Deferred Prosecution Agreement Submission

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

(a) DPAs reduce the negative consequences for blameless employees, shareholders, customers, pensioners, suppliers and investors

Crimes are committed by individuals, not corporations. The emphasis of any effort to address corporate crime should be on holding specific individuals in the corporation who commit the crimes liable. By allowing for DPAs, the government could focus its efforts on the responsible individuals and avoid long and costly litigation. DPAs would also limit the negative effects on the firm and others who were not involved in the wrong doing.

(b) DPAs would help to foster a compliance culture and encourage voluntary disclosure

Given the flexibility of DPAs compared with the traditional prosecution route, corporations are more likely to notify the authorities when they become aware of employees engaged in wrongdoing. This would benefit the public good since corporations will be incentivized to disclose corporate wrongdoing voluntarily. It would also allow corporations to work with the government to address the wrongdoing and develop internal compliance measures that would help prevent wrongdoing from occurring in the future. DPAs would encourage corporations to develop strong internal compliance measures since the corporation can be confident that a DPA arrangement would allow them to deal with employees engaged in wrongdoing efficiently and effectively.

Further, if criminal conviction is the only option, given the debarment policy, a corporation heavily reliant on government contracts may have no choice but to vigorously defend against charges through all levels of the court and avoid any conduct that could be interpreted as an admission.

(c) DPAs would still have the effect of denouncing and deterring wrongful behavior, but would allow corporations to address behavior and stay in business

Some suggest that DPAs would encourage corporations to view financial penalties as "the cost of doing businesses" and therefore, reduce the deterrent effect. However, this issue is present in every case and not just economic crime. Further, this notion has not deterred other Canadian law enforcement agencies from developing similar arrangements. Concerns about corporate attitudes towards financial penalties can be addressed by the appropriate use of prosecutorial discretion, e.g., whether to offer or accept a DPA. Ultimately, when a corporation takes corrective action to appropriately discipline culpable individuals, there is less rationale to prosecute the corporation.

Question 2: *For which offences do you think DPAs should be available and why?*

At a minimum, DPAs should be available for all offences which can result in debarment under the Integrity Policy, including *Competition Act* offences. For many firms, debarment would significantly harm their ability to operate. As such, the possibility of debarment would likely motivate a corporation to seek a DPA (particularly given that debarment punishes not only the individual employees responsible, but also employees who were not involved in the wrongdoing).

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

The court should assume a limited supervisory role in the DPA process, however, DPAs should not be subject to extensive judicial approval processes. The DPA regime is based on an exercise of prosecutorial discretion and any court process should not involve second-guessing the exercise of that discretion but rather be limited role to ensure transparency and public confidence in the DPA process itself.

For example, in civil matters, when the Competition Bureau enters into a Consent Agreement, it is simply registered with the Competition Tribunal and by doing so becomes a Tribunal order. The resolution is then placed on the public record. In criminal matter plea agreements, the prosecution service and parties attend before the court for a single brief court appearance to enter the plea and the matter again is available on the public record

A DPA regime based on the UK style Court approval process would add significant uncertainty, involve multiple court appearances, increase uncertainty, and undermine the attractiveness of the DPA process. The offer/negotiation of a DPA should be at the discretion of the responsible government authority. The role of the court should focus on ensuring sufficient transparency in the process to facilitate public trust in the system, not approving the terms of the agreement itself.

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

The most important factor is whether the DPA is in the public interest. The legitimacy of a DPA regime is dependent on public trust. For a DPA to be in the public interest, the corporation must accept responsibility for the conduct and demonstrate that it genuinely seeks to reform its business practices and corporate culture and mitigate the damage caused by the relevant conduct.

Some other factors include:

(a) Impact on Third Parties

It is not clear how the seriousness of the offence and impact on third parties may factor into the consideration of whether to offer a DPA.

In our view, the impact on third parties is a matter that would be considered in exercising prosecutorial discretion to use a DPA and its provisions such as restitution obligations.

