**Office of the Commissioner of Lobbying of Canada**
255 Albert Street
10th Floor
Ottawa, Ontario K1A 0R5

Dear Ms. Sheppard:

I am writing to you today with regard to the proposed changes to the Lobbyists Code of Conduct. These comments reflect my views, and mine alone, and do not reflect those of any client (current or former).

From the outset, let me state that I unreservedly support the proposed changes to sections 1,2,3,5 and 10 of the Code and its preamble.

As the remainder of this submission is considered, I would like the reader to reflect on three questions:

1) What is the problem we are trying to solve with these changes to the Code of Conduct?
2) Do the changes proposed in the Code of Conduct erode constitutionally protected rights?
3) Is the balance between the purported problem and the erosion of rights appropriate?

It is my view that the problems which the changes to the draft Code of Conduct purport to solve are hypothetical in nature. No evidence has been presented to indicate that lobbyists are benefitting from 'preferential access' or a 'sense of obligation' from the public office holders they engage with. No evidence of a resulting shortfall in the public's confidence in the current system has been offered. To solve a hypothetical problem by potentially eroding constitutional rights of Canadians is over-reaching. Constitutional rights ought only be imperiled when a true, identifiable evil requires they be minimally impaired. In the absence of the above noted evidence, the changes to sections 7, 8 and 9 of the Lobbyists Code of Conduct are premature.

**Why do we have a Code of Conduct?**

Under Section 10.2 of the *Lobbying Act*, the Commissioner is required to develop a code of conduct for lobbyists. When originally developed, the purpose of the Code of Conduct was to help foster trust and ensure that lobbyists acted in a way that promoted transparency. The Registry exists to allow for a bright light to shine on legitimate activities. That public scrutiny acts as a check on the relationship between our governors and those who petition them. The registry has so served for years, and continues to accomplish this goal.

Under the *Conflict of Interest Act* and the regulations promulgated thereunder, a public office holder is explicitly prohibited from using his/her position to influence a decision so as to further their own private interests or those of relatives or friends, or to improperly further the private interests of another person. In this specific regard, the goal is to prevent a non-arms length beneficiary from benefitting from government business or decisions.

In the draft Code of Conduct for lobbyists, the Commissioner has proposed to specifically limit lobbyists from engaging with relatives, business partners and friends. Admittedly, I do not

understand what problem the lobbying commissioner is trying to solve with these proposed changes that isn't already covered by the aforementioned *Conflict of Interest Act*. The background paper provides an academic, if not hypothetical, examination of interactions and the appearance of impropriety that **could** ensue in the event that improper influence and preferential access is in fact taking place in Ottawa. There is no evidence presented to show this impropriety, just an assertion that failing to enact these changes will erode the public's confidence in the system.

The current regime does an admirable job in publicly displaying when meetings between lobbyists and certain high-ranking government officials occur, and does so conspicuously. The Commissioner and her staff should be lauded for the changes they have made to a system that is now very accessible and easy to navigate.

**What problem are we trying to solve?**

In the background paper, it has been inferred that unseemly relationships may exist, or have the potential to exist, resulting from preferential access for friends and/or a sense of obligation owed to lobbyists resulting from their friendships and/or political activity. The solution to this problem is to ban the activity in question. There has been insufficient evidence adduced thus far to suggest that inappropriate relationships are bearing fruit for lobbyists, their clients, or their employers to require an outright prohibition. Similarly, there is no evidence that the broadly defined 'political activities' are creating a conflict of interest, which has in turn led to preferential access being afforded to lobbyists who work on election campaigns.

If there is a perception, founded or otherwise, that lobbyists and government officials have inappropriate relationships – the changes to the Code of Conduct will do nothing to erode that perception. It is my view that promoting transparency requirements would do more to engender public trust than the proposed changes to the Code of Conduct.

