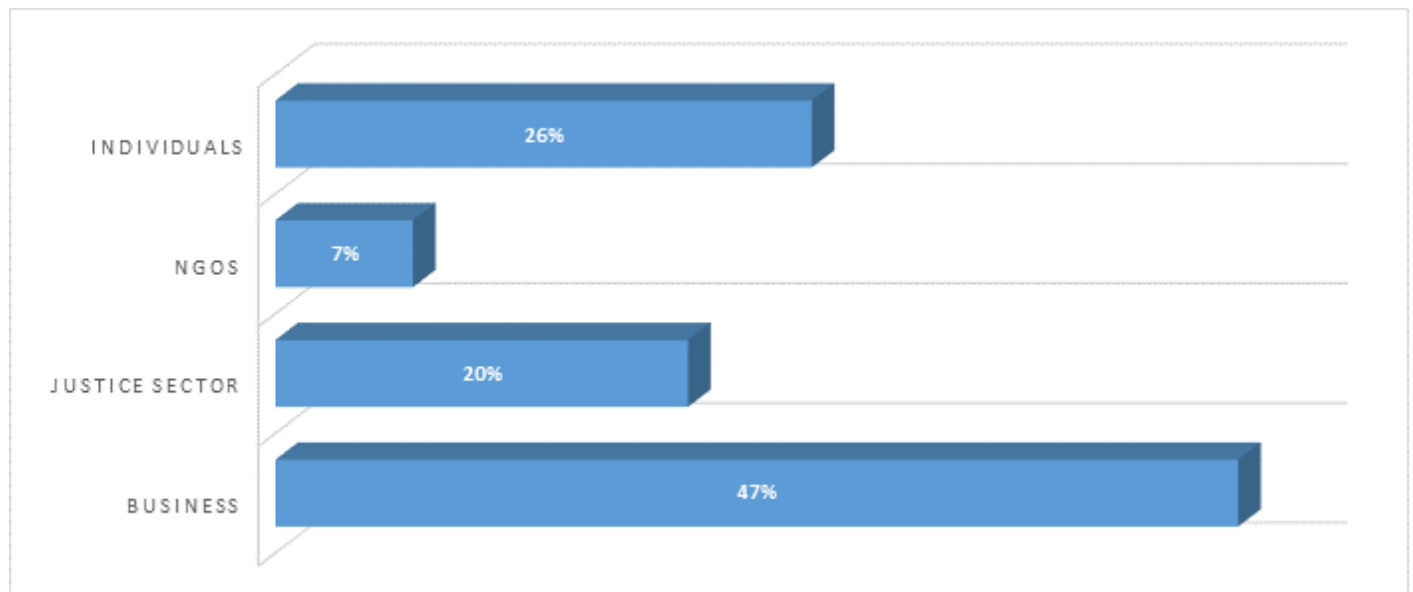
Feedback was received from a variety of participants across Canada, including industry associations, businesses, justice sector stakeholders (including law enforcement) and non-governmental organizations (NGOs), and academics. Government officials held over 40 meetings with approximately 370 participants to listen to views on the consultation topics. The Government of Canada received 30 online submissions related to potential enhancements to the Integrity Regime and 45 submissions on the possible adoption of a DPA regime in Canada.

A plurality of submissions regarding the Integrity Regime was provided by business (43%). The remaining submissions came from individuals (30%), NGOs (20%), and the justice sector (7%). Similarly, a plurality of submissions regarding DPAs were provided by business (47%); the remaining submissions came from individuals (26%), the justice sector (including law enforcement) (20%), and NGOs (7%).

