THE CANADIAN CHAMBER OF COMMERCE
LA CHAMBRE DE COMMERCE DU CANADA

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Employment and Social Development Canada
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Dear Mr. Carruthers,

Re: Comments on the regulatory proposals to enhance the Temporary Foreign Worker Program compliance framework

The principles of fairness, objectivity and transparency should be central to government's administration of programs governed by legislative statute. Canadian business expects government to uphold these principles and respect the standards of Canadian administrative law. These principles are not strongly evident in the proposed regulatory amendments outlined in *Discussion paper: Regulatory proposals to enhance the Temporary Foreign Worker Program and International Mobility Program compliance framework*.

The Canadian Chamber would endorse a compliance framework that would prosecute "bad actors" in the Temporary Foreign Worker Program (TFWP). However, in the discussion paper, the government proposes a compliance framework that could very likely injure many innocent Canadian businesses (including small businesses who have been the majority of employers in the program historically) in the process of penalizing bad actors.

Employers in certain sectors and regions of the country need to recruit skilled individuals from abroad to work on a temporary basis to fill labour market needs. The proposed compliance framework would introduce further

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constraints in those employers' ability to hire foreign nationals to work in Canada.

The TFWP already suffers already from poor administrative standards. To ensure a smooth-functioning administrative process with clearly defined rules is put in place and succeeds, regulations with predictable outcomes, administrative oversight and an appeal and/or review process must be present and are key components to the success and ongoing viability of the TFWP and any other government program. These components ensure that applicants to the program receive their desired and deserved outcomes while preventing potential abuses or errors that could be made by applicants or administrative decision-makers.

Under the proposed compliance framework, the discretion in determining employers' non-compliance leads to the imposition of potentially detrimental penalties including administrative monetary penalties (or AMPs, which are fines) and bans from the program. One in four employers in the TFWP will be inspected each year, according to the discussion paper. Inspections are intended to verify employer compliance with program conditions.

Where there is discretion in decision-making by government officials, there should be procedural fairness which is hard to discern in the regulatory proposals outlined in the discussion paper.

There are three key concerns in the discussion of the TFWP regulatory proposals that are especially concerning to the Canadian Chamber, namely:

1. The removal of the good faith provisions which acknowledge that human error may occur and should not by itself result in disproportionate penalties;

2. The lack of commitment to full transparency with respect to guidelines and criteria which increases the risk that comes with civil servants' discretionary decision-making; and

3. The lack of administrative oversight (via a quasi-judicial body, for example) in light of the discretion accorded to civil servants in determining highly punitive penalties.

In the brief time provided to consult with members and meet the deadline for response, the Canadian Chamber offers these comments on the regulatory proposals cited in the paper.

3.0 Enhanced compliance framework

3.1 Stronger standards for compliance

In the discussion paper on page 5, the government states that:

> "Regulatory amendments to the existing justifications would be introduced so that consequences could be imposed on non-compliant employers regardless of whether they take corrective action. Specifically, non-compliance resulting from good faith errors and unintentional accounting or administrative errors would be subject to consequences such as an AMP and/or a ban, and the employer's name would be published." (Underlining added.)

The removal of the good faith provisions for companies that have made an honest mistake and/or an effort to correct their behavior is an unduly harsh measure that disregards the fact that human errors occur for any number of reasons. It appears that an employer who makes an administrative mistake (like miscalculating an employee's vacation pay) would be treated as non-compliant just as the employer who commits a more serious violation of the conditions (such as having an abusive workplace).

While the proposed measures would not abrogate the judicial recourse available to companies under the Federal Court Act, they imply that companies would have to consider litigation if they felt human errors led to non-compliance and penalties and wanted to argue the good faith issue under the law.

This proposal also appears to be inconsistent with the emphasis the government has placed on education and awareness, as outlined in Figure 1 on page 4 of the discussion paper. A better approach would be a system with escalating warnings that lead to a penalty if the employer fails to rectify their missteps after educative measures have been taken.

3.2 Consequences for non-compliance

3.2.1 Proposed AMPs system

On page 6 of the discussion paper, the government states that:

> "In cases where an employer is found non-compliant with more than one condition, the AMP amounts would be calculated separately and added together to produce the total amount payable. When a violation affects more than one foreign national, each foreign national would be treated as a separate case and the resulting penalties would be added together. For example, if a violation affects five foreign nationals and results in an AMP of $10,000 in each case, the total penalty payable would be $50,000."

With the maximum amount payable for a single violation set at $100,000 and the possibility that a violation could then be multiplied against the number of foreign nationals, AMPs could be high enough to cause significant damage to a business. There is no ceiling on penalties, which is not typical with fines in other regulatory regimes.

In addition, the AMP must be paid within 30 days of the employer receiving notice of the violation. One could imagine a fine of $100,000 payable within 30 days being very harmful and possibly impossible to settle by a small business.