**Scope of the Act**

When first introduced, the primary goal of (what was then known as)the *Lobbyists Registration Act* was to provide the public with transparency with regard to who was speaking on any given issue, and on whose behalf they were speaking. Changes to the Act in 2006 greatly increased the reporting requirements placed on lobbyists, and without a doubt, the transparency aspects of the regime are conspicuous. The system administered by the Commissioner is easily navigable, and provides Canadians with ample information about who is lobbying who, and on what subjects, should they choose to seek it out.

The Act, however, is not meant to further regulate lobbying activity. Beyond the specific limitations on designated public office holders found directly in the text of the Act, there are no specific limitations on lobbying. Of the prohibitions found in the Act, the limitations are based on benefitting from government services after the completion of that public service. That prohibition is time limited.

The Act does not limit lobbying activities beyond this narrow, time limited carve-out. This is because lobbying is an important tool of the citizenry in petitioning their government, and as stated

in the preamble of the Act, reaffirms the validity of the exercise and its importance to democratic governance.

I believe the net effect of the proposed changes expands the office's authority to create explicit prohibitions on lobbying activities and/or *defacto* limitations on constitutional rights. This was not specifically contemplated by Parliament. Parliament contemplated only the creation of a code of conduct, not a range of rules which would significantly curtail constitutionally protected activity. **These proposed rules will limit the activities of registrants under the Act.** This was not Parliament's intention for the Code of Conduct – Parliament's intention was to ensure transparency. The changes found in the draft Code of Conduct could fundamentally change the role of the Lobbying Commissioner to include becoming the regulator of the activities and relationships. That change comes at the potential peril of transparency, a core principle of the *Lobbying Act*. If it was Parliament's intention to limit the activities of citizens, it would have stated so explicitly.

**Friends**

I take no issue with the principle that lobbyists should avoid creating a conflict of interest. Nor do I take issue with a rule which would safeguard against creating the appearance of a conflict of interest. In this regard, as it relates to both 'relatives' and 'business partners,' terms which can (and have) been defined by statutes and regulations, the current Code of Conduct can be interpreted to avoid the appearance of impropriety. Where this becomes far more challenging is the inclusion of the term 'friend.'

Section 7 and 8 of the draft code of conduct seeks to limit what 'friends' can do. There is no time limitation to this prohibition. It is my considered view that there are four different problems around this amendment:

1) It is very difficult to define what a friend is, or is not;
2) It is an over-reach to suggest that this is an activity that can give rise to a conflict of interest;
3) It insinuates that public office holders are somehow beholden to their friends to the point that they will ignore their duties and other legal responsibilities; and
4) The proposed code amendments may frustrate the intended purpose of the Act

Currently, all business between would be registrants and public office holders require registration, and in specific cases, monthly reporting. Under the current framework, when friends and professional relationships intersect, the registration and reporting requirements ensure that information is posted publicly. The antiseptic nature of the limelight acts as a sufficient safeguard to prevent untoward activity.

In the event that there is a disincentive to reporting any conversation, that light is not given the opportunity to shine. Under the status quo, there can be no doubt that there are those who have failed to register and report. This change only further encourages that criminal behavior. I believe that an outright prohibition on these meetings will not prevent them from happening; it will only prevent them from being reported. While that would constitute a violation of the Act, as opposed to

simply a breach of the code, absent a prosecution, the transparency we currently enjoy will not manifest itself.

It is better that the classes of persons enumerated in the draft Code of Conduct report their activities in a transparent public forum then it is to give them reason to not report their affairs. The goal of the statute is to promote public trust in the system. That trust is found in being able to see what is going on.

As noted by the Conflict of Interest Commissioner (COIC) in many of her reports, there is no statutory definition of the term 'friend.' The COIC, through their office's decisions and bulletins, have developed precedents for what a 'friend' is for the purpose of the *Conflict of Interest Act.* It is very important to note that these interpretations were established for the purposes of defining what gifts can/not be received and who can/not benefit from a government decision. In so doing, the COIC attached legal terms to a relationship which is by its very nature dynamic. A relative is either related, or not. A business relationship can begin and end. A friendship is consummated, grows, strengthens/weakens, and changes throughout its life. Unlike the other two, there is no 'bright line' test to determine who is, or is not, a friend. Perhaps ironically, its evolution is influenced more than anything by building trust.

