

Office of the Commissioner of Lobbying Canada

Public Consultation

Revised Lobbyists' Code of Conduct

Comments of the Canadian Association of Petroleum Producers

December 2014

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Introduction

The following are the comments of the Canadian Association of Petroleum Producers (CAPP) on the proposals for a Revised Lobbyists' Code of Conduct (the 'Code') contained in the Background Paper issued by the Commissioner and dated October 2014. The current Code has been in place since 1997.

CAPP welcomes this opportunity to provide comments and thanks the Commissioner for engaging in this consultation process,

CAPP is an organizational lobbyist under the *Lobbying Act* with many staff registered to lobby. CAPP takes its obligations under the Act seriously and devotes significant effort to ensuring its staff understand their obligations as lobbyists, as well as the obligations of CAPP, and conduct themselves with integrity in their interactions with public office holders and with full respect for the obligations of public office holders to act in the public interest.

CAPP recognizes that the Act, section 10.2, requires the Commissioner to “*develop a Lobbyists' Code of Conduct respecting the activities described in subsections 5(1) and 7(1).*” These activities are the communication with public office holders in respect of the matters listed in each sub-section, essentially, communications in respect of the making or changing of laws, regulations, policies or programs, awarding of grants or other financial benefits, or awarding of contracts and, in the case of consultant lobbyists, arranging a meeting with a public office holder and another person. CAPP's comments are made within this statutory framework.

CAPP also understands that a violation of either a principle or a rule under the Code can give rise to an investigation and a report that is tabled in both Houses of Parliament.

Scope of the Code

The Code is proposed to be revised to align its scope with the Act and the provisions that relate to the client/lobbyist relationships are to be removed.

CAPP supports this change.

Introduction to the Code

The changes to the Introduction are largely of a descriptive nature. The purpose remains substantially unchanged and is as follows:

“The purpose of the Code is to assure the Canadian public that lobbying of public office holders is done ethically and with the highest standards with a view to

enhancing public confidence and trust in the integrity, objectivity and impartiality of government decision-making.”

As such, CAPP has no comments on the text of the Introduction to the Code.

Preamble

The Preamble to the Code is substantially unchanged.

As such, CAPP has no comment on the content of the Preamble

Principles

Integrity and Honesty

Lobbyists should conduct with integrity and honesty all relations with public office holders.

This principle, while revised as to the client/lobbyist relationship, is otherwise unchanged. CAPP supports this principle.

Openness

Lobbyists should be open and frank about their lobbying activities.

This principle, while revised as to confidentiality which is now addressed separately, is otherwise unchanged. CAPP supports this principle.

Professionalism

Lobbyists should observe the highest professional and ethical standards. In particular, lobbyists should conform fully with not only the letter but the spirit of the Lobbyists' Code of Conduct as well as with all the relevant laws, including the Lobbying Act and its regulations.

This principle is unchanged. CAPP supports this principle.

Respect for Democratic Institutions

Lobbyists should respect democratic institutions. They should act in a manner that does not diminish public confidence and trust in government.

This principle is new.

The rationale for the new principle is stated as follows in the Background Paper:

“Lobbying is a legitimate activity. It is potentially an important source of information that can support government in making sound public policy decisions. However, it must be conducted in a transparent manner and in accordance with the highest ethical standards.

In that context, lobbyists should represent the interests of their clients and employers while respecting democratic institutions. As many pointed out during the 2013 consultation, public office holders have a duty to put the public interest first. Although lobbyists do not share this duty, they should not act in a manner that diminishes public confidence in public institutions and government decision-making.”

