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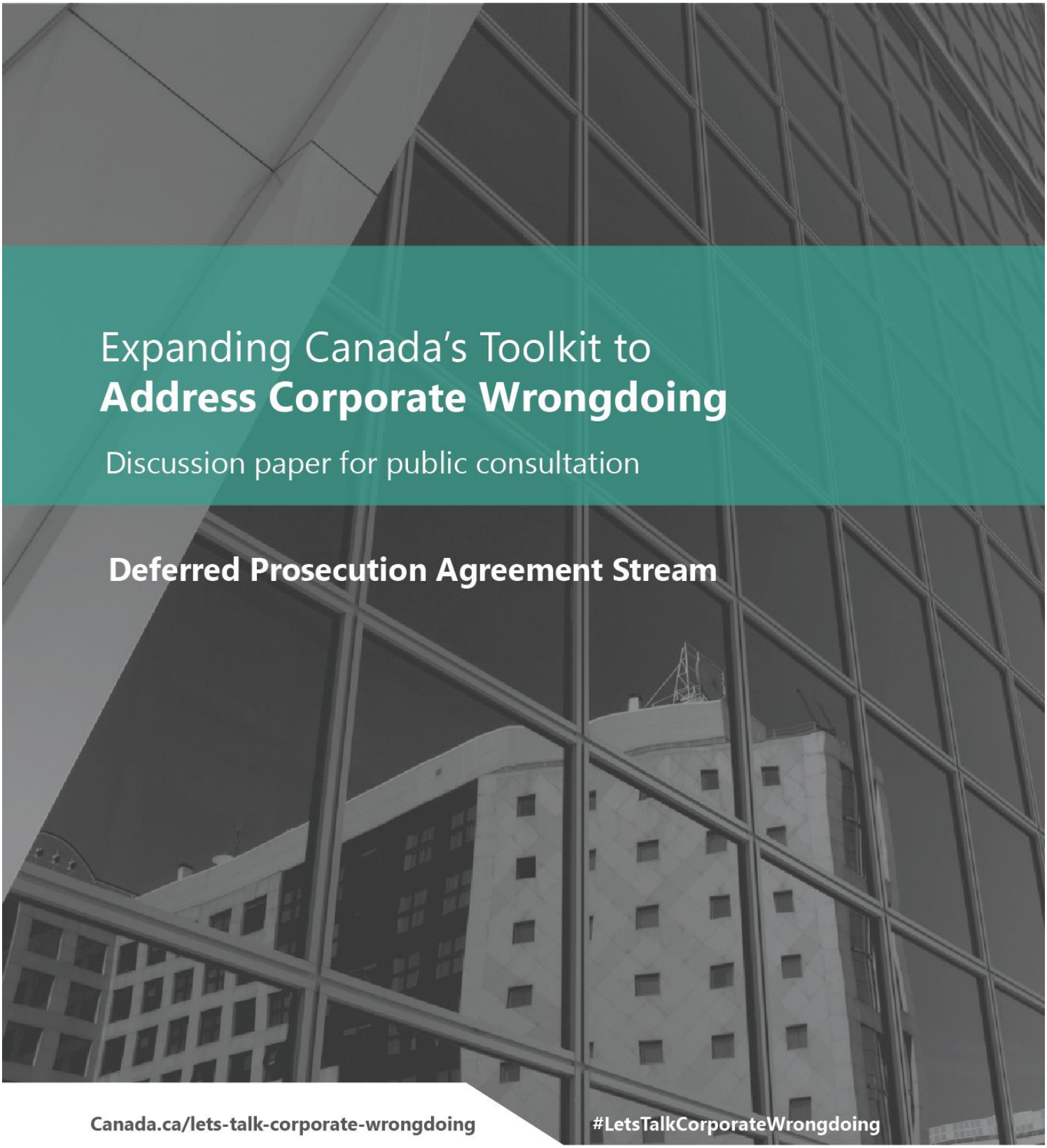

Expanding Canada's Toolkit to **Address Corporate Wrongdoing**

Discussion paper for public consultation

Deferred Prosecution Agreement Stream

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Canada

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Expanding Canada's toolkit to address corporate wrongdoing: The deferred prosecution agreement stream discussion guide

The Government of Canada has invited Canadians to participate in a discussion and to provide their views on whether it has the right tools in place to address corporate wrongdoing. As part of this engagement, the government will be consulting with Canadians on potential enhancements to the Integrity Regime and on considerations regarding the possible adoption of a deferred prosecution agreement (DPA) regime in Canada. The following discussion paper is designed to guide the public consultations regarding a possible DPA regime in Canada. A similar document regarding the Integrity Regime is available from the Integrity Regime consultation: Expanding Canada's toolkit to address corporate wrongdoing web page.