The net effect of this proposed rule is to require a subsequent interpretation bulletin – or an investigation into a relationship which offers a definition for 'friend' after a lobbyist has engaged in the prohibited behavior. This will create a situation where a lobbyist will only be made aware of their violation of the code of conduct after the fact.

**Recommendation #1: The term 'friend' is removed from Rule 7 and 8 of the draft Code of Conduct. In the alternative, the Commissioner should incorporate by reference the definition of friend used by the Conflict of Interest Commissioner, which states that a friend is a 'person with whom one has some history of mutual regard beyond simple association.'**

**<u>Constitutional Issues:</u>**

The Charter of Rights and Freedoms guarantees that all Canadians can participate in public discourse, freely assemble, vote in elections, and engage in public debates. These rights are inextricably linked with one another. The *Lobbying Act* preamble indirectly protects these principles, and they are the cornerstone of a free and democratic society.

While not a statutory instrument *persae*, the Code of Conduct nevertheless is likely to be considered a 'law' subject to Charter scrutiny, as it is expected to be followed by registered lobbyists and stems from statutory authority. The Charter can also apply in the context of an application for the judicial review of a decision made under the Code.

The proposed rules clearly touch on Charter protected values and interests as they serve to meaningfully restrict the ***full range*** of expressive activities and political participation in which a lobbyist can freely engage. That is no trivial matter.

Lobbyists have heard that it is the Commissioner's intent to ensure that not all political or expressive activities will give rise to the limitations found in the proposed code. Neither the current Code nor the proposed Code contains an outright prohibition on political or expressive activities. As noted in a previous interpretation document:

> *"(p)olitical activities and registrable lobbying activities are both legal and legitimate. The issue of conflict of interest, and the application of Rule 8 of the Lobbyists' Code of Conduct,* ***may*** *arise when the two intersect. A conflict of interest* ***may*** *arise when a person engages in political activities that advance the private interest of a public office holder, while at the same time, or subsequently, seeking to lobby that public office holder, or, in the case of a Minister or Minister of State, the department or agency for which they are responsible."*

Lobbyists – in public forums – have stated that as a result of the new provisions of the Code of Conduct, they **may not** participate to the fullest extent possible in a future federal election. As a condition precedent, I understand that registrants are not prohibited from engaging in even these more politically intensive activities – they are only prohibited from subsequently lobbying that same office holder with whom a 'sense of obligation' has been developed. Ultimately, as the protected activity in question is not directly in peril, lobbyists **may** be forced to choose between qualifying their participation in our democracy and their careers.

The issue for many registrants is that today, and with the advent of a new Code of Conduct, it remains unclear what constitutionally protected activities remain permissible, and which ones would give rise to an investigation. The constitutionality of limitations protected interests of lobbyists are curtailed will depend on the scope that the limitations are given by the Commissioner (and any subsequent reviewing court). To date, the commissioner has not provided additional clarity with the new code or the background document.

For example, the Commissioner has stated that political activities captured by the rule "would likely not include voting in an election, placing a sign on a lawn, purchasing a ticket to a fundraising event such as a barbeque or golf tournament, or donating money to an election campaign within the limits established in the *Canada Elections Act*." This is not an exhaustive list. Even this assistance is not definitive as it includes the words ***"likely not."*** It is also important to note that Charter rights are intertwined, and that a 'political activity' can **also** be constitutionally protected speech, or the constitutionally protected right of assembly. Placing limits to the constitutionally protected rights of registrants under the *Lobbying Act* was not intended by Parliament in creating the provisions pertaining to the Code of Conduct.

That said, the Charter may be relevant both as an aid to interpreting provisions in the Code, and by ensuring that restrictions on conduct are applied to the facts of each case in a manner that respects Charter values.

**Section 2 – Expression and Association**

The freedom of expression guarantee under section 2(b) will be engaged where a legal rule or state action, in purpose or effect, limits or restricts activity which conveys or attempts to convey

meaning. Section 2(d), which guarantees the freedom of association, can be engaged in a number of ways. It protects the freedom to establish, belong to and maintain an association, the freedom to do with others what one is legally permitted to do alone, the freedom to not have certain important associational activities "substantially interfered" with by state action or inaction.