**Figure 1.** Percentage of submissions by type for the Integrity Regime Stream



**Figure 2.** Percentage of submissions by type for the Deferred Prosecution Agreement Stream



## WHAT WE HEARD ON POTENTIAL ENHANCEMENTS TO THE INTEGRITY REGIME

The Integrity Regime stream of the consultation was organized around four themes:

1. time periods associated with ineligibility and suspension
2. criteria for ineligibility and suspension
3. addressing organized crime
4. expanding the scope of application



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## 1. Time periods associated with ineligibility and suspension

Under the current Integrity Regime, discretion within the determination process is limited, as much of the [Ineligibility and Suspension Policy](#) is rules-based. As a result, concerns have been raised regarding the time periods associated with suspension and ineligibility. Consultation participants were asked to what extent, if any, the duration of ineligibility and/or suspension should be modified, and how greater discretion could be built into the Regime to address issues associated with periods of ineligibility. Participants were also asked to provide their views on what factors should be considered in determining whether a supplier should benefit from discretion.

This theme garnered the most comments and strongest views.

### *Time period*

The majority of participants suggested that the time periods associated with ineligibility be reduced from the current 10 years (reducible to five), which was seen as too long. The principal view was to favour full discretion in the determination of a period of ineligibility, including the ability to reduce the period to zero.

Other views were for:

- an ineligibility period aligned with those of Canada's major trading partners
- a maximum period of between three and five years

### *Factors to determine time period*

Many provided a list of factors to be taken into account when determining an appropriate ineligibility period with some noting that these should be published as part of the policy; others suggested that such factors be used as guidelines rather than be an exhaustive list. Most proposals for factors for consideration included:

- the severity of the offence committed
- self-reporting and cooperation with law enforcement
- taking corrective action
- establishing compliance programs
- efforts at restitution
- repeat offences

Other factors raised were:

- the consideration of the impacts on employees, the economy and government
- the inclusion of exemptions from debarment for participants in pre-existing cooperation programs, such as the Competition Bureau's Leniency program

There was a recognition that introducing a considerable amount of discretion into the Integrity Regime could pose risks of inconsistent decision making and reduced predictability in determination processes. Therefore, the importance of transparency and due process in the determination process was stressed, including:

- an opportunity for suppliers to present their side / facts and submissions
- the publication of guidelines governing the exercise of discretion
- procedures to appeal and to reduce debarment periods

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The need to integrate a safe-harbour provision that would allow companies to self-disclose adverse information without being punished was identified. The possibility of a reassessment of the debarment decision after a certain amount of time was also raised.

## 2. Criteria for ineligibility and suspension

The [Ineligibility and Suspension Policy](#) lists offences for which a charge or a conviction triggers a determination of suspension or ineligibility under the Regime. Consultation participants were asked to respond to questions regarding the set of criteria that should be taken into account to trigger a determination of suspension or ineligibility. Participants were also asked if the Government should consider also taking into account other offences or judgments and on what basis, at what point debarment action should be taken, if debarment should have an impact on access to other government services, and if debarment in other jurisdictions should have an impact on a supplier's status under the Integrity Regime.

### *Additional offences*

There was a range of views expressed regarding the possible inclusion of additional offences. Some expressed support for expanding the current list to include other federal offences that call into question a supplier's integrity. However, a common view in the business responses was that the list is sufficient, while a few suggested narrowing the current list of offences to focus more on bribery, fraud, and similar wrongdoing.

There was support for adding similar provincial offences with a suggestion to harmonize the Integrity Regime with Quebec's list of offences.

There was a general acceptance of the idea that the same behaviour in different jurisdictions should be treated similarly under the Integrity Regime. However, many business participants advised caution in assessing similar offences in foreign jurisdictions, as the nature of the legal system must be taken into consideration. While one business participant supported adding foreign civil judgements from a fairness perspective, others raised concerns in this area related to the lower burden of proof required.