The rationale for the principle as stated above has merit. However, this rationale relates to the purpose of the Code as a whole and not simply one principle within the Code. The principle as worded repeats the overarching purpose of the Code as stated in the Introduction, namely, the purpose of assuring *“the Canadian public that lobbying of public office holders is done ethically and with the highest standards with a view to enhancing public confidence and trust in the integrity, objectivity and impartiality of government decision-making.”*

In addition, the choice of words to translate this rationale into a principle is troublesome. Despite the fact that communications on matters of law and public policy between public office holders and those affected by the authority exercised by public office holders are both legitimate and essential in a democracy, the choice of the term “lobbying” to characterize this legitimate activity has an unfortunate consequence because among its popular meanings is an unsavory connotation. Given this, what would be the measure of an action that diminishes public confidence and trust in government?

It is entirely reasonable that lobbyists act in accordance with the highest ethical standards and to recognize that the public interest comes first. Indeed public office holders are themselves expected to act in accordance with the highest ethical standards and to place the public interest first. The starting point then should be to achieve symmetry between the obligations of the public office holders and those of lobbyists. This means lobbyists must respect the position of public office holders to act in the public interest and to lobby in a manner that respects that obligation.

The “public interest” is of course a term that is difficult to define and can have different meanings depending on the context. Generally speaking, it connotes an interest that is more general than that of any one individual.

The Quebec Code of Conduct for Lobbyists in section 3 frames the matter in these terms *“In representing the special interests of a client, a business or an organization, lobbyists shall take into account the public interest.”* Section 4 speaks to respect for institutions as follows: *“In carrying on their activities, lobbyists shall be respectful of parliamentary, government and municipal institutions and of public office holders. They shall also respect the right to equal access to those institutions.”*

The converse of the public interest is a private interest. The *Conflict of Interest Act* speaks, in section 4, of the duty of public office holders in terms of not improperly furthering “*private interests*” which is a defined term in that Act. Public interest is not used in that Act. The Act makes clear, in its definition, that an interest is not a private interest if the matter is of general application or affects the public office holder as one of a broad class of people. For the latter, in the present context, we might say ‘affects the lobbyist as one of a broad class of people.

While the codes of conduct for members of Parliament and Senators speak in terms of acting in the public interest and carrying out their public duties in a manner that enhances public confidence, most of the public office holders that federally registered lobbyists communicate with are subject to the *Conflict of Interest Act*. It would be incongruous if lobbyists were held to a higher standard than those legislated by Parliament for Ministers of the Crown and other public office holders.

We would suggest a rewording of the principle along the following lines:

Lobbyists should respect democratic institutions. In carrying on their activities, they should respect the duty of public office holders to serve the public interest.

With this wording the lobbyist is seen to be supporting the public expectation that government institutions function in the public interest which also ties into the purpose of the Code. The objective of the Code to enhance public confidence is then achieved by the lobbyist complying with the full set of principles and rules – honesty, integrity, professionalism, openness, respect for public duties, etc..

Rules

Rule 1

Transparency

Identity and purpose

1. A lobbyist shall, when communicating with a public office holder, disclose the identity of the person, organization or corporation on whose behalf the communication is made and the nature of the relationship with that person, organization or corporation, as well as the reasons for the approach.

This rule is substantially the same as the current rule.

CAPP supports this rule.

Rule 2

Accurate information

2. A lobbyist shall provide information that is accurate and factual to public office holders in order to avoid misleading public office holders.

The current rule recognizes that, even though the provision of information may be viewed as misleading, there is no violation of the rule if the person providing the information honestly believes the information to be accurate. The new rule, however, is absolute and, while the interpretation and application of the rule by the Commissioner may be expected to involve some standard of reasonableness that recognizes honest mistakes or honest differences of opinion as to what information is or is not misleading, it would be better to recognize this explicitly in the rule. To do otherwise risks embroiling the Commissioner in unwarranted disputes about whether or not lobbyists are providing misleading information. In that regard, there are situations where what constitutes misleading information is shaped by a person's belief as to the end state that public policy should achieve and two people with sharply different views will see the information that is relevant, and hence misleading or not, very differently.

CAPP suggests rewording this rule as follows:

A lobbyist shall provide information that, in the honest belief of the lobbyist, is accurate and factual to public office holders in order to avoid knowingly misleading public office holders.

