TRANSPARENCY INTERNATIONAL CANADA

# Another Arrow in the Quiver?

## Consideration of a Deferred Prosecution Agreement Scheme in Canada

July 2017

# About Transparency International and Transparency International Canada

**Transparency International (TI)** is the world's leading non-governmental anti-corruption organization. With more than 100 chapters worldwide and an international secretariat in Berlin, TI has helped put corruption on the agendas of governments and businesses around the world. Through advocacy, research and capacity building work, TI strives toward a world that is free of corruption.

**Transparency International Canada (TI Canada)** is the Canadian chapter of Transparency International. Since its foundation in 1996, TI Canada has been at the forefront of the national anti-corruption agenda. In addition to advocating legal and policy reform on issues such as whistleblower protection, public procurement and corporate disclosure, we design practical tools for Canadian businesses and institutions looking to manage corruption risks, and serve as an anti-corruption resource for organizations across Canada.

# DPA Acknowledgements

The board of TI Canada is extremely grateful to the members of TI Canada's Legal Committee for producing an outstanding report. Members of the Committee provided a broad range of views and opinions that greatly enriched the final report. TI Canada would also like to thank the University of Toronto's Faculty of Law, and Prof. Mariana Mota Prado in particular who, through a Donner Fellowship, provided the support of a student, Lewis Fainer. Mr. Fainer's excellent work in reviewing the draft report and researching various points was invaluable.

The board would like to particularly commend the following members of the Legal Committee for their sustained and dedicated work in producing the report:

**Matthew Konby**, Chair TI Canada Legal Committee

**Simon Laliberté**, Member TI Canada Legal Committee

**Mark Morrison**, Member TI Canada Board of Directors

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# Forward:

In recent years, Deferred Prosecution Agreements, or DPAs, have gained increasing visibility and prominence in the international fight against corruption. The United States first adopted DPAs in the context of enforcing the Foreign Corrupt Practices Act. Since then the concept has gained acceptance in numerous countries, including the UK and France, with more countries examining incorporating DPAs into their enforcement regimes. It is, therefore, particularly timely that TI Canada`s Legal Committee would undertake an ambitious study of DPAs and their potential adoption into Canadian law. This report is the product of that study and was made possible by the hard work of a dedicated group of expert volunteers.

DPAs are agreements between enforcement authorities and a corporation whereby the authorities agree to refrain from prosecuting the corporation for certain apprehended offences provided that the corporation makes various undertakings and other public interest criteria are met. DPAs are not uncontroversial and many observers doubt that they are an effective or advisable mechanism for enforcing criminal laws. Even among our Legal Committee, a divergence of views emerged as to the wisdom and necessity of implementing DPAs into Canadian law. We have strived to provide a balanced and impartial inventory of the pros and cons of DPAs. As our work progressed, however, a consensus did emerge that in the Canadian context - where enforcement activity levels are chronically low – DPAs, if properly designed and implemented, have the potential to support increased enforcement of anti-corruption laws and increased self-disclosure and compliance by corporations.

Our report reviews the experience of other countries who have adopted, or who are considering adopting, DPAs. This international experience provides insight into the pros and cons of DPAs and the challenges that have emerged in their implementation. It also provides some benchmarks regarding the transparency of the process, judicial oversight, and public interest considerations that are relevant in the Canadian context. Our report goes on to consider the implementation of DPAs in the Canadian context and the various safeguards that we believe would be necessary to ensure the legitimacy, effectiveness, fairness, predictability, accountability, and transparency of DPAs in Canada. In this regard, we underscore that DPAs must provide for meaningful consequences for the corporations involved – they must not be simply a way for corporations to buy their way out of prosecutions that should otherwise proceed. We also emphasize the importance of providing for judicial oversight and approval of DPAs, as is the case in the UK.

On balance, as a means of pursuing greater enforcement of and compliance with anti-corruption laws, we urge the Government of Canada to consider adopting a properly designed DPA mechanism. Our report provides what we view as the minimum essential requirements for such a mechanism. We hope that our report will contribute to enriching the dialogue about the adoption of DPAs in Canada and that our views will be carefully considered by lawmakers. The possible adoption of DPAs in Canada represents a unique opportunity to have an important public discussion about the fight against corruption in Canada. TI Canada welcomes that policy debate, intends to actively participate in it, and invites all like-minded Canadians to support our activities.

**Paul Lalonde**
Chair and President
Transparency International Canada

# EXECUTIVE SUMMARY

A DPA, or Deferred Prosecution Agreement, can sometimes serve as a middle ground for officials who would otherwise face a choice between declining to prosecute a corporation and engaging in a lengthy and costly trial. A DPA is a tool that allows prosecutors to enter into negotiations with an accused.

In essence, a prosecutor will charge the accused with certain offences, usually related to economic crimes, but will then suspend the proceedings. The parties will then enter into negotiations. The accused will agree to undertake a series of commitments aimed at reducing its risk of subsequent violations including payment of financial penalties, reimbursement of victims and implementation of corporate compliance. In exchange, the prosecutor will prolong the suspension of the proceedings and, if the accused fulfills its undertakings, will drop the charges altogether.

DPAs are intended to be a tool to encourage self-reporting by offending corporations, enable greater compliance overall and incite corporations to turn over individual wrongdoers to law enforcement. They were introduced in the United States in the early 1990s and are widely used there. In recent years, DPAs have also been employed by authorities in the United Kingdom. Yet they remain the subject of considerable debate.

Today, there is talk of adopting a DPA scheme in Canada. This document is intended to provide a general review of the most frequent arguments against and in favour of DPAs, an in-depth analysis of the American and British DPA models, as well as key issues for consideration by Canada.

Should DPAs be adopted in Canada, Transparency International Canada believes it is crucial to take precautions to avoid perceived pitfalls experienced in the United States. For a DPA scheme to be effective, it should be enacted through specific legislation, carried out under transparent judicial purview and include specific measures aimed at the following objectives:

1) Financial reparations
2) Sincere compliance reform
3) Accountability of individual wrongdoers

If these conditions are met, DPAs have the potential to be an efficient tool for law enforcement, prosecutors and the judiciary in achieving greater compliance, deterrence and corporate accountability.

However, DPAs must not be seen as a simple cost of doing business. Additionally, they must not be treated by government as a stand-alone measure in the fight against corporate crime. The debate on a potential DPA scheme should be part of a greater reflection on the state of corporate criminality in Canada and serve as the opportunity to invest the resources required by law enforcement, prosecutors and the judiciary to efficiently combat corporate crime.

## INTRODUCTION

Since the Enron scandal in 2001, corporations have been subjected to increasing levels of criminal law scrutiny and regulation, particularly by the United States. Sadly, the same is not true north of the border. From 2005-2006 to 2013-2014, the number of cases against companies in Canada yielding guilty verdicts fell from 327 to 160. Of the 160 cases against companies in 2013-2014, only 7 were in relation to crimes against property, which includes offences such as fraud and theft. Comparatively, 140 fell under "residual federal statutes", excluding drug-related statutes.[1]

These 160 cases represent a mere 0.07% of the overall 266,430 guilty findings in Canada in 2013-2014. While these numbers are undoubtedly low, the question that most interests us is not the absolute figures, but rather how we can ensure that the cases that should have been brought against corporations have indeed been brought before the courts. Why are these numbers so low and what can be done to bolster enforcement?

While many discussions have been had, and should be had, on the adequacy of financial and human resources in the criminal justice system, especially after the *Jordan* decision[2], the objective of this document is to consider whether DPAs can achieve greater enforcement and corporate compliance through what amounts to a diversion program for corporations.

Diversion programs currently provide an alternative to criminal proceedings to the individual accused of a crime. Instead of going through the motions of an adversarial trial, the prosecutor can make an offer to the accused to suspend the criminal charges while he or she enters into a program designed to rehabilitate the individual. If the program is completed successfully, the charges are either dropped or the accused receives an absolute discharge.

Currently, diversion programs in Canada are generally made available only to individuals. However, the United States, and more recently, the United Kingdom have designed programs (DPAs) that can be made available to corporations for certain specific offences, usually related to economic crimes (such as fraud, false accounting, cheating the public revenue, forgery, and bribery, both domestic and foreign). While there are differences between both models, to "successfully complete the program" and be deemed rehabilitated, a corporation will generally have to reimburse its illegally obtained profits, compensate victims, pay fines and enact major compliance reforms.

The content of DPA programs are set out clearly by the authorities of both countries, guaranteeing a reasonable level of certainty of outcome for corporations. This in turn often provides incentive for companies to come forward and to self-disclose wrongdoing, leading to greater enforcement.

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[1] Statistics Canada, *"Guilty Sentences Against Companies Broken Down by Type of Offence – 05/06 to 13/14*". Data taken from CANSIM Table 252-0056 online at: http://www5.statcan.gc.ca/cansim/a05?lang=eng&id=2520056 .

[2] *R.* v. *Jordan*, 2016 SCC 27 – which highlighted significant issues of delay in the current Canadian criminal law system.