Most argued against the use of allegations and investigations of wrongdoing as a basis for determinations of suspension or ineligibility, citing either the need for due process or the presumption of innocence, as well as the possibility of liability and reputational harm in cases where charges are never laid. Other views expressed were:

- an openness to considering allegations in cases of vendor performance issues and “exceptional circumstances”, where it is not in the public interest to award a contract
- that allegations or investigations that pointed to patterns of tax avoidance should be taken into consideration

### *Application to non-procurement Government of Canada services*

Several participants expressed an openness to applying Integrity Regime determinations to non-procurement services provided by the federal government but with caveats such as:

- where it is relevant to the service (for example, the Trade Commissioner Services)
- provided it was done on a case-by case basis or with discretion

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- only where withholding a service would not interfere with a company attempting to be compliant, or where withholding the service would not be disadvantageous in the context of trade agreements, environmental protection or Canada’s reputation

However, the most common view was that Integrity Regime determinations should be applied only in the context of federal contracts and real property transactions and should not impact non-procurement services.

### *Other jurisdictions’ debarment decisions*

Most were supportive of taking into account the debarment decisions of other jurisdictions, but there was a range of views on what type of impact they should have. Several participants thought that there should be a high level of discretion involved as debarment regimes rules vary from one jurisdiction to another. One participant explicitly noted that cross-debarment decisions should not be automatic, while another expressed support for taking these decisions into account in cases involving serious misconduct, such as human trafficking.

Several participants indicated that debarment decisions made by foreign jurisdictions should not have an impact on a supplier’s status under the Integrity Regime. One participant noted that it may not be appropriate given differences in legal systems, but noted that consideration of provincial debarment decisions might make sense.

### **3. Addressing organized crime**

Participants were asked to consider what type of measures should be taken to preclude those with known membership in, or associations with, organized crime from doing business with the federal government.

It was generally recognized that the infiltration of organized crime poses a significant risk to the integrity of federal procurement. In large part, there was agreement that the Integrity Regime sufficiently addresses organized crime, as a supplier can be suspended or determined to be ineligible for a charge or conviction under [sections 467.11 to 467.12 of the Criminal Code](#)<sup>2</sup>, or due to known linkages between illicit drugs and organized crime, under sections 5 to 7 of the [Controlled Drugs and Substances Act](#)<sup>3</sup>. Many expressed concerns that suspending or rendering a supplier ineligible on the basis of an allegation of an association with organized crime – rather than a charge or conviction – would be challenging and potentially perilous. However, if facts substantiated an affiliation with organized crime, there was support for the Government to take action.

Finally, some participants expressed support for leveraging the Integrity Regime to strengthen existing efforts to address organized crime, and suggested that greater cooperation with the law enforcement community may prove helpful.

Other views were that:

- the Government of Canada look for possible guidance on how organized crime is addressed through procurement in other jurisdictions (for example, Quebec) or under other federal programs

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<sup>2</sup> That is, participation in the activities of a criminal organization, recruitment of members by a criminal organization, commission of an offence for criminal organization and instructing commission of offence for criminal organization.

<sup>3</sup> That is, trafficking in substance; importing and exporting; and production of a substance.

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(for example, Health Canada’s process for licensing producers of cannabis for medical purposes or Transport Canada’s Security Screening Program)

- it would be critical for law enforcement agencies to be directly involved in the determination of facts, and that any terminology regarding an “association with organized crime” would need to be clearly defined and defensible

#### 4. Expanding the scope of application

Participants were asked to consider whether the application of the Integrity Regime should be broadened to include federal entities beyond departments and agencies, and what factors should be considered when deciding what other organizations should be added. Participants were also asked how the Regime could be used to achieve other social, economic, or environmental policy objectives.

##### *Application of the Integrity Regime to other federal entities*

Currently, the Regime applies to all federal departments and agencies identified under Schedules I, I.1 and II of the [Financial Administration Act](#). Other federal entities, such as Crown Corporations, are encouraged to opt in on a voluntary basis.

The majority of participants supported the expansion of the Regime to apply to other federal entities, but suggested that attention be paid to:

- the administrative burden this may place on Crown Corporations and suppliers
- allowing flexibility to opt-out if necessary

Where there were different views in this area, the majority of participants cited challenges that may be encountered with respect to some federal entities’ independence or their arm’s length status. One solution brought forward could be to have departments and agencies share best practices and due diligence measures with other federal bodies, rather than requiring them to opt-in.