Setting the context

In Canada, corporate crime is subject to criminal prosecution. Given complex corporate structures and increasingly sophisticated ways of channeling funds and hiding illegal conduct, corporate crimes are often challenging to identify, time-consuming and resource-intensive to prosecute (especially when the alleged wrongdoing involves multiple jurisdictions) and difficult to prove. Investigations may take many years and require significant resources. Companies may be reluctant to report misconduct due to the prospect of a criminal conviction, which could damage the company's reputation and economic prospects, result in a loss of investor confidence and have an adverse impact on the company's employees and stakeholders.

While diversion from criminal prosecution is available under Canadian law in some limited circumstances, it is not generally available for corporate criminal liability.[1] The court may order as a condition of a probation order that a company establish policies, standards and procedures to reduce the likelihood of committing a subsequent offence, but the focus of criminal prosecution is on punishing the wrongdoing rather than encouraging remediation and compliance going forward.

The Government of Canada is considering the merits of implementing a DPA regime, not as a replacement for prosecution, but as an additional tool to be used by prosecutors. Since a company that complies with the terms of a DPA will avoid being convicted, the prospect of a DPA may encourage self-disclosure of misconduct, thereby enhancing detection and enforcement.

About deferred prosecution agreements

A DPA is a voluntary agreement negotiated between an accused and the responsible prosecution authority. Under a DPA, the criminal prosecution is suspended for a set period of time. During that time, the accused must comply with the terms of the agreement. If the accused complies, the charges are withdrawn when the DPA expires and no criminal conviction results. If the accused does not comply,

[1] In Canada, corporate criminal liability applies to organizations, which include corporations, companies, firms, partnerships and trade unions.

charges may be revived at any point during the term of the DPA and a prosecution may be pursued and a conviction sought.

DPAs are intended to sanction criminal conduct appropriately and deter wrongdoing. They retain aspects of a negotiated plea agreement, including an admission of facts and imposition of a financial penalty. DPAs usually include requirements for the accused to cooperate fully with law enforcement and prosecutors, identify responsible individuals, implement or enhance compliance measures and give up profits. An independent corporate monitor may be appointed to ensure compliance with the terms of the DPA throughout its lifetime.

What other jurisdictions are doing

The United States (US) and United Kingdom (UK) have DPA regimes in place. In November 2016, France adopted a DPA-like mechanism to resolve anti-corruption investigations. The Australian Ministry of Justice released a public discussion paper on DPAs in 2016 and, in May 2017, completed consultations on a draft law.

DPAs have been used extensively in the US since the early 1990s as an enforcement tool for corporate crime, particularly for *Foreign Corrupt Practices Act* offences, although they can also be used with individuals. There have been many significant DPA enforcement actions. Except in limited circumstances, prosecutors have the discretion to offer a DPA in respect of any federal crime for which there is a prosecutable case. A DPA is not available for cases where: the accused has two or more prior felony convictions; the offence relates to national security or foreign affairs; the accused is (or was) a public official and is charged with an offence involving a violation of the public trust; or Department of Justice policy dictates that the offence should be diverted for state prosecution.

In the US, DPAs are governed by policy. They do not have to be published and the role of the courts is fairly limited. DPAs are registered with the court in case a prosecution is resumed, but the courts do not play a role in approving, or in overseeing the carrying out of, the terms of the agreement.

Following a public consultation process, the UK DPA regime came into effect in 2014 as Schedule 17 to the *Crime and Courts Act 2013*. Under the Act, DPAs are available to corporations, partnerships and unincorporated associations, but not to individuals. A DPA may be entered into in relation to listed offences, such as fraud, theft, false accounting, forgery, bribery and money laundering. The regime is different from the US system in several other respects:

- the Act sets out a role for the courts in approving and overseeing DPAs
- the DPA process and application criteria are publicly available (in the Act and in legislatively-mandated guidance)
- the terms of the DPAs are published

It is an overarching principle of the UK model that DPAs will only be offered in specific circumstances and that, in many cases, criminal prosecution will continue to the appropriate course of action. The regime has only been used three times to date.