As we will discuss later on, the aforementioned aspects of a DPA, and many more, can be customized to suit each jurisdiction and each case. However, we believe that a DPA should always be moored in two overarching principles. First, DPAs should be considered as an extraordinary measure granted to companies that can demonstrate that they seek to reform themselves and will fully cooperate with prosecutors and law enforcement. DPAs should not operate as a cost of doing business and full prosecution of corporations must always remain an available option.

Secondly, DPAs should be based on the understanding that it is the individuals within a corporation, rather than the corporation itself, that make or carry out decisions that produce illegal conduct. This is consistent with the Yates memorandum in the United States and the legislation in the United Kingdom. This means that corporations should have to identify the individuals responsible for the wrongdoing to be eligible for DPAs and that these individuals should be prosecuted to the full extent of the law.

If these principles are observed, DPAs could be useful tools to bolster compliance and enable stronger enforcement overall against corporate wrongdoing, while achieving an adequate level of social acceptability.

This document is divided into three main sections. The first section will provide an overview of the current response to corporate crime in Canada, as well as present the most frequent arguments formulated in favour of and against DPAs. The second section will detail the two existing models of DPA currently in use around the world (US and UK). The final section sets out the elements that TI-Canada believes should be part of a policy discussion on DPAs, should the Government of Canada choose to establish a DPA program.

## CURRENT RESPONSE TO CORPORATE CRIME

Under the current framework of the Canadian criminal justice system, prosecutors are presented with two main choices when faced with a corporate accused: to prosecute or not to prosecute.

This binary set of options is often expanded when the accused is an individual. Through diversion programs, the prosecutor can employ a greater set of tools to ensure that the state's response to wrongdoing is tailored to the individual. These programs are usually made available when the accused is a first-time offender or is afflicted with a psychiatric or other medical condition that is the underlying cause of the offense.[3] In these instances, if the accused successfully undergoes treatment for this condition, the criminal charges will be dropped or the prosecutor will recommend an absolute discharge.

There are some similar diversion programs that are available for corporations and exist under specific laws, such as the Competition Bureau's *Immunity* and *Leniency Programs*,[4] the *Environmental Violations Administrative Monetary Penalties Act*[5] to

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[3] See for example programs pioneered by the Montreal Municipal Court: http://ombudsmandemontreal.com/programmes-sociaux-a-la-cour-municipale-de-quoi-sagit-il/4333

[4] The Competition Bureau's *Immunity Program* is available online at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_02000.html . The *Leniency Program* is available online at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02816.html .

[5] Environmental Violations Administrative Monetary Penalties Act (S.C. 2009, c. 14, s. 126).

be administrated by Environment and Climate Change Canada, or Canada Revenue Agency's *Voluntary Disclosure Program*.[6]

However, no such diversion program presently exists for corporations accused under the *Criminal Code* or associated federal statutes.

## THE ARGUMENTS IN FAVOUR OF IMPLEMENTING A DPA PROGRAM

Before examining the details of the American and British DPA programs, or discussing possible parameters of a Canadian version, two basic questions need to be answered: should the Canadian government implement a DPA scheme and, if so, how could it benefit Canadian society?

### a) Benefits for Parties and Victims

A DPA has the potential to save costs for both parties. Whereas a corporation would avoid paying the legal fees resulting from a multiyear trial, the government would free resources on three fronts; law enforcement, prosecutors and the judiciary.

Investigation of corporate wrongdoing can take many years. The complexity of a corporate offense will require the work of specialists and, in an ever globalized economy, will usually involve cooperation between different branches of law enforcement, both domestically and internationally. In acquiring the evidence needed for a prosecution, investigators often will have to manage mutual legal assistance treaty (MLAT) requests, considerations of attorney-client privilege and protection of witnesses in multiple locations around the world.
The complexity of these cases can require specialized prosecutors with the expertise to understand sophisticated financial transactions and explain the evidence in plain language to judges and jurors. By encouraging increased levels of self-disclosure, DPAs would likely increase the number of cases brought forward which would enable the development of investigative and prosecutorial knowledge and expertise with regards to serious corporate crime. In addition, by offering a potential pathway to early resolution, DPA's would also free up resources to concentrate on prosecuting the most egregious cases.

Furthermore, prosecuting corporate wrongdoing generally entails lengthy trials. Avoiding unnecessary trials through DPAs will increase the availability of a court's resources for other cases.

A rapid resolution through a DPA would also benefit victims. Negotiations between prosecutors and accused corporations could lead to greater amounts of restitution available to victims, and paid sooner than if it had been ordered following a lengthy trial.

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[6] Canada Revenue Agency's *Voluntary Disclosure Program* is available online at: http://www.cra-arc.gc.ca/gncy/nvstgtns/vdp-eng.html .

### b) Certainty as an Incentive to Bolster Compliance and Enforcement

As with other diversion programs, DPAs provide an alternative to criminal prosecution. Instead of proceeding through all of the pretrial and trial stages, the government and the company charged with an offence negotiate a DPA. If the negotiations are successful and if the company fully discloses all relevant information and complies with all of the DPA's provisions, the charges will be dropped by the prosecutor.

For the company, a DPA may enable it to avoid the legal (debarment from public contracts at domestic or international levels) or reputational (loss of share value, investor confidence and contract opportunities) ramifications of a conviction. For the government, the terms of the DPA can require the disgorgement of illegally earned profits, the payment of fines, and the adoption by the company of corrective compliance measures to reduce the risk of subsequent offences.

A DPA can therefore provide a more certain and more positive outcome for both parties than can a criminal trial.

### c) Improved Flexibility of the Criminal Justice System

Making DPAs available does not mean that they always will, or should, be used. Like any other diversion program or tool afforded to prosecutors, DPAs should be employed only when certain conditions are met.

Fundamentally, DPAs as an alternative to criminal sentencing, should conform to one of the fundamental tenets of sentencing: that the sentence be tailored to the circumstances of the accused. As a general proposition, DPAs should be available only to first-time corporate offenders that have genuinely demonstrated guilt and remorse through conduct that includes thorough internal investigations and the adoption of appropriate compliance reforms. Unrepentant offenders or those that have engaged in especially egregious conduct should be prosecuted to the full extent of the law. A detailed analysis of the conditions that should be present before a DPA is concluded follows later in this document.

### d) Limiting Negative Impacts on Innocent Third Parties

The prosecution of companies can have serious collateral consequences on innocent third parties such as employees, customers, suppliers and investors. Potential unintended impacts include losses in jobs, pensions, shareholder value and supplier contracts, resulting in damages to related businesses and markets. These elements were a motivating factor for the increased use of DPAs in the US following the collapse of accounting firm Arthur Andersen in 2002.[7] While these considerations will not always militate in favour of DPAs, there is little doubt that DPAs can protect internal and external stakeholders against at least some of these consequences.

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[7] Court E. GOLUMBIC and Albert D. LICHY, *The "Too Big to Jail" Effect and the Impact on the Justice Department's Corporate Charging Policy*, Hastings Law Journal, Vol. 65:1293, 2014, p. 1306, available online at: http://www.hastingslawjournal.org/wp-content/uploads/Golumbic-Lichy-65.5.pdf

### e) Consistency of a DPA Regime with the Current Legal Framework

Section 718.21 of the Criminal Code lists a series of factors that can be taken into consideration when a court imposes a sentence on an organization, such as:

*(a) any advantage realized by the organization as a result of the offence;*
*(b) the degree of planning involved in carrying out the offence and the duration and complexity of the offence;*
*(c) whether the organization has attempted to conceal its assets, or convert them, in order to show that it is not able to pay a fine or make restitution;*
*(d) the impact that the sentence would have on the economic viability of the organization and the continued employment of its employees;*
*(e) the cost to public authorities of the investigation and prosecution of the offence;*
*(f) any regulatory penalty imposed on the organization or one of its representatives in respect of the conduct that formed the basis of the offence;*
*(g) whether the organization was — or any of its representatives who were involved in the commission of the offence were — convicted of a similar offence or sanctioned by a regulatory body for similar conduct;*
*(h) any penalty imposed by the organization on a representative for their role in the commission of the offence;*
*(i) any restitution that the organization is ordered to make or any amount that the organization has paid to a victim of the offence; and*
*(j) any measures that the organization has taken to reduce the likelihood of it committing a subsequent offence.*

That these factors have been largely incorporated into the American and British DPA schemes supports the notion that DPAs can be engineered to be consistent with the current Canadian criminal law framework.

## THE ARGUMENTS AGAINST IMPLEMENTING A DPA PROGRAM

The previous arguments notwithstanding, DPAs have had their fair share of opposition and criticism. This section sets out some of the arguments that have been made against DPAs.

### a) Undermining the Criminal Justice System

There is a real risk that DPAs could undermine the public's confidence in the criminal justice system, if DPAs are used too widely or are seen to be too lenient to corporate wrongdoers. However, taking into consideration lessons learned from the American and British experiments, it should be possible to establish a strict framework for DPAs that would ensure that they are used in an appropriate and efficient manner. For example, DPAs should never be available to repeat offenders or in cases of egregious violations.