##### *Using the Integrity Regime to achieve other policy objectives*

A number of participants, particularly those representing NGOs and some from the justice sector, suggested that the Government of Canada should use the Integrity Regime to advance other policy goals, including:

- combatting forced labour and other labour violations
- protecting human rights and the environment
- combating human trafficking
- encouraging stronger business ethics surrounding corporate social responsibility
- encouraging the payment of taxes

In addition to the use of debarment, some suggested that these policy goals could also be supported by requiring suppliers to certify that they have made a good faith effort to ensure that forced labour does not occur in their supply chain; and including references to the International Labour Organization Conventions and ISO certifications regarding environmental protection and social responsibility in the Procurement Code of Conduct and other solicitation documentation. Note that a false certification by a supplier can lead to debarment.

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Those representing the business community indicated that the central objective of the Integrity Regime should continue to be to ensure that the Government of Canada does business with ethical suppliers (for example, those that have not engaged in corporate crime). To this effect, it was noted that:

- expanding the scope may dilute the Regime’s core objectives
- this approach could be seen as political interference in the procurement process and could be used to favour companies that agree with the government’s priorities, agenda and ideologies over those that do not
- it may be unrealistic to expect companies to fully comply with all elements of any applicable laws and regulations that may be captured under an enhanced Regime
- companies may be found unfairly liable for a breakdown in operational procedures (for example, a negligent employee or a control system failure) in this regard it was noted that “a compliance violation is not necessarily a business practice”

### **Additional viewpoints expressed**

Although public consultations focused on potential enhancements to the Integrity Regime, other key issues raised included the following:

- Moving the Integrity Regime to legislation instead of policy
- Changing the administration of the Regime from a regime in which suppliers certify that they are compliant to a system where suppliers need to be pre-authorized to contract with the government
- Clarifying technical aspects of the [Ineligibility and Suspension Policy](#) for suppliers, including possibly narrowing the definition of an affiliate
- Removing the ability to suspend a supplier based upon a charge
- Requiring suppliers to provide information on beneficial ownership, offshore subsidies, trusts and foundations, and other judgments

## **WHAT WE HEARD ON A POSSIBLE CANADIAN DPA REGIME**

Participants were first asked whether they thought DPAs could be a useful additional tool for prosecutors to use at their discretion in appropriate circumstances to address corporate criminal wrongdoing and meeting the following objectives:

- ensuring a criminal sentence that is effective, proportionate and dissuasive, consistent with the sentencing principles in the [Criminal Code](#)
- identifying more corporate and individual criminal activity through greater self-reporting by companies which would be required to identify implicated individuals for prosecution purposes
- reducing the potential negative impact of a conviction on innocent third parties
- enhancing compliance and improving corporate culture

With this in mind, stakeholders were asked to outline what they felt were the key advantages and disadvantages of DPAs as a tool to address corporate criminal wrongdoing in Canada. The consultation then posed a series of more specific questions about the details of a possible DPA framework, were the government to decide to proceed in this direction. Some key framework elements include: for what offences a DPA could be available; what eligibility criteria would be appropriate; what could be possible DPA terms; and what should be the role of the court.

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The majority of participants (particularly those from the business sector) thought that DPAs could be useful and cited advantages, including meeting the above four objectives, but also mentioned the benefits of having a tool that avoided a binary (prosecute or not prosecute) outcome and that focused on rehabilitation rather than on punishment. Possible justice system efficiencies were also mentioned, along with facilitating victim restitution, where appropriate. Others did not support DPAs as they were of the view that there was no demonstrable need for them in Canada. A number expressed concerns that a DPA regime would give too much discretion to prosecutors and could compromise public confidence in the justice system. Related to this was a concern expressed by some that DPAs could be seen as favouring large companies over smaller companies and individual offenders. Of the responses that compared a possible Canadian regime to the U.S. policy-based regime and the UK statutory regime, most favoured the UK model for reasons of transparency. It should be noted in this respect that Australia introduced its own DPA legislation on December 6, 2017 and the first arrangement has been entered into under France's recently enacted DPA-like regime.