Some perceived advantages of deferred prosecution agreements

DPAs may offer several advantages. DPAs may be more effective than criminal prosecution in improving compliance and corporate culture since a DPA would require that the company put in place appropriate compliance measures and could also require independent corporate monitoring. There could also be a broader beneficial impact on the corporate community more generally, to the extent that DPAs are published and made known.

The prospect of being invited to negotiate a DPA may motivate companies to self-disclose wrongdoing since they may otherwise have to face the prospect of a formal criminal conviction, whether as a result of a guilty plea or following a trial. Presuming that the company complies with its terms, the DPA would allow the company to focus its attention and resources on conducting business, to the benefit of investors, employees and other third parties.

DPAs may reduce the negative consequences for blameless employees, shareholders, customers, pensioners, suppliers and investors and may enhance the prospects for prosecuting and holding criminally liable the individuals within the corporation who are responsible for the corporate wrongdoing. A DPA would also prevent the company from being disqualified from receiving procurement contracts under conviction-based debarment regimes. Moreover, victim restitution, as a DPA term, may further help to address the effects of corporate misconduct on third parties (and potentially sooner than through a restitution order as part of a sentence following a conviction).

Some perceived disadvantages of deferred prosecution agreements

The chief argument that has been made against DPAs is that they may not deter misconduct. Some argue that DPAs have become “a cost of doing business,” allowing corporations to buy their way out of trouble by paying a financial penalty and passing the costs on to the consumer. Shareholders are cautioned not to assume that the appointment of an independent monitor would replace the need for their continued vigilance in monitoring the activities of the corporation and its board members to ensure that appropriate compliance measures are being implemented.

If the terms of the DPAs are seen as being too lenient, or if DPAs are seen to be applied in what are generally considered to be inappropriate instances, then there is a risk of undermining public confidence in the criminal justice system.

Key issues for consideration

Consideration 1: Usefulness of deferred prosecution agreements as part of the Canadian criminal justice system

This paper is intended to elicit views as to whether an additional prosecutorial tool (in this case, a DPA) could support the achievement of the following objectives:

- more corporate criminal activity identified (that is, through greater self-reporting), investigated and successfully brought to justice
- more flexibility for prosecutors to secure effective, proportionate and dissuasive penalties for corporate wrongdoing while reducing the negative impact of prosecutions on innocent third parties
- improved corporate culture and enhanced compliance

Provide your thoughts on consideration 1

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

Consideration 2: Scope of offences

It must be clear to which offences a possible DPA regime would apply. As indicated, in the US, DPAs are available for all federal crimes, except where otherwise indicated for public policy reasons. The UK and the (proposed) Australian regimes limit DPAs to specified economic crimes. In Canada, this could be taken to include *Criminal Code* fraud, bribery and money laundering offences and *Corruption of Foreign Public Officials Act* offences. DPAs could be limited to such crimes and possibly other offences under federal statutes that could be committed by corporations. In determining to which offences a possible DPA regime would apply, it would be important to ensure that no offences that resulted in bodily harm or death, and no offences that compromise public safety or national security, would be included.

Provide your thoughts on consideration 2

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

Consideration 3: Role of the courts

The role of the courts must be considered with respect to any DPA regime.

Having a strong role for the courts can be viewed as contributing to transparency and enhancing public confidence in the process. However, with greater judicial involvement comes less certainty as to whether in fact companies could be approved to enter into a DPA, which could deter companies from self-reporting.

As mentioned, the courts play a limited role in the US DPA system, where there is no statutory basis for their involvement. DPAs do not require judicial approval, but they are registered with the court for enforcement in the event of a breach.

In contrast, before a DPA is approved in the UK, the prosecutor must apply to the court for a preliminary hearing to obtain a declaration that entering into the DPA is likely in the public interest and that the proposed terms are fair, reasonable and proportionate. Once negotiations are complete, the prosecutor must apply for a final hearing to obtain a declaration that the DPA meets these conditions. Where the

court grants approval of a DPA, it must give its reasons in open court. The prosecutor must return to court in the event that it is necessary to vary or discontinue a DPA and, if it remains in force, must give notice to the court that criminal proceedings will be discontinued upon its expiration.