### b) Unfair Advantage for Corporations

Another argument levied against DPAs is that it is unfair that they would only be available to corporations. This critique is directed at the British model; the United States allows individuals to be offered DPAs. In our view, a Canadian DPA program should follow the British model in this regard, and prosecutorial efforts should focus on the individuals that have committed or ordered the wrongdoing in recognition of the fact that criminal conduct by a company is in reality the conduct of individuals within the company.

Indeed, as will be discussed further on, the guidelines in both the US and the UK state that the identity of the individuals responsible for the wrongdoing within the corporation should be disclosed and that they should be extensively investigated and prosecuted. We would highly recommend that this principle also be applied to a potential Canadian DPA program, and that responsible individuals be prosecuted to the full extent of the law.

### c) Innocence of Third Parties

Critics also note that the third parties that may benefit from the use of DPAs, such as corporate shareholders, are not necessarily innocent: they may have failed to engage in sufficient oversight of the company's conduct and may themselves have benefitted from profits generated through wrongful actions. This is a sound reason why DPAs should be used selectively and only when circumstances warrant.

### d) Demobilizing Shareholders and Other Stakeholders

DPA opponents also point out that such agreements can have a demobilizing effect on shareholders and other stakeholders. Indeed, the terms of a DPA can sometimes include the appointment of a monitor to oversee the implementation of compliance reforms within the company. In such a scenario, the shareholders and other stakeholders may be lured into a false sense of security and shy away from their own responsibilities of monitoring the activities of the board of directors and that of the corporation at large.

## ANALYSIS OF EXISTING MODELS

There are currently two countries that use DPAs as diversion programs: the United States since 1992 and the United Kingdom since 2014. The analysis will begin with a brief overview of the American model and the challenges it has faced through the years, followed by a look at the British version and the first DPA which was concluded in November 2015.

### United States

The first reported use of a DPA was in a 1992 settlement with Salomon Brothers.[8] DPAs in the United States have no statutory basis and are not subjected to any

specific legal framework. Rather, they are based on policies issued by the Department of Justice ("DOJ") and guidelines set out in memos issued by the Deputy Attorney General.

This places DPAs under the general authority and discretion of prosecutors. Therefore, their form and content may vary a great deal from case to case. Although they have to be filed with a court and a judge must approve the terms of a DPA before it enters into force, the lack of a statute defining the court's obligations and the boundaries of the prosecutor's powers and that of the accused's rights means that the level of judicial involvement will depend on the judge hearing the case.

Additionally, in the case of a non-prosecution agreement (NPA), it is possible that the court will have no role to play because the agreement is entered into by the prosecutor and the accused before the company is charged, and if the agreement is respected, there will be no charges or record whatsoever.

A DPA may be offered to a corporation or to an individual and can only be offered by a prosecutor from the DOJ or the Securities and Exchange Commission ("SEC"). Publication of DPAs is not mandatory, but remains relatively frequent for DOJ agreements and is systematic for SEC agreements.

Prosecutors have a great deal of discretion with regard to the types of offenses for which a DPA may be available. However, there are some limits; DPAs are not available for certain matters, such as those involving national security, foreign affairs, for an individual with two or more felony convictions or a matter where a public official has violated the public trust.[9]

DPAs came into existence in the United States, have been used there for longer than any other country, and are governed by a relatively loose legal framework. As a result, they have been the subject of several controversies. We will now look at certain issues that they have faced.

**Attorney-Client Privilege Waivers**

The initial DOJ Corporation Prosecution Guidelines were issued in 1999 in the form of a memorandum from then Deputy Attorney General Eric Holder ("Holder Memorandum")[10]. It set forth eight factors to be considered in deciding whether to charge a corporation or other business organization:

1. *The nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime;*

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[8]Court E. GOLUMBIC and Albert D. LICHY, *The "Too Big to Jail" Effect and the Impact on the Justice Department's Corporate Charging Policy*, Hastings Law Journal, Vol. 65:1293, 2014, p. 1302, available online at: http://www.hastingslawjournal.org/wp-content/uploads/Golumbic-Lichy-65.5.pdf

[9]*United States Attorneys' Manual*, Title 9-22.100, *Pre-trial Diversion Program: Eligibility Criteria,* available online at: https://www.justice.gov/usam/usam-9-22000-pretrial-diversion-program

[10]For a copy of the Holder Memorandum detailing each of the above eight factors, see: http://federalevidence.com/pdf/Corp_Prosec/Holder_Memo_6_16_99.pdf

2. *The pervasiveness of wrongdoing within the corporation, including the complicity in, or condonation of, the wrongdoing by corporate management;*

3. *The corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it;*

4. *The corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of the corporate attorney-client and work product privileges;*

5. *The existence and adequacy of the corporation's compliance program;*

6. *The corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies;*

7. *Collateral consequences, including disproportionate harm to shareholders and employees not proven personally culpable;*

8. *The adequacy of non-criminal remedies, such as civil or regulatory enforcement actions.*

Since 1999, there have been several other memos issued, but the eight factors above have mostly remained unchanged.

In 2003, Deputy Attorney General Larry Thompson issued a memo ("Thompson Memorandum")[11] that mainly focused on revising the authenticity of a corporation's cooperation (factor 6) and the efficacy of the corporate governance mechanisms in place within a corporation (factor 7).

In 2005, then Acting Deputy Attorney General Robert McCallum issued a memo ("McCallum Memorandum")[12] that instructed United States Attorneys to "establish a written waiver review process for [their] district or component." The waivers aimed to lift corporate attorney-client privilege and work product protection and were meant to "seek timely, complete, and accurate information from business organizations" in relation to the negotiation of DPAs.

The McCallum Memorandum, in conjunction with a prosecutorial practice in which "waiver ha[d] become a standard expectation of Federal prosecutors"[13], sparked controversy in legal and political circles. Letters to the Attorney General were sent from Former Attorneys General[14] and congressional hearings on the matter took

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[11] An electronic copy of the memo is available at:
http://federalevidence.com/pdf/Corp_Prosec/Thompson_Memo_1-20-03.pdf

[12] An electronic copy of the memo is available at:
http://federalevidence.com/pdf/Corp_Prosec/McCallum_Memo_10_21_05.pdf

[13] Testimony of the Honorable Dick Thornburgh, "*White Collar Enforcement: Attorney-Client Privilege and Corporate Waivers",* Hearing before the House Judiciary Subcommittee On Crime, Terrorism, and Homeland Security, 109th Cong., 2d Sess. (March 7, 2006) (Serial No. 109–112), p. 13. An online copy of the hearing's report is available at:
http://federalevidence.com/pdf/Corp_Prosec/HRJudicHearingWhiteCollar3-7-06.pdf

place. Opponents of waivers criticized the Government's practice as eroding corporations' right to an attorney by enabling prosecutors to infer a lower degree of cooperation, if not obfuscation, should the corporation refuse to waive attorney-client privilege. DPAs were therefore seen as an indirect way for the government to erode attorney-client privilege.

In 2006, a memo sent by then Deputy Attorney General Paul McNulty ("McNulty Memorandum")[15] set forth a test based on a series of criteria to determine when a waiver could be requested, and to some extent, expected from the corporation to count towards cooperation credit. However, this failed to quell the issue and resulted in a further round of letters from former U.S. Attorneys[16] and Senate hearings.[17] Ultimately, it took the threat of legislative action by Congress and the issuance of another memorandum in 2008 ("Filip Memorandum")[18] to finally put the matter to rest.

The Filip Memorandum outlined five additional principles to be taken into consideration by prosecutors:

(1) *"Cooperation will be measured by the extent to which a corporation discloses relevant facts and evidence, not its waiver of privileges: the government's key measure of cooperation will be the same for a corporation as for an individual: to what extent has the corporation timely disclosed the relevant facts about the misconduct? That will be the operative question – not whether the corporation waived attorney-client privilege or work product protection in making its disclosures."*
(2) *[...] "Attorney-client communications that were made in furtherance of a crime or fraud, or that relate to an advice-of-counsel defense, are excluded from the protection of the privilege [...]".*
(3) *"Federal prosecutors will not consider whether the corporation has advanced attorneys' fees to its employees in evaluating cooperation."*
(4) *"Federal prosecutors will not consider whether the corporation has entered into a joint defense agreement in evaluating cooperation."*
(5) *"Federal prosecutors will not consider whether the corporation has retained or sanctioned employees in evaluation cooperation."*

Furthermore, the Filip Memorandum was the first to include these Corporation Prosecution Principles in the United States Attorneys' Manual.[19]

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[14] An electronic copy of one such letter is available at: http://federalevidence.com/pdf/Corp_Prosec/Former_DOJ_Lttr_9_5_06.pdf .
[15] An electronic copy of the Memorandum is available at: http://federalevidence.com/pdf/Corp_Prosec/McNulty_Memo12_12_06.pdf
[16] An electronic copy of the letter is available at: http://federalevidence.com/pdf/Corp_Prosec/FormerUSAttyLetter_6_23_08.pdf
[17] Examining Approaches to Corporate Fraud Prosecutions and the Attorney-Client Privilege Under the McNulty Memorandum, Hearing before the Senate Judiciary Committee, 110th Cong., 1st Sess. (Sept. 18, 2007) (Serial No. J–110–55). An electronic copy of the report on the hearing is available at: http://federalevidence.com/pdf/Corp_Prosec/SenJudHearingMcNulty9-07.pdf
[18] An electronic copy of the letter sent by then Deputy Attorney General Mark Filip to Senators Patrick Leahy and Arlen Specter is available at: http://federalevidence.com/pdf/Corp_Prosec/Filip_Letter_7_9_08.pdf

## Monitors

Parallel to the debate on attorney-client privilege, a separate issue arose in relation to the selection of monitors to ensure the internal compliance reforms often required by DPAs. The situation came to a head when it was revealed in January 2008 that then U.S. Attorney Chris Christie directed a medical supply company that had entered into a DPA to award an 18-month monitor contract worth between $28 million and $52 million to former Attorney General John Ashcroft.[20] The contract was given out without public notice or a bidding process, and even without Ashcroft's firm having lobbied for it.