While the majority of the feedback focused on the first question, the consultation elicited detailed views from many participants on a potential DPA framework, as outlined below under questions 2 through 13. Key themes that came across were that transparency of process and result (which could be achieved through having guidelines, requiring publication and providing a strong role for the judiciary) are very important in maintaining respect for the criminal justice system and for reasons of general deterrence. Most thought that DPAs should be limited to economic crimes (such as fraud, bribery and money laundering), which tend to be more complex and resource-intensive to prosecute, but some thought that they could be useful for other crimes (with the exception of crimes involving physical harm to individuals) and that, after a period of operation, consideration could be given to expanding a possible regime to apply to other criminal conduct. Participants broadly agreed with the eligibility criteria in the DPA discussion guide, and considered that the accused's cooperation and genuine commitment to reform to be crucial criteria in determining whether a DPA would be appropriate. The importance of taking a flexible, customized approach to DPA terms and duration was highlighted. While victim remediation was considered to be a laudable goal, it was acknowledged that it is only viable where the victims may be identified and the harm quantified. Discussion surrounding corporate monitoring focused on the importance of avoiding real or perceived conflict of interest and on the challenges of ensuring that monitors' terms of reference are appropriately tailored to the case and that there is sufficient technical expertise within the justice sector to make appropriate use of the monitoring reports.

## **1. Usefulness of DPAs as part of the Canadian criminal justice system**

Participants were asked for their views with respect to the potential advantages and disadvantages of using DPAs to address corporate criminal liability in Canada. This issue received the most attention from participants, with the majority taking the view that the advantages of having a DPA regime would outweigh the possible disadvantages.

### ***Advantages***

The majority of participants thought that a DPA regime would encourage self-reporting, promote accountability, foster a compliance culture and enhance public confidence in addressing corporate wrongdoing. A DPA regime is also viewed as a means to improve enforcement outcomes and could increase justice system efficiencies by avoiding protracted criminal trials. The extent to which DPAs would encourage self-reporting is dependent on the predictability of the outcome, which in turn is linked

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to how the DPA regime is structured. While there is little judicial involvement in the US DPA process, under the UK regime, the courts must find that the terms are fair and reasonable. This adds a degree of uncertainty, as the court could require that changes be made or may not approve the DPA at all.

Several participants noted that DPAs provide greater flexibility for prosecutors to structure tailored resolutions in appropriate cases, while reducing the negative consequences of a company's conviction for innocent third parties, such as employees.

Other cited advantages include that DPAs may:

- help Canada put in place a tool for prosecutors that is available in other jurisdictions
- provide an alternative means of holding a corporation accountable for misconduct, while avoiding the legal and reputational harm that could result from prosecution and conviction
- facilitate the more timely payment of compensation to victims

## ***Disadvantages***

There was a sense among some participants that instituting a DPA regime could give companies a false sense of security as they might consider that they would not be at risk of prosecution, but could, rather, “buy their way” out of trouble through the payment of financial penalties rather than being held accountable by a court of law. If this were to be the case, it could weaken the deterrent effect of the criminal law on corporations and ultimately undermine public confidence in the criminal justice system.

Further disadvantages that were identified include that a DPA regime may:

- shield employees who have played an active role in the misconduct by focusing enforcement on the company rather than on pursuing charges against individual offenders
- allow corporate monitors too much leeway over their mandates, such that the terms of the DPA go beyond what was intended
- result in wasted effort and resources and potentially compromise a subsequent prosecution in cases where significant time is spent trying, unsuccessfully, to negotiate a DPA

Some thought that providing more investigation and prosecution resources would be more effective than adopting a DPA regime in addressing a possible perception that commercial crime and corruption are not sufficiently investigated and prosecuted in Canada.