Recognizing honest mistakes or honest differences of opinion in this manner is entirely consistent with the ethical conduct.

Rule 3

Disclosure of obligations

3. A consultant lobbyist shall inform each client of their obligations as a lobbyist under the Lobbying Act and the Lobbyists' Code of Conduct.

CAPP supports this rule which is reworded from the current rule to focus more clearly on the consultant lobbyist.

Rule 4

4. The responsible officer (the most senior paid employee) of an organization or corporation shall inform employees who lobby on the organization's or corporation's behalf of the responsible officer's obligations under the Lobbying Act and the obligations of the employees under the Lobbyists' Code of Conduct.

In large organizations the actual hands on task of informing staff is delegated to others who are accountable to the most senior officer. The rule would be better if it said "*shall ensure*" employees are informed.

Also, in instilling a culture of compliance within an organization, it is essential to make the employees feel personally accountable for the organization's responsibilities when

undertaking lobbying. While the reference to the senior officer's responsibilities in the proposed rule is legally accurate, it would be desirable to find wording that included an organizational focus.

CAPP would propose rewording the rule as follows:

The responsible officer (the most senior paid employee) of an organization or corporation shall ensure employees who lobby on the organization's or corporation's behalf are informed of the obligation of lobbyists to be registered in accordance with the Lobbyist Act and, in particular, the responsible officer's obligations under the Lobbying Act and the obligations of the employees under the Lobbyists' Code of Conduct.

Rule 5

Confidential information

5. A lobbyist shall neither use nor disclose confidential information received from a public office holder, without the consent of the originating authority.

Conflict of Interest

CAPP understands this rule arises from a situation where confidential information came into the hands of a lobbyist through inadvertence or some other misadventure. However, the rule as written has unintended consequences.

Lobbyists are open and frank in their discussions, as is reflected in the principle of openness. Likewise, the public office holder may be open and candid within the limits of their ability to do so. In that context of open and frank discussion and exchange of views, stakeholders (who by definition will include lobbyists) may be provided with information that is intended for limited distribution and to that extent confidential. Also there can be situations where the public office holder may advise stakeholders who have been involved in a consultative process of the timing of a public announcement with a view to enabling those stakeholders to be prepared. In both situations the lobbyist knows exactly what the information can be used for and also what the limitations are on distribution of the information. The rule as written does not cover such situations.

CAPP would suggest rewording the rule as follows to cover these situations as well as the situation of misadventure which we understand gave rise to the rule:

:

A lobbyist shall use or disclose confidential information received from a public office holder only in the manner contemplated by the public office holder. Where the public office holder does not have the originating authority in respect of the confidential information, the lobbyist shall confirm with the public office holder that the originating authority consents to the use and disclosure of the information by the lobbyist and, in the absence of such confirmation by the public office holder, the lobbyist shall, upon being informed of this fact, not use or disclose the information. In the event the originating authority has not in fact given such consent, the lobbyist shall cease to disclose or use the

information and shall return the information if it in a form capable of being returned as well as any copies made of the information.

Rule 6

Conflict of Interest

6. A lobbyist shall not place public office holders in a real or apparent conflict of interest by proposing or undertaking any action that would constitute an improper influence on a public office holder.

This rule is the same as the existing rule with the addition of the requirement to avoid an apparent conflict of interest.

CAPP does not consider this addition to be necessary; however, CAPP does not object to the addition of a requirement to avoid apparent conflict of interest.

Rules 7 and 8

In particular:

Preferential access

7. A consultant lobbyist shall not arrange for another person a meeting with a public office holder who is a relative or friend of the lobbyist or has financial or business dealings with the lobbyist.

8. A lobbyist shall not lobby a public office holder who is a relative or friend of the lobbyist or has financial or business dealings with the lobbyist. A lobbyist shall also not lobby other public office holders who work within that public office holder's area of responsibility.