The media outcry and political turmoil prompted then Acting Deputy Attorney General Craig Morford to issue a memo ("Morford Memorandum")[21] that identified nine principles for the selection and use of monitors in DPAs.

With regard to the selection of a monitor, the Morford Memorandum stated that the monitor should be a highly respected person or entity (and not necessarily an attorney), that any potential or actual conflicts of interests be avoided and that the monitor instill public confidence.

While the Memorandum does not mandate a sole method of selecting a monitor, it is strongly suggested that a standing or ad hoc committee of prosecutors should be created to consider a pool of at least three qualified candidates submitted by the corporation. Alternatively, should the "selection process call for the Government to play a greater role in selecting the monitor"[22], the roles would be reversed with the Government submitting a list of names for the corporation to choose from.

Other notable directives contained within the Morford Memorandum include:

- Both the monitor and the corporation must provide a commitment that the former will not be employed or retained in any direct, indirect or subcontracted fashion by the latter for a period of at least one year following the termination of the DPA;
- To protect the monitor's independence, the corporation may not seek to obtain or obtain legal advice from the monitor. Conversely, the monitor should be seen as independent from the Government;
- A monitor is not responsible to the corporation's shareholders. Therefore, the responsibility for designing an ethics and compliance program should remain with the corporation, subject to the monitor's evaluation and recommendations;
- "It may be appropriate for the monitor to make periodic written reports to both the Government and the corporation […]";

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[19] U.S. Attorney's Manual, §§ 9-28.000 to 9-28.1300.

[20] Philip Shenon, *Ashcroft Deal Brings Scrutiny in Justice Dept.*, N.Y. Times, A1 (Jan. 10, 2008), available online at: http://www.nytimes.com/2008/01/10/washington/10justice.html

[21] An electronic copy of the Memorandum is available at : https://www.justice.gov/sites/default/files/dag/legacy/2008/03/20/morford-useofmonitorsmemo-03072008.pdf .

[22] *Ibid.*

- If a corporation chooses not to adopt a recommendation made by the monitor within a reasonable timeframe, either the monitor or the corporation, or both, should report that fact to the Government. The Government will then determine if the corporation's rejection of the recommendation and its reasons complied with the DPA;
- The DPA "may set forth forth certain types of previously undisclosed or new misconduct that the monitor will be required to report directly to the Government"; and
- "If a corporation is purchased by or merges with another entity that has an effective ethics and compliance program, it may be prudent to terminate a monitorship."

In 2010, a tenth principle was added by then-Acting Deputy Attorney General Gary Grindler ("Grindler Memorandum").[23] This supplemental directive was for DPAs to explain what role the DOJ could play in resolving potential disputes between the monitor and the corporation. According to the Memorandum, this role would be aided by the fact that the DOJ is not a party to the contract between the corporation and the monitor. DOJ assistance would focus on determining if a corporation complied with the terms of a DPA. It would not be called upon to resolve contractual disputes between a company and the monitor. Its role would also depend on the public and law enforcement interests implicated by the dispute.

Both of these memoranda were integrated in the U.S. Attorneys' Manual.[24] Additionally, a report from the *Corporate Crime Reporter* in 2013 states that four major DPAs entered into in 2012 all adopted the practices suggested in the Morford Memorandum.[25] According to their report, it is now standard DOJ practice for the corporation to submit three potential monitors and for the Department to select its preferred one.

**Increased Prosecution of Individuals**

In September 2015, Deputy Attorney General Sally Yates issued the most recent memo in relation to DPAs ("Yates Memorandum")[26]. Once again, the memo underscores the obligation for the corporation to provide all relevant facts to qualify for any cooperation credit. However, the Yates Memorandum modifies this cooperation obligation by adding that the relevant facts sought are those relating to the individuals responsible for the misconduct.

The memo goes even further by stating that "criminal and civil corporate investigations should focus on individuals from the inception of the investigation".

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[23] An electronic copy of the Memorandum is available at: https://www.justice.gov/sites/default/files/dag/legacy/2010/06/01/dag-memo-guidance-monitors.pdf

[24] U.S. Attorney's Manual, Criminal Resource Manual, §§ 163, "Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations".

[25] "Morford Memo Morphed: Who Picks the Corporate Monitors?" http://www.corporatecrimereporter.com/news/200/whopicksthemontiors01012013/

[26] An electronic copy of the Memorandum is available at: https://www.justice.gov/dag/file/769036/download

Furthermore, "absent extraordinary circumstances or approved departmental policy, the Department will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation; and Department attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases, and should memorialize any declinations as to individuals in such cases."

There can be no ambiguity as to the DOJ's different stances on the prosecution of corporations and individuals following the Yates Memorandum; leniency should only be offered to corporations and can only be offered in exchange for disclosing the responsible individuals.

**United Kingdom**

The United Kingdom chose a different route than the United States to enact DPAs. In October 2012, the UK Minister of Justice announced that a bill implementing DPAs would be tabled to help combat economic crime.[27] The measure was introduced as Schedule 17 of the Crime and Courts Act 2013 and received royal assent in April 2013.[28]

Public consultations were held jointly in the summer of 2013 by the Serious Fraud Office and the Crown Prosecution Service. Both organizations sought comments on their draft Code of Practice and asked eight specific questions. They then published a summary of the 32 responses obtained, along with a revised version of their Code of Practice on 14 February 2014.[29] DPAs were made available to prosecutors on 24 February 2014.

**Outline of Schedule 17**

Schedule 17 of the Crime and Courts Act 2013 consists of around 40 sections which provide in-depth guidelines for DPAs, from their inception to resolution. An outline of Schedule 17's most significant elements follows.

(i) Section 2: Legal Proceedings Must Be Instituted

Whereas NPAs are available in the United States, the provisions of section 2 of Schedule 17 implicitly prohibit prosecutors from agreeing to withhold charges in exchange for measures of any kind. Legal proceedings must be commenced for the alleged offence. They are automatically suspended following commencement of DPA negotiations.

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[27]The Minister estimated that fraud alone costs the UK £73 billion each year, but that "too few cases are brought to justice": https://www.gov.uk/government/news/new-tool-to-fight-economic-crime .

[28]An electronic copy of Schedule 17 is available online at: http://www.legislation.gov.uk/ukpga/2013/22/schedule/17/enacted

[29]Details of the consultation, as well as the summary of responses can be found online at: https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/

(ii) Section 4: DPAs Are Only Made Available to Corporations

Once again, contrary to American practice, DPAs are only made available to "a body corporate, a partnership or an unincorporated association", and not to individuals.

(iii) Section 5: Contents of a DPA

Section 5 enumerates requirements that are mandatory in every DPA, such as a statement of facts (which may or may not include admissions by the accused) and an expiry date, as well as suggestions of terms that may be provided for. The latter category includes requirements:

(i) "to pay to the prosecutor a financial penalty;
(ii) to compensate victims of the alleged offence;
(iii) to donate money to a charity or other third party;
(iv) to disgorge any profits made by [the accused] from the alleged offence;
(v) to implement a compliance programme or make changes to an existing compliance programme relating to [the accused]'s policies or to the training of [the accused]'s employees or both;
(vi) to co-operate in any investigation related to the alleged offence;
(vii) to pay any reasonable costs of the prosecutor in relation to the alleged offence or the DPA."

A DPA may impose time limits within which the accused must comply with the requirements, as well as a term setting out the consequences of a failure to comply.

Furthermore, should there be a financial penalty agreed to by the Prosecutor and the accused, it "must be broadly comparable to the fine that a court would have imposed on [the accused] on conviction for the alleged offence following a guilty plea".

(iv) Section 6: Code on DPAs

Section 6 specifically mandates the Serious Fraud Office and the Crown Prosecution Service to issue a Code for prosecutors offering guidance on DPAs. It also creates a positive obligation for prosecutors to take the Code into account when exercising their functions.

(v) Sections 7-11: DPA Proceedings and Judicial Oversight

The greatest innovation of the UK model compared to its American counterpart is that of extended court supervision. Indeed, wary of regulation-by-prosecutor critiques in the US, the UK scheme grants the judge a predominant, and predefined, role in the proceedings.