Overall, the proposed penalty regime seems to be excessive in its punishment of employers, because it combines AMPs with bans from the program, there is no ceiling on the AMPs or the bans, and the AMPs are high enough to possibly bankrupt a business on the basis of even a small error.

The penalty regime will arguably increase the cost of doing business, possibly cause undue hardship, and could significantly increase litigation. It will be costly and time-consuming for all parties involved. It almost appears as though the government will enforce compliance on a basis that disregards if an employer may go out of business as a result.

3.2.2 Proposed ban lengths
3.2.3 Violations

In the discussion paper on page 7, the government states:

> "It is proposed that the violation of all conditions for which an inspection may be conducted be subject to a possible AMP and/or ban. This would include conditions listed in sections 209.2, 209.3 and 209.4 of the Regulations relating to:
>
> - the genuineness of the job offer;
> - the employment of a live-in caregiver;
> - wages, occupation and working conditions;
> - reasonable efforts to provide a workplace free from abuse;
> - labour market impact;
> - reporting and document retention; and,
> - cooperation during inspections."

The question here is: how to measure whether any of these conditions have been violated to the extent that warrants a possible AMP and/or ban? For example, how does one measure the "genuineness" of a job offer?

The list of conditions which could be violated is long and lacks detail (as outlined on page 8). Consider the uncertainty regarding an employer of high-wage workers who was required to "demonstrate job creation or retention for Canadians/PRs" as a condition that led to a positive Labour Market Impact Assessment (LMIA). There need to be objective criteria to make it clear when a condition will be violated.

3.2.4 Determining AMP amounts and ban lengths

Discretionary decisions made by administrative decision-makers should be relevant, reasonable, and consistent, with the process being free of any abuse. Unfortunately, this has not been the case with past Labour Market Opinion (recently renamed LMIA) applications. It is imperative to the overall success and economic well-being of Canadian businesses that the administrative decision-makers of the TFWP be subject to the standards outlined under Canadian administrative law.

Given the inconsistent and contradictory information provided to employers by Service Canada officials handling these applications to date, including those in the same office and those in different provincial offices, the Chamber is concerned that employers that are trying to follow the rules will nevertheless be subject to unwarranted and harmful fines and bans.

The criteria serving as basis for administrative penalties provide for a wide scope in their interpretation. Good faith errors, even if they are promptly corrected, may lead to severe sanctions. In addition, the proposed point and category system, which appears to be detailed, is also open to interpretation and varying application.

The problem the proposed framework introduces is giving further power to civil servants, who will use it in a discretionary manner, and that the power will lead to pecuniary sanctions which are easy to impose and difficult to challenge – notwithstanding the lack of competency of some of the inspectors and the lack of homogeneity in the manner the penalties are issued.

As a practical matter for bureaucrats administering this regime, as well as for employers trying to follow the new rules, the Chamber strongly recommends the government develop a fully transparent set of guidelines and criteria so that everyone is following the same playbook. Full transparency is the only way to administer a fair, objective and successful TFW program.

In considering the severe and disproportionately punitive nature of the penalties that employers will be subject to, it is the Chamber's view that there should be judicial oversight. The power to issue AMPs usually resides with a tribunal. If a quasi-judicial body is not in place, there may be due process concerns. Decision-making about unlimited penalties should not be informed by civil servants outside a judicial body, as proposed in the discussion paper.

A quasi-judicial body would likely work very well to administer this type of oversight. More specifically, the government could place all of the enforcement power into the hands of an administrative body to ensure that only civil servants trained and working for that administrative body were assessing potential violations and applying fines and bans.

3.2.6 Administrative review process

Section 3.2.6 proposes that regulations will provide an administrative review process, but the discussion paper does not divulge the process. The Chamber would need to know the proposed process to be in a position to comment.

This is a very critical aspect of the whole regime. The Chamber seeks a process that will be as prescriptive as possible and provide clear parameters for the exercise of discretion.

3.2.8 Collection of AMPs

The Chamber submits that 30 days is an exceptionally short timeframe to require an employer to pay an AMP. The deadline from issuance of the notice of violation should be 90 days if small employers in particular are to be in a position to arrange for payment and/or legal counsel.

Request for pre-consultation on draft regulations

Given the lack of details in the discussion paper, the short timeframe for comments, and the high proportion of small businesses in the TFWP, it would be appropriate for the government to ensure more detailed consultation on the compliance framework before the regulations are drafted for public comment.

This consultative step would be in the spirit and intent of the government's Red Tape Reduction Action Plan. The plan includes providing a "forward regulatory plan" of anticipated regulatory changes or actions to give stakeholders a greater opportunity to inform the development of regulations and to plan for the future.

The Canadian Chamber urges the government to pre-consult on its draft regulations in advance of publishing them in the *Canada Gazette*.

Thank you for the opportunity to comment on the regulatory proposals.

Yours truly,

S. Anson-Cartwright

Sarah Anson-Cartwright
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