In CAPP's judgment these rules go beyond what is required to achieve the purpose of the Code and in fact violate the exercise of political freedoms under the *Charter of Rights and Freedoms*.

The codes of conduct applicable to public officials do not go so far as to preclude people with whom the public office holder has some familial or social relationship from communicating with the public office holder on matters of making or changing laws, regulations, policy or programs, etc. What is required of the public office holder is that any decision they make be free of influence of a private interest and be based on the public interest. As noted above, the *Conflict of Interest Act* is very clear that an interest is not a private interest if the matter is of general application or affects the public office holder as one of a broad class of people. As such, it is not the people with whom the public office holder may communicate that is relevant is the nature of the influence that is brought to bear.

Likewise the concept of a “friend” is very uncertain in this context and, while the *Conflict of Interest Act* uses this term (which has been interpreted by the Conflict of Interest and Ethics Commissioner in the *Watson* case to be of a nature sufficiently close to create a sense of obligation on the part of the public office holder), the description of the obligation to avoid conflicts of interest in that Act is, as discussed above, quite different from the proposed rule.

The prohibition on contacting any public office holder within the an area of responsibility, apart from being vague and uncertain, appears to involve an implicit assumption that the sense of person obligation the public office holder feels toward the lobbyist is such that all those within the sphere of influence of that public office holder would be made to act inappropriately and in violation of their own individual obligations as public office holder. This is truly extreme.

CAPP notes that the concern addressed by these rules relates to preferential access. Yet the rule as written is over-broad as regards that concern. The rule leads to *no* access even if others would be given access.

CAPP considers that the general rule stated in Rule 6 is sufficient.

However, if despite this submission, the Commissioner does seek to become more particular in regard to the aspect of preferential access, then CAPP would suggest the following:

A consultant lobbyist shall not arrange for another person a meeting with a public office holder who is a relative or close friend of the lobbyist or has financial or business dealings with the lobbyist if the public office holder would not, in the absence of this relationship, meet with that person.

A lobbyist shall not lobby a public office holder who is a relative or close friend of the lobbyist or has financial or business dealings with the lobbyist if the public office holder would not, in the absence of this relationship, entertain the lobbying by the lobbyist. A lobbyist shall also not, when lobbying other public office holders who work within that public office holder’s area of responsibility, indicate or imply that, because of the relationship of the lobbyist with the public office holder, the public office holder or those other public office holders are under an obligation which might bring into question the public office holder’s primary duty to uphold the public interest.

Rule 9

Political activities

9. A lobbyist shall not lobby a public office holder if political activities undertaken by the lobbyist prior to or at the same time as the lobbying activities create a sense of obligation which might bring into question the public office holder’s primary duty to uphold the public interest. A lobbyist shall also not lobby

other public office holders who work within that public office holder's area of responsibility.

The first sentence of the rule is sound. However, for similar reasons to those above, the second sentence should be deleted or, failing that, reworded as follows:

A lobbyist shall also not, when lobbying other public office holders who work within that public office holder's area of responsibility, indicate or imply that, because of the political activities of the lobbyist, the public office holder or those other public office holders are under an obligation which might bring into question the public office holder's primary duty or their primary duty to uphold the public interest.

Rule 10

Gifts

10. A lobbyist shall not provide or promise a gift, hospitality or other benefit that a public office holder is not allowed to accept.

While organizations such as CAPP will endeavor to do the work necessary to determine what a public office holder may accept, the question of what is or is not acceptable is somewhat opaque. This rule might benefit from a guidance note as to the kinds of things public office holders may accept or alternatively include some of the wording from the *Conflict of Interest Act*. That Act, in paragraph 11(2)(c) states that public office holders may accept a “*gift or other advantage ... that is received as a normal expression of courtesy or protocol, or is within the customary standards that normally accompany the public office holder's position*”. This language still calls on the lobbyist to be aware of what is normal and acceptable.

In conclusion, CAPP thanks the Commissioner for the opportunity to provide comments.