Section 7 provides that, after the commencement of DPA negotiations but before the terms are agreed to, the prosecutor must apply to a court for a preliminary declaration that (1) entering into a DPA with the accused is likely to be in the interests of justice, and (2) the proposed terms of the DPA are fair, reasonable and proportionate. The court must then render a reasoned decision. Should the court refuse to make the

preliminary declaration, the prosecutor may modify terms of the proposed DPA and make a further application. Both the hearing and the rendering of a decision must be held in private.

If the prosecutor is successful in obtaining a preliminary declaration under section 7, negotiations on the terms of the DPA proceed between the Crown and the accused. Once a final agreement is reached, Section 8 provides that it must be submitted to the court for final approval, on the basis of the same two criteria as those detailed above. The hearing may be held in private if the court declines to approve the DPA, but any positive ruling must be done in open court. Following a positive decision and barring any exceptional order of postponement of publication, the prosecutor must publish the DPA, the declaration of the court and its preliminary reasoning under section 7 (including any initially negative response), as well as the court's final declaration and reasoning under section 8.

Sections 9 and 10 pertain to the procedures subsequent to a perceived breach and outline provisions related to modifying the terms of DPA. The court must weigh in on whether there is a breach of the DPA or if the terms of the DPA may be modified. In both of these scenarios, the decision lies with the court, which must give reasons for its decision. Section 9 also places an obligation on the prosecutor to publish a decision, should she believe that an offender has failed to comply with the terms of a DPA, but has decided not to bring the matter before a court.

Finally, section 11 sets forth the prosecutor's power to discontinue proceedings upon expiry of a DPA. However, if it is discovered, even after a DPA has expired, that the accused provided inaccurate, misleading or incomplete information, or knew or ought to have known that the information was inaccurate, misleading or incomplete, the prosecutor may introduce fresh proceedings. Any decision on discontinuance of the DPA must be published.

(vi) Section 12: Court Order Postponing Publication of Information

A court may order that publication of any information that is required under sections 8-11 be postponed if doing so is necessary to avoid a substantial risk of prejudice to the administration of justice in any legal proceedings.

(vii) Section 13: Use of Material in Criminal Proceedings

Section 13 provides that the statement of facts contained in the DPA is to be treated as an admission by the accused and can be used in any criminal proceedings in relation to the alleged offence. However, this is conditional upon the DPA having received final approval from a court under section 8.

If there is the commencement of DPA negotiations or only preliminary approval from a court under section 7, DPA material (including the draft of the DPA, draft of a statement of facts and statement indicating that the corporation entered into DPA negotiations) may only be used in evidence during a prosecution for an offence alleging the provision of inaccurate, misleading or incomplete information by the

accused, or for an offence in which the accused has made a statement inconsistent with the material.

(viii) Subsequent Sections of Schedule 17

A majority of the subsequent sections list the offences for which a DPA may be entered into (both common law and statutory offences) or pertain to consequential amendments and transitional provisions. The offences are related to a variety of economic crimes, such as theft, false accounting, cheating the public revenue, forgery, bribery, and fraud.

**DPA Code of Practice**

After public consultation, the Director of Public Prosecutions and the Director of the Serious Fraud Office published a DPA Code of Practice in February 2014.[30] Prosecutors have an obligation under section 6 of Schedule 17 to take the Code into account when exercising their functions. As such, an overview of the most significant provisions of the DPA Code of Practice follows.

(i) The Initiation of DPA Negotiations

Sections 1.1 and 2.1 of the Code state that the Serious Fraud Office and the Crown Prosecution Service are first and foremost prosecutors, that a DPA is a discretionary tool and that only the prosecutor may invite an accused to enter into DPA negotiations as an alternative to prosecution.

The accused has no right to be invited to DPA negotiations, but may refuse an invitation if one is offered (section 3.3).

(ii) How Do Prosecutors Determine When to Enter into DPA Negotiations?

Sections 1.2 to 1.6 set forth a two stage test (evidential and public interest) that must be met for prosecutors to initiate DPA negotiations. Prosecutors must be satisfied that:

A. "Either the evidential stage of the Full Code Test in the Code for Crown Prosecutors is satisfied or, if this is not met, that there is at least a reasonable suspicion based upon some admissible evidence that P has committed the offence, and there are reasonable grounds for believing that a continued investigation would provide further admissible evidence within a reasonable period of time, so that all the evidence together would be capable of establishing a realistic prospect of conviction in accordance with the Full Code Test; and

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[30]The "Deferred Prosecution Agreements Code of Practice" is available online at: https://www.cps.gov.uk/publications/directors_guidance/dpa_cop.pdf

B. The public interest would be properly served by the prosecutor not prosecuting but instead entering into a DPA with P in accordance with the criteria set out below.

Section 2.2 adds a third element, which is that the prosecutor must be satisfied that the full extent of the alleged wrongdoing has been identified.

Sections 2.3 to 2.10 present a variety of factors that prosecutors can take into consideration when evaluating the public interest aspect of the test including:

- The seriousness of the offence, the culpability of the accused and the harm to the victim;
- The UK's commitment to abide by the OECD Convention on "Combating Bribery of Foreign Public Officials in International Business Transactions";
- The accused's history of similar conduct (including the history of its directors, partners and majority shareholders);
- Whether the alleged conduct is part of the accused's established business practices;
- Whether the accused had an effective corporate compliance program at the time of the offense;
- Timeliness of self-reporting and quality of internal investigation;
- Significant harm caused to the integrity or confidence of markets and local or national governments;
- Genuinely proactive and timely cooperation;
- Extent of compliance reforms undertaken;
- Whether the accused is effectively a different entity from that which committed the offences (taken over by another organization, no longer operates in the relevant industry or market, disciplinary action and dismissal of culpable individuals, structures and processes changed to minimise risk of re-offending);
- Whether a conviction is likely to have disproportionate consequences for the accused under domestic law or that of another jurisdiction; and
- Whether a conviction is likely to have collateral effects on the public, the employees, the shareholders or the accused's pension holders.

(iii) Transparency, Confidentiality & Use of Material

Section 3.4 identifies certain steps a prosecutor must take to guarantee that DPA negotiations are transparent. Under sections 3.6-3.11, along with the invitation to commence DPA negotiations, the prosecutor's letter to the accused must contain undertakings protect the confidentiality of the information provided by the accused during the course of negotiations.

Section 4 generally reiterates the two possibilities in which a prosecutor could subsequently use material obtained during DPA negotiations. Section 4.6 lists some types of documents that could be considered "material".

(iv) No Admission of Guilt Necessary

Section 6.3 established that there is no requirement for a formal admission of guilt by the accused in respect to the offences charged. However, the accused will have to admit the contents and meaning of key documents referred to in the statement of facts.

(v) Monitors

Sections 7.11 to 7.22 deal with the issue of monitors. The general principle under the UK DPA scheme is that the appointment of a monitor will depend on the factual circumstances of each case and must always be fair, reasonable and proportionate. If the accused already has a "genuinely proactive and effective corporate compliance programme", the DPA may not mandate the appointment of a monitor. When the use of a monitor is deemed appropriate, the accused will bear all the costs associated with the selection process, as well as the appointment and remuneration of the monitor.

The accused must afford the monitor complete access to all relevant aspects of its business during the course of the DPA. However, any legal professional privilege is unaffected and remains intact.

The accused should provide the prosecutor with three potential monitors (with relevant qualifications, past associations with the accused and an estimate of the costs of the monitorship). Section 7.17 states that the prosecutor should ordinarily accept the accused's preferred monitor, except if there is a conflict of interest or the monitor is inappropriate. Given its broad supervision powers, the court may also refuse the proposed monitor.

Under section 7.20, "the monitor's reports associated correspondence shall be designated confidential with disclosure restricted to the prosecutor, [the accused] and the court, save as otherwise permitted by law."

Section 7.21 details a long list of elements of a corporate compliance program that a monitor must ensure the accused has in place, such as a code of conduct, a training and education program, adequate reporting procedures, and contract terms with partners, subcontracts and subsidiaries that include express contractual obligations and remedies in relation to misconduct. Section 7.22 tasks the monitor with examining "contemporary external guidance on compliance programmes" when designing the accused's compliance program.

(vi) Other Elements of the DPA Code of Practice

In helping the judge to establish the appropriate financial penalty, the prosecutor may draw the judge's attention to any victim statement or other information available as to the impact of the alleged offense on the victim (s. 8.1). Section 8.4 states that the financial penalty should also include consideration of the accused's means, as well as

a "discount equivalent to that which would be afforded by an early guilty plea" and that "current guidelines provide for a one third discount for a plea at the earliest opportunity".

According to section 12.6, the accused is not entitled to the return of any monies paid under the DPA prior to its termination or to any other relief for detriment arising from its compliance with the DPA.

**Overview of the UK's First DPA**

On 30 November 2015, a UK court approved the first use of a DPA.[31] The Serious Fraud Office had initiated proceedings against Standard Bank plc (now known as ICBC Standard Bank plc) for failing to prevent the bribery of Tanzanian officials during the raising of funds for the government through sovereign note private placement.