On its face, the proposed Code of Conduct violates the freedom of expression as it may limit who a registered lobbyist can speak to – either in advance of an election as a campaigner, or in the professional context on behalf of clients. Similarly, on its face, the proposed Code may limit the people with whom a lobbyist can associate with during a political enterprise. While the limitation of those rights flows from the subsequent lobbying activity for remuneration, it is nevertheless a limitation of the right.

Parliament has placed a requirement on registration to those who, for remuneration, engage in activities to influence public policy. Courts have repeatedly found that expressive activities undertaken in the course of employment are protected. Courts have not required individuals to choose between their jobs and their expression. This is the case even if their expression was perfectly unbounded outside of the employment activities in question and even if the restrictions on expression in the course of employment are relatively minimal. The fact that a lobbyist could avoid the limitations on expression by undertaking other professional or remunerative activities, or undertaking the same expressive activities in a different context, is unlikely to dissuade the courts from finding a *Charter* violation.

Irrespective of compensation, a prohibition on directly petitioning or lobbying a public officer who is a friend, relative or business associate of the lobbyist limits the freedom of expression and association found in Sections 2(b) and 2(d) of the charter. The reasonableness of that infringement will depend on, amongst other things, the objective that is being pursued by the offending rule.

**Recommendation Two: There should be no limitations, constructive or otherwise, on the freedom of expression and association in the Lobbyists Code of Conduct.**

**Section 3 and Political Activities**

The Supreme Court of Canada in the *Figueroa* decision noted that Section 3 is about more than just voting and standing for election. The court held that section 3 was about being able to 'meaningfully participate' in the democratic process.. Given that lobbyists have publicly stated that they may not (or will not) engage in political activity as a direct result of the current Code of Conduct and the proposed Code, a court could determine that any restriction on the political activities as constitutionally vulnerable under Section 3.

Even where those restrictions are only triggered upon subsequent economic activity, or constructively by engaging in two activities, the Charter saves from harm both of the activities taken together in the eyes of the elector. How each individual believes they can 'meaningfully participate' in the democratic process will vary widely, as the franchise is an intensely personal activity. It is incumbent on electors – regardless of their profession – to determine how they plan to 'meaningfully participate' in the democratic process. Those activities are constitutionally protected **even if** they create a sense of obligation in the public office holder who is subsequently lobbied.

The proposed Code of Conduct will further stifle the democratic participation of Canadians who may elect to not participate for fear of a professional reprisal. Suggesting that participating in a healthy democracy (in a non-pecuniary) fashion could create that conflict of interest rejects fundamental tenets of participatory democracy – where democratic institutions are healthy because of the vibrant participation of the citizenry. Interestingly, the new preamble of the draft Code of Conduct encourages lobbyists to respect democratic institutions. I must ask what better way is there to respect those institutions than to shape them.

**Recommendation Three: There should be no limitations, constructive or otherwise, on political activities. In the alternative, the political activities which could give rise to possible preferential treatment must be very narrowly defined and a 'bright line' test for permissible activities must be released as soon as possible.**

## Conclusion

If enacted as written, the Commissioner must take great care in interpreting the proposed Code of Conduct. These restrictions on the scope of lobbying must be interpreted/applied reasonably. If they are applied unreasonably by the Commissioner – that is, in a way that did not properly balance registrants' important expressive, associational and democratic interests in light of the objectives of the Code – such individual decisions may be set aside by a court reviewing them.

While lobbyists recognize that they are still entitled to participate in elections and engage in free speech and assembly, it is my view that the new code is effectively restricting certain expressive and democratic activities of a lobbyist by forcing them to choose between their rights and their continued employment. The restriction comes **after** the protected activity, and is forcing them to choose one activity over another. It is my view that this is inconsistent with, if not the letter, then the spirit of the Charter of Rights and Freedoms. That is in and of itself reason for pause.