## **2. Scope of offences**

Participants were asked to identify offences for which DPAs could be made available. The vast majority felt that DPAs would be best suited for economic offences committed by organizations, such as fraud, offences under the [Corruption of Foreign Public Officials Act](#), bribery, money laundering and, generally, offences under the [Competition Act](#). It was stated that these offences are often difficult and costly to prosecute.

Some suggested that the Government should begin with a narrow scope of offences and thereafter, with the benefit of experience, consider expanding the scope of offences to include, for example, health, environmental and other crimes that, like economic crimes, may be challenging to investigate and prosecute. One participant within the legal community did not support the use of DPAs in principle as, in the participant's view, they supplanted the criminal law. The participant accordingly did not support a possible expansion of DPAs beyond serious economic crimes or their possible application to individuals.

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As well, some participants thought that the scope of offences should mirror the offences listed under the Integrity Regime. Participants did not think that DPAs would be appropriate for offences related to terrorism or national security or for offences where bodily harm had been caused, though, with these exceptions, several were open to the idea of having DPAs apply to offences other than economic crimes. One participant thought that it would not be necessary to list offences to which a regime would apply, as this would be a matter for prosecutorial discretion.

### **3. Role of the courts**

The majority of participants favoured the UK model, which provides for strong judicial oversight throughout the DPA process. This would include the need for the courts to review the draft DPA to ensure that it is in the public interest and that its terms are fair, reasonable and proportionate. The court should also be involved in variance and termination determinations. Viewing DPAs principally as agreements between the prosecutor and the accused, a few participants thought the role of the court should be limited (for example, to serving as a repository for DPAs).

A smaller number of participants indicated that the courts should be given an even broader oversight role from negotiation to conclusion of the DPA, with a regular review function.

Others cautioned that a close supervisory role from the courts would place an unnecessary burden on court resources, and may be more appropriately handled outside of the court system. One written submission was supportive of the U.S. model, where DPAs are registered with the court for enforcement in the event of a breach.

### **4. Conditions for negotiating a DPA**

In addition to meeting the prosecution threshold (of reasonable prospect of conviction and being in the public interest), participants suggested that a range of factors should be taken into account in determining when it would be appropriate for a prosecutor to offer to negotiate a DPA. For transparency, it was suggested that the factors be enacted through legislation, rather than relying on a policy-based approach and, to allow maximum flexibility, that the list not be exhaustive.

The following factors were generally considered to be relevant for DPA negotiation purposes:

- whether the company self-reported misconduct and acknowledged wrongdoing
- cooperation with the Crown
- whether there is a sincere willingness to reform business practices and corporate culture
- whether there is any history of misconduct and/or compliance
- the nature and gravity of the offence
- the level of culpability (for example, whether the misconduct was sanctioned and condoned by senior management or constituted the actions of rogue employees)
- whether the company has taken any remedial measures or put in place compliance programs
- the potential consequences of a conviction (for example, whether it would result in significant negative consequences for innocent third parties)

Conversely, when asked to identify factors that could be used to determine circumstances where a DPA would not be appropriate, participants stressed that negotiation of a DPA should not be offered where:

- there is a history of misconduct or of unethical behaviour and there is no evidence of efforts having made to remedy the situation



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- the misconduct caused a significant level of harm to the public or to competitors
  - the company has not cooperated with authorities
  - a DPA would not adequately deter misconduct
  - a DPA would not serve the public interest or the proper administration of justice
  - there are policy reasons against using a DPA in the circumstances (for example, where the conduct involves serious personal injury)

Nearly all participants were in agreement that a DPA should not be available to individuals as the terms of DPAs (for example, large fines, compliance measures and corporate monitoring) would in most cases not be appropriate. There is also a general acceptance that individuals should not benefit from a DPA to shield themselves from prosecution of their criminal actions.