The final terms of the DPA were approved and included:

i. Payment of USD $6 million in compensation plus interest of USD $1,046,196.58;
ii. Disgorgement of profit on the transaction of USD $8.4 million;
iii. Payment of a financial penalty of USD $16.8 million;
iv. Past and future co-operation with the relevant authorities in all matters relating to the conduct arising out of the circumstances of the draft Indictment;
v. At its own expense, commissioning and submitting to an independent review of its existing internal anti-bribery and corruption controls, policies and procedures regarding compliance with the Bribery Act 2010 and other applicable anti-corruption laws; and
vi. Payment of the costs incurred by the SFO (estimated around £330,000).

The bank avoided a more significant penalty given its promptness to self-report, its full and complete cooperation, its undertaking of a full and independent review of its anti-corruption procedures, that the predicate offense involved inadequate compliance systems to prevent bribery rather than knowing participation, and the ambiguity of SFO's policy on the matter. The judge also took into account the fact that the Tanzanian authorities investigating the wrongdoing did not object to the proposed settlement, nor did the SEC in the United States (which resolved its action against the bank following a USD $4.2 million civil monetary penalty).

At para. 16, the judge states that the "most difficult assessment was as to the appropriate financial penalty". Ultimately, he said he relied on the guideline for corporate offenders provided by the Sentencing Council and came to the conclusion

[31] An electronic copy of the decision can be found online at: https://www.judiciary.gov.uk/wp-content/uploads/2015/11/sfo-v-standard-bank_Final_1.pdf

that the appropriate penalty should be 300% of the total fee, reduced by one third based on the earliest possible admission of responsibility.

It is also of note that since the final hearings were to be held in public, the judge "gave leave for an appropriate stock market announcement to be published pursuant to the Johannesburg Stock Exchange Rules governing Standard Bank Group Ltd, the shareholder upon which the financial impact of the DPA will fall".

Finally, even though the judge agreed that the preliminary hearings should be held in private so that the court could retain control of the ultimate outcome and ensure that the possibility of prosecution was not jeopardised as a consequence of publicity, he states at para. 21 that "publication of the relevant material now serves to permit public scrutiny of the circumstances and the agreement."

Some aspects of UK's first DPA were ill-received by some commentators, most notably, Corruption Watch UK.[32] The anti-corruption organization targeted three specific areas:

(I) Individual accountability: no single individual in the UK has been held accountable for the bank's failure to prevent the alleged bribery, despite high levels of control and approval by individuals;
(ii) Reliance on the company's internal investigation: since the prosecution relied so heavily on the bank's internal investigation, Corruption Watch believes that the SFO, the court, and the public will not learn whether the full extent of wrongdoing was discovered, or whether the case is representative of a systemic problem within the bank or an isolated incident; and
(iii) Relatively low financial penalties that do not reflect adequate victim compensation or disgorgement of profits: Corruption Watch alleges that the full harm to Tanzania, revenue streams made by the bank on the transaction, and the market advantage achieved as a result of the wrongdoing, were not adequately taken into consideration in the DPA.

The organization also lauded some aspects of the DPA, such as the high level of detail in the Statement of Facts, the fact that compensation was given to Tanzania, that Standard Bank will not seek tax reduction on any of the monies it pays out under the DPA, that the SFO consulted the US DOJ to peg its fine to US levels, and the inclusion of a 'muzzle clause' preventing Standard Bank from contradicting the narrative of facts in public.

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[32]Corruption Watch UK, *The UK's First Deferred Prosecution Agreement*: *Good News for the SFO but Worrying News for Tanzania and the Fight against Bribery*, December 2015. An electronic copy of the document is available at: http://www.cw-uk.org/wp-content/uploads/2015/12/Corruption-Watch-UK-Report-and-Analysis-UKs-First-Deferred-Prosecution-Agreement-December-2015.pdf

A second DPA has since been concluded by the SFO on 8 July 2016.[33] For the sake of brevity, this DPA will not be analysed in the present text.

### Other Governments Considering DPAs

On 16 March 2016, the Australian Minister for Justice released a public consultation paper on a possible Australian scheme for DPAs.[34] The public consultation period closed on May 2, 2016. Of the 16 responses, 14 were in favor of the introduction of a DPA regime.[35] On March 31, 2017 the Australian Minister for Justice released a subsequent public consultation paper entitled "Proposed model for a defined prosecution agreement scheme in Australia".[36]

France seemed set to adopt its own DPA scheme in 2016, but has experienced different setbacks. In drafting the Transparency and Modernization of Economic Life bill, which aims to prevent foreign bribery,[37] the French government inserted a provision that would have introduced settlements to resolve foreign bribery allegations. However, that provision was viewed unfavourably by the *Conseil d'État*, and the government removed the clause at the end of March 2016.[38] It has since been reintroduced, in a somewhat diluted form, through an amendment from a MNA at first reading of the bill in the *Assemblée nationale* in June.[39] At the moment of writing this report, a final version of the bill has yet to be enacted.

## CANADIAN DPA SCHEME: KEY ISSUES FOR CONSIDERATION

In light of American and British models that have been discussed above, we believe that the following elements should be considered by the Canadian government, should it enact its own DPA scheme. In general terms, if Canada were to adopt a DPA scheme we would favour a scheme closer to the UK model, as well as proceeding through the legislative route, rather than solely through memoranda and prosecutors' guidelines.

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[33] Press release: "SFO secures second DPA". Both the preliminary and the final decision are available online at: .https://www.sfo.gov.uk/2016/07/08/sfo-secures-second-dpa/

[34] An electronic copy of the Minister's statement, as well as the public consultation paper can be found online at: https://www.ag.gov.au/consultations/Pages/Deferred-prosecution-agreements-public-consultation.aspx

[35] See section "Next Steps": https://www.ag.gov.au/consultations/Pages/Deferred-prosecution-agreements-public-consultation.aspx

[36] An electronic copy of the Minister's statement, as well as the public consultation paper, can be found at https://www.ag.gov.au/Consultations/Pages/Proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.aspx

[37] An electronic copy of the French government's press release can be found online at: http://www.gouvernement.fr/argumentaire/loi-sapin-2-transparence-lutte-contre-la-corruption-modernisation-de-l-economie-4207

[38] Elisabeth Danon, *France: Foreign Anti-Bribery Bill Won't Allow Corporate Settlements*, published on the FCPA Blog, Monday, 28 March 2016. The article can be found online at: http://www.fcpablog.com/blog/2016/3/28/france-foreign-anti-bribery-bill-wont-allow-corporate-settle.html

[39] "La loi Sapin II pose les fondements d'une protection des lanceurs d'alerte", Le Monde, 8 June 2016: http://www.lemonde.fr/politique/article/2016/06/08/la-loi-sapin-ii-pose-les-fondements-d-une-protection-des-lanceurs-d-alerte_4942256_823448.html

### a) Utility of a Canadian DPA scheme

Apart from the statistics set out in the first pages of this document, it is difficult to generate a detailed account of Canada's current situation with regard to the prosecution of corporate offenders for criminal matters. This does not seem unique to Canada. Most studies on economic crime tend to focus on crimes committed within companies, rather than economic crimes committed by companies.[40]
In the absence of detailed studies, it is possible to proceed by evaluating the volume of case law constituted by cases where a corporation is the accused. To that end, results are not much more encouraging. For example, the Canadian government enacted Bill C-45 in 2004, which amended the Criminal Code to institute reforms related to the criminal responsibility of organizations.[41] However, it was not until 2012 that these reforms were first invoked before a criminal court.[42] And since then, there have not been many other cases.[43]

Based on the American experience with the Foreign Corrupt Practices Act ("FCPA"), foreign bribery is an area where one might expect a significant number of corporate prosecutions. For example, from 2007 to 2015, the DOJ and the SEC brought 115 corporate FCPA enforcement actions.[44] By contrast, the *Corruption of Foreign Public Officials Act*[45] came into force in Canada in 1999 and has since been invoked in prosecutions of just four corporations and thirteen individuals (with only one of those individual prosecutions resulting in a conviction to date).

From this rapid overview of statistics and jurisprudence, it is safe to say that Canada has a low level of prosecution of criminal corporate wrongdoing. DPAs can therefore provide the opportunity for greater enforcement through a diversion program that rewards self-reporting.

### b) Diversion Programs Currently in Existence in Canada

There are many diversion programs currently in existence in Canada, the majority of which are tailored for individuals. Many programs, such as those pioneered by Montreal's Municipal Court,[46] are aimed at the rehabilitation of the accused through treatment of an underlying psychiatric or other medical cause that precipitated the offense, such as alcoholism, kleptomania, or pathological anger issues. In some

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[40] See for example, PricewaterhouseCoopers' *Global economic crime survey 2016: Canadian Insights*, available online at: http://www.pwc.com/ca/en/deals/publications/2016-02-Global-Crime-Survey-Canada.pdf

[41] See, *A Plain Language Guide: Bill C-45 – Amendments to the Criminal Code Affecting the Criminal Liability of Organizations*, Department of Justice Canada, 2004. An electronic version of the document is available online at: http://www.justice.gc.ca/eng/rp-pr/other-autre/c45/

[42] *R.* c. *Pétroles Global inc.*, 2012 QCCQ 5749.