(b) Involvement of Senior Management

The level of involvement by senior management would raise the degree of remedial measures required to be taken by the corporation to demonstrate that it genuinely seeks to reform its business practices and corporate culture. In our view, barring access to a DPA because of the involvement of senior management would hurt those employees not involved in the wrongdoing, or unnecessarily penalize shareholders and other stakeholders, and limit the effectiveness of the DPA regime.

(c) Disclosure of Information by Corporation

When developing a DPA regime it is important to remember that corporate crime is committed by individuals and not corporations themselves. Often, the corporation is just as eager as the public to uncover evidence of wrongdoing. However, implicated individuals may be more incentivized to look out for their own interests and will not necessarily cooperate with the corporation's investigation. A corporation may not be able to obtain cooperation of implicated individuals and there may be limits to the evidence that the corporation can reasonably be expected to obtain. Further, the expectation for corporations to report "without undue delay" must be qualified by the reality that the corporation may have difficulty accessing the information requested.

(d) National Security

The public interest is always engaged when national security is concerned. The government should have strong discretion on whether to offer a DPA when there are national security issues at play.

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

The government should have discretion to determine when a DPA may not be in the public interest, particularly when the misconduct involves national security or foreign affairs issues. Further, where the corporation is not a bona fides business and exists only for the purposes of illegal conduct, a DPA should not be offered.

If the corporation is a serious repeat offender, it is questionable whether they should be afforded the benefit of the DPA regime.

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

The factors set out on page nine of the discussion document are reasonable terms and conditions for DPAs. To add to the discussion, we believe that a DPA regime should include:

- flexible terms to address each case
- elements that foster compliance
- cooperation obligations
- financial penalties (profits earned from the offending conduct will drive the amount of the fine as opposed to an additional financial penalty)
- a fixed expiry date
- garnishment of wages, but this should be limited to individuals directly involved in the wrongdoing

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

The appropriate duration of DPAs should be determined by considering the nature of the wrongdoing. The government should be flexible in determining how long a DPA should last based on the corporation's actions to respond to the wrongdoing. Certain mitigating factors might also be considered relevant to a shorter DPA term. For example, where a company has made a good faith attempt to reform its business practices as evidenced by corrective actions, the government should consider this in determining the duration of the DPA.

Similarly, for certain aggravating factors, the duration of a DPA should be longer. For example, where a company is a repeat offender, the government would be justified in considering a longer period for the DPA.

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

The public credibility of the DPA regime is crucial for its success and transparency is an important part of ensuring public credibility. Nevertheless, some flexibility regarding the details disclosed publicly would encourage corporations to engage in DPAs. For example, the publication of proprietary information could be detrimental to corporations and would disincentive them from participating in DPAs.

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

The government and courts should have discretion in addressing non-compliance with a DPA as an instance of non-compliance may not be material. In addition, due process is important when determining whether non-compliance has occurred. The organization should have a right to be heard where the government is determining whether the corporation has breached the terms of the DPA.

Serious instances of non-compliance that demonstrate lack of corporate resolution to comply with the relevant legislation may warrant criminal charges or termination of the DPA. However, isolated technical violations may warrant less onerous measures, such as warnings or renegotiated terms of the DPA.

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

If a DPA is not reached, the government should not be entitled to use statements made in the negotiation process against the company. An ability to do so would be a significant disincentive for corporations engaging in the DPA regime.

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

Active monitors may not always be required and periodic certified reports subject to audit may be sufficient. The system should be flexible to fit the particular circumstances of each individual case.

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

See 11 above.

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

As a general principle, it would seem appropriate to include victim compensation where applicable, recognizing that not all offences have a victim — e.g., where the offence is in the agreement itself, even if the agreement is not implemented

It may also be appropriate to limit victim compensation under the DPA to persons who suffered direct harm — e.g., the customer whose contract was subject to a bribe. The DPA should not become a tool for broad-based class actions seeking to profit from the wrongdoing.

Nor should a DPA require compensation to persons who are implicated in or a party to the illegal conduct.

If there are no direct victims of the wrongdoing, the corporation might be required to make a charitable donation. However, the charitable donations should only be considered when appropriate and there should be no expectation or bias towards them in every DPA.