Provide your thoughts on consideration 3

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

Consideration 4: Conditions for negotiating a deferred prosecution agreement

The following factors could be considered in exercising prosecutorial discretion to invite an accused[2] to enter into a DPA negotiation:

- Whether a DPA is appropriate, having regard to there being a reasonable prospect of conviction and the prosecution being in the public interest
- Whether the company accepts responsibility for conduct that would constitute the offence and consents to participate in the process
- The seriousness of the offence, including its collateral impact on third parties
- The company's conduct, including:
    - any history of similar conduct, including whether the company has previously entered into a DPA
    - the level of involvement of senior management
    - whether it reported the wrongdoing without undue delay and provided information unknown to law enforcement
    - its level of cooperation with authorities in addressing the matter, including its willingness to identify implicated individuals
    - whether it genuinely seeks to reform its business practices and corporate culture as evidenced by the corrective actions it has taken to mitigate the damage and the measures it has put in place to prevent future misconduct

Provide your thoughts on consideration 4

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

Question 5
When would a DPA not be appropriate?

[2] Given the focus on corporate wrongdoing and the goal of prosecuting implicated individuals, it is proposed that DPA eligibility be limited to organizations (refer to note 1).

Consideration 5: Potential deferred prosecution agreement terms

DPA terms would be customized to fit the case, but could require the accused to:

- admit to facts that would constitute the offence and to provide full and accurate representations throughout the DPA process
- consent to having the agreement and supporting admissions registered with a court
- agree to implement measures to ensure future compliance and to prevent further misconduct, which may include enhancing internal controls and providing training to employees
- agree to assist the responsible authorities in investigating and prosecuting individuals associated with the offence
- pay a (generally substantial) financial penalty
- set an expiry date for the DPA
- recover profits from the misconduct, compensate victims in the form of anticipated restitution, garnish executives' wages and bonuses

The legal effect and consequences of the DPA should also be addressed:

- if the accused complies with the DPA, the prosecution authority will not proceed with the prosecution and will withdraw the charges upon the expiration of the DPA
- if the accused does not comply with the DPA, the DPA may be cancelled and the prosecution reinstituted, with the facts admitted to in the DPA entered as evidence against the accused
- the accused may be prosecuted for any other crime it commits while the DPA is in force
- the breach of the DPA could be considered as a separate offence and be added to the charges for which the company could be prosecuted in a reinstated prosecution
- the fact that an accused had received a previous DPA could be an aggravated factor in sentencing

DPAs could include general terms such as a guarantee that the parties have entered into the agreement in good faith; a warranty as to the accuracy of the information provided during negotiations and a statement that the terms are in the public interest.

A key consideration is what would be the appropriate duration for a DPA in a given case? On what basis would it be set and how would it be calculated? Would there be a maximum term for a DPA? If so, what would it be?

Provide your thoughts on consideration 5

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

Consideration 6: Publication

The transparency of process and result is critical in upholding public confidence in DPAs as a valid criminal law enforcement mechanism. In considering a publication requirement, it is also important that the company be assured that confidentiality will be respected during negotiations; otherwise, the process may be undermined by its unwillingness to disclose wrongdoing.

Although not required, US prosecutors are increasingly publishing DPAs.

Under UK law, the prosecution authority must publish a DPA once it is approved by the court, along with the court's declaration that the DPA is likely to be in the public interest and that the proposed terms are fair, reasonable and proportionate. (The court's declaration at the preliminary judicial hearing is not published as it is considered to be part of the negotiation process.) Provision is made for publication to be delayed in cases where it might compromise the administration of justice (for example, if related proceedings are ongoing).

Provide your thoughts on consideration 6

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

Consideration 7: Process of addressing non-compliance

In order for a DPA to constitute a valid criminal law measure, it is important that the threat of prosecution be retained in the event of non-compliance during the lifetime of the DPA.