## 5. Potential DPA terms

Participants were asked which terms should be included in a DPA. Most agreed that the terms should be flexible and applied on a case-by-case basis. There was a widely-shared view that key terms should include:

- an agreed statement of facts
- an acknowledgement of responsibility for the wrongdoing
- an obligation to identify those who have engaged in the misconduct, for prosecution purposes
- a significant financial penalty
- recovery of profits
- remedial measures to be undertaken
- the appointment of a monitor in many cases
- an expiry date
- the process to modify terms and a review mechanism
- the conditions under which a DPA may be discharged or rescinded
- the effect of compliance and the consequences of non-compliance

The point was also made that the Crown's costs should be reimbursed.

Participants said that the duration should be set on a case-by-case basis and should be sufficient to allow for the terms of the DPA to be complied with, which should take into account:

- the nature and complexity of the misconduct
- the allocation of sufficient time to implement compliance obligations
- the time required to pay financial penalties
- the amount of time necessary to have a deterrent impact

Some participants specified that the base duration should be comparable to the durations of DPAs in foreign jurisdictions or to the probation order provisions of the [Criminal Code](#), with adjustments made to take into account aggravating and mitigating factors. While there was support for providing flexibility to extend the duration of a DPA to afford further time to implement remedial measures, it was suggested that extending the duration of a DPA should be offered only under exceptional circumstances.

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## 6. Publication

It was a commonly held view that it would be important for the material provided in the course of DPA negotiations to remain confidential in order not to discourage organizations from coming forward and openly sharing information when invited to enter into a DPA. There was a clear preference for publishing the final, definitive text of the agreement following the successful conclusion of the negotiations. Publication was seen as a transparency measure, which could promote public confidence in the DPA regime and act both as a deterrent to other companies and as a form of “jurisprudence” on which they can base a decision to come forward.

Participants were asked under what circumstances should publication of the DPA be waived or delayed, and the responses varied.

Some participants thought that the court should retain the discretion to delay publication or to redact sensitive information where to publish could compromise the administration of justice (for example, where there are related ongoing investigative or court proceedings) or where the safety of individuals is at risk.

While some participants did not support the waiver of publication under any circumstances, others were prepared to accept exceptions being considered on a case-to-case basis in order, for example, to protect proprietary and commercially sensitive information, preserve third party rights, national security or international relations.

## 7. Process of addressing non-compliance

The majority suggested that addressing non-compliance by the organization with the terms of the DPA should be a matter of discretion and based on the severity of the non-compliance, whereby a DPA could be terminated in severe cases and the prosecution would be reinstated. In less serious cases of non-compliance, other options could be available, such as reviewing or modifying the terms of the DPA or allowing additional time to implement remedial measures to correct the conduct.

It was suggested that the court should determine whether non-compliance has taken place, and that a variety of consequences be available to the Crown. Others suggested that the prosecutor, in collaboration with the assigned monitor, would be best suited to determine matters of non-compliance.

The consequences of non-compliance could involve a financial penalty, additional terms or conditions being added, and extension of the DPA expiry date. Of those who responded on this point, the majority thought that a company should be given one, but only one, extra chance to comply.

## 8. Potential use in court of DPA negotiation material

Participants were asked when facts disclosed during DPA negotiations should be admissible in a prosecution against a company. Most suggested that facts disclosed during a negotiation, including negotiations where a DPA was not reached, should not be used in a prosecution. Some specified that this is critical because if this information was not to be kept confidential, corporations might be discouraged from disclosing relevant information in a negotiation, which would undermine the DPA process.

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However, most participants also indicated, while information disclosed in the negotiations should remain confidential, that the agreed statement of facts in the DPA should be admissible in a reinstated prosecution against the corporation, if the DPA is breached and terminated, and for the prosecution of other undisclosed offences.

Conversely, others suggested that any facts disclosed during the DPA process should always be admissible, or at least admissible in a prosecution against another company or against individuals responsible for the wrongdoing or used in the prosecution of perjury or contradictory evidence cases.

