

Goodmans^{LLP} Update

Canada Adopts New “Remediation Agreement” Regime to Address Corporate Crime

In the fall of 2017, Public Services and Procurement Canada (PSPC) conducted a public consultation to determine if Canada should expand the toolkit available to prosecutors to address corporate wrongdoing, including through the adoption of a made-in-Canada version of U.S. and U.K.-style deferred prosecution agreements (DPAs). The public consultation revealed high levels of support for introducing DPAs into Canada. On March 27, 2018, PSPC announced that the Government of Canada would be adopting a “remediation agreement” regime as an alternative means of addressing corporate wrongdoing and economic crime.

Canada’s “remediation agreement” regime officially came into effect on September 19, 2018, in conjunction with recent amendments to the *Criminal Code*. The new regime will, for the first time, allow prosecutors to enter into formal agreements with organizations accused of having committed a criminal offence as an alternative to prosecution in specific circumstances (a “**Remediation Agreement**”).

What is a Remediation Agreement?

Law enforcement agencies in the U.S. have long had the ability to enter into DPAs with organizations (usually corporations) under criminal investigation. DPAs allow and encourage companies to self-report unlawful activity on the basis that, by cooperating with authorities in exchange for an admission of wrongdoing, payment of a fine and internal reforms, companies can avoid prosecution and more serious sanctions.

Much like a DPA, a Remediation Agreement is a voluntary agreement between a prosecutor and an organization accused of committing an economic crime such as bribery, money laundering, theft, forgery or fraud. Criminal prosecution is suspended upon the accused agreeing to fulfill certain requirements, such as admitting to facts that would support a conviction, paying financial penalties, and implementing a program to improve future compliance. If the accused complies with the terms and conditions set out in the Remediation Agreement, the prosecutor can apply to a judge for an order of completion and the charges against the organization will be stayed.

Such arrangements were previously not available in Canada (except in the Competition/Antitrust context, where participants in a price-fixing conspiracy or other unlawful scheme can obtain immunity or leniency in sentencing in exchange for disclosing illegal conduct to the Commissioner of Competition). Generally, companies that uncovered unlawful activity within their organization were faced with the dilemma of: (i) reporting the conduct to the authorities at the risk of being criminally prosecuted (despite their efforts to prevent, detect and report); or (ii) staying quiet in the hope that the conduct is not uncovered.

Now, under the new regime, companies operating in Canada will be encouraged to proactively address criminal activity discovered within their organizations in order to minimize the potential adverse consequences arising from such wrongful conduct.

Key Conditions

The *Criminal Code* imposes a number of conditions to qualify for a Remediation Agreement:

- the applicant must be an “organization” as defined in the *Criminal Code*, which includes corporations, but excludes public bodies, trade unions and municipalities;
- the organization must adhere to a comprehensive regulatory framework; and
- the remediation scheme must be approved by the court before the Remediation Agreement can come into effect.

In addition, there are certain conditions that must be satisfied before the prosecution is authorized to negotiate a Remediation Agreement. Pursuant to section 715.32 of the *Criminal Code*, prosecutors may only enter into negotiations for a Remediation Agreement if the following conditions are met:

- there is a reasonable prospect of conviction;
- the offence did not cause and was not likely to have caused serious bodily harm or death, or injury to national defence or security, and was not committed for the benefit of, at the direction of, or in association with, a criminal organization or terrorist group;
- negotiating the agreement is in the public interest and appropriate in the circumstances; and
- the Attorney General has consented to the negotiation of the agreement.

When determining whether to propose a Remediation Agreement, prosecutors must also consider other factors set out in the *Criminal Code*, which include, *inter alia*, the circumstances in which the offence was brought to the attention of authorities, whether the organization has taken disciplinary action against the individual(s) involved, and whether the organization has taken steps to remedy the harm (and prevent future harm). As such, it will be important for companies to maintain robust internal compliance and ethics programs, and to promptly and thoroughly investigate any evidence of criminal conduct, in order to benefit from Canada's new regime.

Possible Implications

Remediation Agreements are a welcome development in Canadian white-collar enforcement. The prospect of avoiding criminal prosecution by entering into a Remediation Agreement should encourage companies to self-disclose wrongdoing early on, thereby furthering the detection and prevention of corporate crime while eliminating the dilemma that responsible and proactive corporations have faced to date.

Remediation Agreements may also reduce the impacts of criminal prosecutions and convictions on the company's greater community of constituents, including employees, investors and their communities, by allowing the company to avoid the economic consequences of a criminal conviction that would otherwise be borne by those constituents.

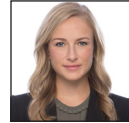
Given these potential material benefits to a company's stakeholders, the failure of a company's officers or board of directors to take the steps necessary to take advantage of the new regime may expose them to potential personal liability. Officers or directors who decide to not investigate evidence of potential criminal wrongdoing, or decide to not disclose wrongdoing to take advantage of the new regime, may find themselves under increased scrutiny if the company is later criminally charged and convicted.

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