[43] For example, see, *R.* v. *Metron Construction Corporation*, 2012 ONCJ 506, 2013 ONCA 541.

[44] See "Corporate FCPA Enforcement in 2015 Compared to Prior Years", FCPA Professor, January 7, 2016, available online at: http://fcpaprofessor.com/corporate-fcpa-enforcement-in-2015-compared-to-prior-years/

[45] (S.C. 1998, c. 34).

[46] An overview of the programs can be found on the following website: http://ombudsmandemontreal.com/programmes-sociaux-a-la-cour-municipale-de-quoi-sagit-il/4333

instances, the prosecutor will drop the charges against the accused if he or she successfully undertakes a treatment program, while in others cases, successful completion of a treatment program will result in an unconditional discharge.

There are also a few programs that are available to corporations. For example, the Competition Bureau has immunity and clemency programs for corporations that self-report their involvement in anti-competitive activities prohibited by the *Competition Act*.[47]
It follows that DPAs would not constitute an entirely new phenomenon in the Canadian legal landscape.

### c) Measures to Promote Certainty & Transparency – Legislation & Policy Guidance

If Canada were to adopt a DPA regime, it could be modelled on the US or British schemes. While each version may suit its legal system well, we believe that the British model, namely specific legislation and accompanying guidelines for prosecutors, would be most in line with the Canadian legal tradition and afford the greatest guarantees of transparency and certainty.

DPAs in the United States have been met with great success since 1999, at least from a financial penalty and general enforcement perspective. However, the memorandum-based, regulation-by-prosecutor DPA scheme has also produced its fair share of criticism, as discussed above.

Adequate implementation of a DPA scheme should not be left solely to prosecutors' initiative. Rather, it should be set forth in a measured framework by legislators, who have the full authority and legitimacy to do so in the eyes of the public. DPAs must not be viewed as shielding corporations from justice, but as an effective tool in changing the culture of organizations from within. Legitimate attempts to experiment with DPAs may produce scandals if guidelines have to be drafted and redrafted according to experience.

Considering Canada's recent history of corporate corruption, both on the federal level with the Sponsorship Scandal and on the provincial level, most recently with the Charbonneau Commission in Quebec, such DPA-growing pains would most likely be met with public skepticism.

For those reasons and others, the Canadian government should well heed the following advice from the late US Senator Arlen Specter that "to avoid a recurrence of prosecutorial abuses and attorney-client privilege waiver demands, legislation is necessary."[48]

Given its ongoing practice of issuing guidelines to prosecutors, the federal government could provide supplemental guidance concerning the appropriate application of DPA legislation, similar to those issued in the US and UK.

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[48] 154 Cong. Rec. S2331-S2332 (Feb. 13, 2009) (remarks of Senator Specter upon the introduction of S. 445): http://federalevidence.com/pdf/2009/Misc/S.445.CR1.pdf

### d) Necessity of Laying Charges – Should NPAs Be Available?

While DPAs are the main focus of this document, they are not the only type of prosecution agreement available. As was touched upon earlier, NPAs are similar in substance to DPAs and can include the same provisions as those discussed above and further in this document.

However, the greatest distinction between NPAs and DPAs is that, with the former, no charges will be laid against the corporation and if the agreement is respected, there will be no record whatsoever. This entails fewer negative repercussions for the corporation, its shareholders and other stakeholders, less negative press and potentially, fewer financial losses. NPA proponents suggest that this in turn would lead to increased corporate self-disclosure and greater overall enforcement, on top of what can be achieved through DPAs.

While this may be true, NPAs also have drawbacks. By granting the prosecutor the discretion not to lay charges and to negotiate the NPA on his or her own, the judiciary is entirely excluded from the process. This would detract from the guarantees of publicity that are inherent to the court, rendering NPA negotiations completely opaque to the public. It would also shift decision-making authority from judges to prosecutors, instituting a system of regulation-by-prosecutor similar to the one that has been the subject of many controversies in the US.

These concerns are what led the UK Ministry of Justice to reject NPAs by stating that they "are not suitable for this jurisdiction due to their markedly lesser degree of transparency, including the absence of judicial oversight".

Finally, it bears noting, as will be discussed in greater length below, that protection from debarment may be granted through a DPA without foregoing the advantages of publicity and adequate judicial oversight.[49]

### e) Parties to a DPA – Corporations and/or Individuals?

The US DPA scheme allows for both corporations and individuals to be eligible for DPAs, while the UK model is only available to corporations. Based on the aforementioned overarching principle that, while corporations have a distinct legal persona, it is individuals who make decisions on behalf of corporations, we would favour exclusive availability to corporations.

Furthermore, guidelines should instruct prosecutors to afford leniency to corporations only when they are willing to identify the individuals responsible for the wrongdoing.

We believe that these two principles are essential and would allow for greater social acceptability of DPAs.

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[49] Ministry of Justice, "Consultation on a New Enforcement Tool to Deal with Economic Crime Committed by Commercial Organisations: Deferred Prosecution Agreements", 2012, Cm. 8348, at 19 (U.K.), available at https://consult.justice.gov. uk/digital-communications/deferred-prosecution-agreements/supporting_documents/ deferredprosecutionagreementsconsultation.pdf.

### f) Conduct for Which a DPA May Be Sought

Like the UK model, prosecutors should be able to pursue DPAs for cases involving economic crimes, such as fraud, false accounting, cheating the public revenue, forgery, and bribery, both domestic and foreign. While investigations into economic crimes are increasingly garnering considerable media and public attention, they are painstakingly complex, time-consuming and expensive. More frequently than not, they also encounter diverse legal challenges, including issues involving attorney-client privilege.

Once an investigation has concluded, obtaining a conviction is no easy task, as trial of these offenses are just as painstakingly complex, time-consuming and expensive. Few jurors can comprehend all of the financial nuances associated with the prosecution of an economic crime. Moreover, an extra layer of complexity is added when the accused is a corporation. In one recent case, the trial lasted 2 years, which lead to issues of jury availability and nearly resulted in a mistrial.[50]

Overall, trials for corporate economic crimes are under-prosecuted and overly complex, which makes them the perfect candidate for DPAs in the event Canada elects to enact a DPA regime. However, this would, and should, not mean that prosecution of these cases would always be resolved with a DPA. In clear, egregious cases, prosecutors should prosecute a corporation to the full extent of the law.

### g) Conduct of Negotiations

Like both the US and UK models, a DPA has to be a discretionary tool, with only the prosecutor permitted to invite the defendant to enter into negotiations. In other words, the accused should have no right to demand that DPA negotiations commence.

However, this does not mean that there should be no confidentiality provisions or procedural guarantees afforded to the accused. Similar to the UK DPA Code of Practice, it would be reasonable for the prosecutor to undertake confidentiality commitments toward an accused. A DPA law in Canada could also envision a caveat along the lines of Schedule 17's section 7, providing for potential private hearings during the preliminary stages of judicial approval.

Other DPA obligations for the Crown would have to include complete, timely and ongoing disclosure of evidence to respect the accused's *Charter* right to make full answer and defence. The issue is specifically addressed in the UK DPA Code of Practice, where it is stated that the prosecution has a continuing duty to disclose to the accused any relevant material, and that the accused is not to be misled as to the strength of the prosecutor's case. Canadian prosecutor guidelines would be the appropriate medium to establish this obligation.

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[50] http://www.theglobeandmail.com/report-on-business/industry-news/the-law-page/ex-cinar-ceo-two-others-found-guilty-on-fraud-charges/article30245930/

Another area of concern for offenders involves the use of DPA material and evidence in subsequent prosecutions. Yet again, we would suggest adopting a compromise similar to the one existing in the UK, in which the Statement of Facts in a concluded DPA can be used subsequently in any case, and in which the use of declarations made by an accused in failed DPA negotiation can only be used in the prosecution of perjury or contradictory version cases.

Finally, the prosecutor's decision regarding whether to invite the accused to participate in DPA negotiations must be satisfied by a threshold evidentiary test and public interest consideration. We would also refer to the UK model for the public consideration factors that should be weighed in favour and against the use of a DPA.

### h) Extent of Judicial Involvement

In light of the controversies surrounding the lack of judicial involvement in the US, we believe it wise to adopt the UK approach should Canada adopt a DPA regime, which mandates strong court supervision in matters involving a DPA. Having a judge presiding over the proceedings and closely scrutinizing the terms of the DPA will afford extra guarantees of transparency and ensure that the public interest is properly considered in the disposition of these matters.

As in the United Kingdom, we believe that the court should be involved in every step, from preliminary hearings to any potential breach or variation of the DPA.

### i) Publicity of DPAs

The final DPA document should be made public, as it is under both British law and standard American practice. We also endorse the provisions of Schedule 17 that pertain to the publication of motivated decisions by the court, where and when appropriate. In other words, even if the court's decision following the preliminary hearing is not immediately made public, it should be published once a final decision has been reached.

### j) Content of a DPA

The agreement should include the standard measures from US and UK practice:

1) fines and financial penalties;
2) compensation of victims;
3) disgorgement of profits;
4) reimbursement of reasonable investigation and prosecution costs;
5) appointment of a monitor where applicable and payment of the monitor's fees;
6) undertakings of compliance reform; and
7) undertakings of full cooperation with law enforcement and the prosecution, including turning over individual wrongdoers.