Measures short of prosecution have also been used to address failure to comply with the terms of a DPA. In the US, DPAs have been extended to give companies a second (and in one recent case, a third) chance to comply. The UK legislation sets out a process whereby the prosecutor may apply for a judicial determination as to whether there has been a failure to comply. In cases of non-compliance, the court will invite the parties to propose a variation of the terms of the DPA or it will terminate the agreement. The termination of the agreement will trigger the resumption of the prosecution. The parties may negotiate a variance on their own initiative and then seek judicial approval of the new terms.

While it may be advisable to provide for flexibility, it would also be important that the deterrent effect not be undermined by the overuse of alternatives to recommencing the prosecution in the case of failure to comply.

Provide your thoughts on consideration 7

Question 9
How should non-compliance be addressed?

Consideration 8: Potential use in court of deferred prosecution agreement negotiation material

The possible use in court of admissions made during a DPA negotiation is a sensitive matter. Under the US and UK regimes, if the prosecuting authority considers it appropriate, it will invite a company to enter into a negotiation on the terms of a DPA. A successful negotiation will result in the admission of facts that are agreed upon by both the prosecutor and by the company. The question then arises as to whether and to what extent these facts, disclosed as part of the DPA negotiation process, can be taken into account should the DPA not ultimately be approved or in a prosecution of the company for other offences.

Provide your thoughts on consideration 8

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

Consideration 9: Compliance monitoring

In addition to requiring the implementation of internal controls, independent compliance monitoring is often included as a term of a DPA. This can decrease the likelihood of having to reinstitute a prosecution and can serve to assure the authorities that the company is indeed complying with the terms of the DPA and provide evidence to that effect. It may also help to improve the corporate culture, thereby reducing the risk of reoffending.

In practice, an independent monitor seeks to ensure that a company complies with the terms of the DPA and takes the necessary steps to reform its behaviour. Provision would have to be made to establish processes for the nomination, selection and payment of independent monitors. It is important that a compliance monitor possess the necessary technical expertise and that there be no actual or perceived conflict of interest in terms of their appointment or in respect of their post-employment activities and that they be at arms-length to the corporation.

Provide your thoughts on consideration 9

Question 11
How should compliance monitors be selected and governed?

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

Consideration 10: Victim compensation

Victim compensation is often cited as a key feature of DPAs. The UK legislation outlines, as a possible DPA requirement, that the accused compensate victims of the offence or donate money to a charity or other third party.

There are significant considerations in including victim compensation as a component of a possible Canadian DPA regime. While the Canadian *Criminal Code,* which falls under federal jurisdiction, allows for restitution of readily ascertainable losses following a conviction, broader victim compensation for certain criminal injuries is a matter that falls within provincial jurisdiction and the schemes vary considerably across Canada. Those who comply with a DPA would not be formally convicted, but could nevertheless still be required to pay a form of "anticipated restitution."

From a practical standpoint, in the case of economic crime, the "victim" may not be an identifiable individual, but rather the employees, stakeholders of the company or of one of its competitors, or, in the case of foreign bribery, for example, the citizens of another country. It may be difficult to determine how payments should be calculated, apportioned among and/or paid to victims.

Provide your thoughts on consideration 10

Question 13
Under what circumstances should victim compensation (that is, anticipatory restitution) be included as a DPA term?

Summary of questions

We are interested in your views and welcome detailed responses regarding the questions set out in this discussion paper, a summary of which can be found below.

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 to be taken into account in offering a DPA?

Question 5
When would a DPA not be appropriate?

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Provide feedback

Responses to this consultation paper may be provided in any of the following ways:

- complete the deferred prosecution agreement online form at www.canada.ca/lets-talk-corporate-wrongdoing
- send an email to tpsgc.dgsiggjapdconsulter-dobifamgdpaconsult.pwgsc@tpsgc-pwgsc.gc.ca (write "DPA Consultation" in the email subject line)
- send comments to:

  Organization:
  Government of Canada

  Address:
  Portage III, Tower A 10A1
  11 Laurier St
  Gatineau QC K1A 9S5

  Email:
  tpsgc.dgsiggjapdconsulter-dobifamgdpaconsult.pwgsc@tpsgc-pwgsc.gc.ca

Responses should be sent no later than 11:59 p.m. (Pacific time) November 17, 2017.

Any questions regarding this consultation process may also be directed to tpsgc.dgsiggjapdconsulter-dobifamgdpaconsult.pwgsc@tpsgc-pwgsc.gc.ca.

Thank you for participating in this consultation process.