## **9. Compliance monitoring**

Participants were asked how compliance monitors should be selected and governed. While some clearly see a role for the courts in the selection process, others thought that this would be more a matter for the prosecution and for the corporation concerned. It was emphasized that monitors needed to be qualified, objective, free from any potential conflict of interest and capable of undertaking the task of monitoring the specific terms of the DPA. Views were offered on how to put these criteria into operation. Several thought that the monitor should be mutually agreed on (by the prosecutor and the company) and that their mandate should likewise be established jointly. Some thought that appointments should be approved by the court. A few suggested that a code of ethics and a set of qualification be established. Some thought that monitors should be drawn from a roster of qualified candidates (based on purpose-made selection criteria) and others thought that the “pool” should consist of licenced professionals (such as lawyers and accountants). A few participants suggested that a monitor would not always be necessary and that the system should be flexible to fit the particular circumstances of each case.

There was broad support for the corporation to pay for the costs of the monitor and for the monitor to report to the Crown prosecutor, providing interim reports and a final report. It was also suggested that trained and skilled prosecutorial teams (also including the investigating police officers) be created to assess the need for a monitor and if so, to tailor the compliance monitoring measures to the circumstances of the case.

Participants were also asked how the compliance monitoring reports should be used. The responses varied. Most agreed that monitoring reports should be reviewed by law enforcement before being relied on in determining whether the terms of a DPA had been complied with, but some thought that this would be a matter for the prosecutor, while others thought that the investigators should play a role. While some indicated that reports should always remain confidential to ensure the protection of economic interests of the corporation, more seemed to suggest that reports of a successful DPA should be made public (for example, through a public database) to increase public confidence in the DPA process and help companies identify good practices.

Many indicated that reports should be used by the monitor or the court to ensure that remedial measures in place are being complied with, and to ensure the conditions were well implemented.

## **10. Victim compensation**

Participants were asked under what circumstances victim compensation (in the form of restitution) should be included as a DPA term. The majority suggested that compensation would be appropriate where the victims can be identified and the losses quantified.

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If victims are not readily identifiable, some suggested that funds could be diverted by charitable donation to other causes.

Some participants specified that compensation should reflect the severity, scope and impact of the offences, and in particular should take into consideration whether the victim suffered direct harm.

A few indicated that victim compensation is best left to the civil courts.

## **NEXT STEPS**

The Government of Canada will further review the feedback received and assess whether enhancements to the Integrity Regime are warranted to ensure that the Regime continues to achieve its objectives, is efficient in doing so, and addresses new trends and risks in a constantly changing marketplace. Feedback will also be used by the Government of Canada in considering the possibility of introducing a Canadian DPA regime as an additional tool for prosecutors, to be used in appropriate circumstances, to address corporate crime.

While this public consultation has ended, the Government of Canada remains committed to hearing from interested parties regarding both the Integrity Regime and DPAs.

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## APPENDICES

### Appendix A – List of consultation questions – deferred prosecution agreement

**Question 1:**

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

**Question 2:**

For which offences do you think DPAs should be available and why?

**Question 3:**

What role do you think the courts should play with respect to DPAs?

**Question 4:**

What factors should be taken into account in offering a DPA?

**Question 5:**

When would a DPA not be appropriate?

**Question 6:**

What terms should be included in a DPA?

**Question 7:**

What factors should be taken into account in setting the duration of a DPA?

**Question 8:**

Under what circumstances should publication be waived or delayed?

**Question 9:**

How should non-compliance be addressed?

**Question 10:**

When should facts disclosed during DPA negotiation be admissible in a prosecution against a company?

**Question 11:**

How should compliance monitors be selected and governed?

**Question 12:**

What use should be made of compliance monitoring reports?

**Question 13:**

Under what circumstances should victim compensation (that is, anticipatory restitution) be included as a DPA term?

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## Appendix B – List of consultation questions – Enhancements to the 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?

### 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?

### 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?

### Question 4:

What factors should be considered in determining whether new offences should be included?

### 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?

### Question 6:

How should Integrity Regime determinations of ineligibility be applied to non-procurement federal 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?

### 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?

### 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?

### Question 10:

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