These measures are in line with the three fundamental objectives of a DPA scheme: financial reparation (measures 1 through 4), sincere compliance reform (measures 5 and 6) and individual accountability (measure 7). In considering the above elements, we believe that it is crucial that any legislation enacting DPAs provide that the prosecution must ensure that all three objectives are met.
If there is no sincere compliance reform, the corporation will continue doing business as usual, thus enabling the reoccurrence of offences, which may end up having to be treated formally through a trial, or worse yet, go undetected and unpunished. If there is no reparation, the direct victims of the wrongdoing as well as the government will not be compensated for the damages suffered as a result of the corporate wrongdoing. Finally, if there is no individual accountability, the individual wrongdoers may reoffend within the corporation despite the change of culture enacted by compliance reform, or they may move on to engage in similar wrongdoing at other companies.

Fines and financial penalties serve a dual purpose of compensating the government's loss and act as deterrence. The compensation of victims must include all identifiable victims and account for a just assessment of the damages suffered. The disgorgement of profits must be acquitted in order not to provide the company with an unjust competitive advantage. Finally, a DPA must include measures accounting for the government resources spent on dealing with the corporation's wrongdoing, including the stage of investigation and prosecution.

Sincere compliance reform may include the appointment of a monitor, which may be required in certain cases as an additional guarantee of transparency. Also, the content of the undertakings of compliance reform must be duly scrutinised in order to ensure the adequacy of the protection afforded by any new compliance scheme. This, however, should be a case by case consideration. In many cases involving genuine remorse and demonstrated commitment to enhanced compliance practices, the cost and inconvenience of a monitor may not be necessary.

In undertaking to provide full cooperation, the corporation must identify individual wrongdoers. Acting illegally within a corporation that has subsequently entered a DPA should not shield individuals from prosecution. This requirement also acts as a deterrent for other individuals, in the same or another corporation, that may be tempted to offend.

It is possible that the corporation may have already undertaken steps towards fulfilling some or all of the three objectives described above before entering into the DPA. In that case, sufficient evidence of the same must be presented to the prosecution and duly documented before any of the 7 measures are left out of the DPA. If not, measures must be agreed upon in the DPA to reach all three objectives.

DPAs could also include a muzzle clause like that which was included in the Standard Bank DPA in the UK, to prevent the accused from attempting to undermine the credibility of the agreement and the authority of the court that approved it.

Furthermore, while it may be pertinent to evaluate the impact of a change of ownership as a factor in favour of the accused (as is suggested by the UK DPA Code of Practice), the DPA itself should contain clauses pertaining to mergers and

acquisitions of the accused. An ownership change could be considered positive if a merging company has a stronger compliance program than the accused, but could also be considered negatively in the event that a change in ownership is used to obfuscate the trail of wrongdoing or dilute the accused's commitment to true compliance reform.

### k) Monitoring of a DPA

The monitor has a central role to play to ensure the effectiveness of a DPA. While it may not always be necessary to appoint a monitor (for example, in cases where the court is satisfied that the company already has a proactive and effective compliance program), when one needs to be appointed, a Canadian DPA scheme must ensure that the fees for monitoring are paid by the corporation and that the monitor chosen satisfy criteria of expertise and impartiality.

Indeed, it is evident that the government should not have to shoulder the burden of paying for the monitoring of a corporation under a DPA scheme. Covering such fees would be in line with demonstrating a true intention of reform.

To achieve expertise and impartiality and prevent a reoccurrence of the US controversies mentioned earlier, a thorough selection must be put in place and could include public tender offers in certain circumstances (e.g. monitoring contract has a value above a certain threshold). DPAs should also include clauses similar to those used in the UK and US preventing the monitor from being hired by the accused for a period of time following termination of the agreement.

### l) Publicity of the Monitor's Report

The final element to consider is the issue of privilege in relation to the monitoring reports produced as a result of the DPA.

Recently in the US, the DOJ blocked the release of annual reports from the corporate monitor installed at Siemens as part of the company's compliance agreement stemming from its guilty plea to FCPA violations in 2008.[51] A non-profit news organization, 100Reporters, filed a lawsuit in 2013 under the Freedom of Information Act to gain access to these reports, but has faced staunch objections from the DOJ.[52]

While 100Reporters has argued that the public has a right to know what Siemens and its corporate monitor have done to satisfy its obligations under the compliance agreement, the DOJ has moved to dismiss the case on the grounds that such information is not subject to FOIA requirements since it relates to law enforcement deliberations. The DOJ has also stated that "if the information that a monitor gives the DOJ can be obtained through FOIA, companies and their employees are not

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[51] Mica Rosenberg, Reuters, *U.S. moves to block release of Siemens anti-bribery monitor report*, 23 March 2016. Available online at: http://www.reuters.com/article/us-usa-justice-siemens-idUSKCN0WP2HZ

[52] *Ibid.*

likely to be candid with monitors" and that the monitor's report and communications contained sensitive commercial information that would harm Siemens' business if released.[53]

Similarly, both the DOJ and HSBC Holdings Plc have opposed the unsealing of the latter's corporate monitor's report, installed after the bank entered into a DPA with the US Justice Department in 2012.[54] The report is believed to be highly critical of HSBC's reform efforts. Based on the grounds that criminals might exploit weaknesses in the bank's anti-money laundering and sanctions compliance programs, HSBC has sought to have some parts of the report redacted, including a scathing conclusion that the bank "moved too slowly and made too little progress toward instilling the type of culture it will need" to build an effective compliance program.[55] Pending an appeal of the lower court's ruling to unseal the document, the January 2015 report has yet to be released, even in a redacted form.

Schedule 17 is silent on this matter. The issue is addressed in section 7.20 of the UK DPA Code of Practice which states that "Monitors' reports and associated correspondence shall be designated confidential with disclosure restricted to the prosecutor, [the accused] and the court, save as otherwise permitted by law".

While there may be very legitimate reasons for the accused to want the report and associated correspondence to remain confidential (legal privilege, commercial secrets or sensitive commercial information, potential criminal exploitation or security concerns), we believe that the monitor's report should be provided to the court.

### m) Coordination with Integrity Regimes and International Efforts

The Government of Canada maintains an "Integrity Regime" for federal public procurements which aims to ensure that the Government conducts business with ethical suppliers in Canada and abroad. It provides that Public Works and Government Services Canada ("PWGSC") will or may determine that a supplier is ineligible to bid on government contracts under certain circumstances. Debarment is automatic when the supplier has been convicted of certain specific offenses (such as fraud, bribery, extortion and laundering proceeds of crimes)[56] and discretionary in other cases.[57]

The most significant aspect of the Integrity Regime with regard to a DPA is the suspension provision. Section 7 (d) states that "PWGSC may suspend a supplier if the supplier has been charged with, or admits guilt of certain offences listed in the policy, or is charged with, or admits guilt of, in PWGSC's opinion, a similar offence

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[53] *Ibid.*

[54] Nate Raymond, Reuters, *HSBC money laundering report's release delayed amid U.S. appeal,* 10 March 2016. Available online at: http://www.reuters.com/article/us-hsbc-moneylaundering-idUSKCN0WC224

[55] *Ibid.*

[56] See "Ineligibility and Suspension Policy", section 6, available online at: http://www.tpsgc-pwgsc.gc.ca/ci-if/politique-policy-eng.html

[57] *Ibid,* section 7.

in a jurisdiction other than Canada". Therefore, a supplier could be suspended by PWGSC even if it has entered into a DPA, because from a procedural point of view, the supplier has been charged.

The Integrity Regime and criminal prosecution serve different purposes which should not be allowed to conflict. The prosecution must not undermine the Integrity Regime's objective by offering protection from debarment lightly, but it must be able to offer such protection if and when justified. After all, protection from debarment represents a key strategic advantage for a corporation that can then proceed to bid on lucrative government contracts.

DPAs should by no means always ensure an automatic protection against debarment. Rather, such a protection should be the object of the prosecution's negotiation with the corporation in exchange for correspondingly significant guarantees of both reparations and sincere compliance reform. It is crucial that the standard remain high for what concessions the prosecution should obtain from the corporation in exchange for protection from debarment, and that adequate guarantees and monitoring must be obtained, when necessary, to ensure DPAs are fully effective.

For the prosecution to be able to offer protection from debarment, the Integrity Regime must therefore be modified in order to allow the prosecution the necessary power to offer protection against debarment.

## CONCLUSION

Should the Government of Canada elect to establish a DPA regime, Transparency International Canada believes that it would be possible to do so in a manner which has the effect of promoting compliance and allowing for efficient use of investigative and prosecutorial resources. To achieve this, any DPA scheme adopted by the Government of Canada should be implemented through specific legislation, carried out under transparent judicial purview, and require:

1. Financial reparations;
2. Sincere compliance reform; and
3. Accountability of individual wrongdoers.

These elements would increase the likelihood that a Canadian DPA scheme would best achieve the interests of transparency, compliance and corporate accountability.

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