HILL+KNOWLTON
STRATEGIES

December 19, 2014

Karen E. Shepherd
Commissioner of Lobbying
255 Albert Street, 10th Floor
Ottawa, Ontario
K1A 0R5

Dear Commissioner,

Re: Consultations on the Revised *Lobbyists' Code of Conduct*

On behalf of Hill+Knowlton Strategies (Canada), please accept this letter as our formal submission in response to your consultations with respect to the proposed revisions to the *Lobbyists' Code of Conduct* ("the Code").

As Canada's largest public affairs consultancy, Hill+Knowlton employs a significant number of consultant lobbyists who are governed by both the *Lobbying Act* ("the Act") and the Code. As such, we believe that we can offer a unique perspective on the proposed revisions and how they could potentially impact those engaged in the profession of lobbying federal public office holders.

Hill+Knowlton agrees the Code should be improved to offer greater clarity to lobbyists, but are concerned that some of the proposed revisions may impede access to government. We are particularly concerned the proposed rules with respect to the receipt and use of confidential information as well as the newly created prohibitions against preferential access could unfairly restrict lawful and legitimate lobbying activities.

The preamble to the Act expressly provides that free and open access to government is an important matter of public interest; that lobbying public office holders is a legitimate activity; and that it is desirable that public officials and the public know who is engaged in lobbying activities. Importantly, the preamble concludes by stating that the system for the registration of lobbyists should not impede free and open access to government.

Moreover, and as set out in your consultation document, the purpose of the Act is "to ensure that federal lobbying activities are conducted in a transparent manner." The purpose of the Code, in turn, is to "outline the behavior expected of lobbyists to ensure they conduct themselves according to the highest ethical standards." Consequently, neither the Act nor Code should restrict legitimate lobbying activities.

The comments set out in this submission are intended to outline and explain the nature of our concerns, and to provide what we hope and believe are constructive suggestions for how the proposed revisions could be reconciled with the purposes of the Act.

PROHIBITION AGAINST LOBBYING 'FRIENDS'

The revised Code, as proposed, introduces two new rules which purport to address conflicts of interest which may arise from certain types of relationships between lobbyists and public office holders. More specifically, Rule 7 and Rule 8 both provide that a lobbyist shall be prohibited from lobbying a public office holder who is a "relative or friend of the lobbyist or has financial or business dealings with the lobbyist."

While Hill+Knowlton agrees that lobbyists should not be permitted to lobby a public office holder to whom they are related or with whom they have financial or business dealings, we would have concerns if the Code prohibited lobbyists from communicating with public office holders solely on the basis of friendship. We view the term 'friend' as vague and ambiguous, with the potential to create confusion and uncertainty.

Determining whether a lobbyist is related to, or has financial dealings with, a public office holder can be done objectively based on the facts of a given case. Friendship, by definition, is an entirely subjective determination. While there may be certain indicia of friendship, there are no formal criteria for friendship. As such, any prohibition on the lobbying of friends would be extremely difficult to interpret, apply and enforce.

Absent a clear definition of the term 'friend', an individual lobbyist may not be able to determine whether the relationship they have with a public office holder is covered by the prohibition. The inherent challenge, of course, is that it may be practically impossible to establish a definition of the term which is, at once, sufficiently clear yet sufficiently broad to encompass all the various types of friendships which could exist between two people.

If faced with an allegation that they may have contravened Rule 7 or Rule 8, as proposed, an individual consultant lobbyist would be placed in the almost impossible position of trying to disprove that they are friends with a specified public office holder. In that scenario, it is difficult to conceive how a lobbyist would be able to prove that an official was merely a casual acquaintance as opposed to a casual friend.

In addition, it is not clear how the rules would be interpreted with respect to in-house lobbyists. Would a company or organization be prohibited from lobbying public office holder if one of their employees was friends with them? Would it matter if the friend was not required to be listed in the in-house lobbyist registration? Would the prohibition only extend to friends of the chief reporting officer in whose name the registration is filed?

Where the Code is intended to provide a set of ethical standards which are subject to formal sanctions, the rules should be drafted in such a way as to allow an individual to demonstrate they are in compliance based on an objective determination. Rules which establish a subjective standard, one open to multiple equally reasonable interpretations, should be avoided at the risk of unfairly impeding free and open access to government.

'AREA OF RESPONSIBILITY'

In addition to the prohibition against lobbying public office holders who are friends, relatives or with whom one has financial or business dealings, the proposed Rule 8 further provides that a lobbyist "shall also not lobby other public office holders who work within that public office holder's area of responsibility." A similar prohibition exists in Rule 9 with respect to political activities.

Where the term "area of responsibility" is not defined in either the Act or Code, or indeed any other relevant or related federal statute, our concern is it is too vague and ambiguous to be effectively interpreted, applied or enforced. It is not entirely clear whether the proposed language is intended to merely encompass any subordinates with a direct reporting relationship or, indeed, anyone who works in the same department or agency.

In the explanatory notes accompanying Rule 9, it is suggested that if the public office holder in question is the Minister then the term "area of responsibility" may extend to their department as a whole. It is not clear whether this explanation would also be applied to the language found in Rule 8. In either case, the language in the explanatory note implies that the 'area of responsibility' may depend on the seniority of the official.

If the scope of the term "area of responsibility", and the prohibition it creates, varies depending on the position of the public office holder, further language is required to clarify how it would be interpreted, applied and enforced. Would the term extend to the entire department if the public office holder was the Deputy Minister? Would it include the Minister and their staff if the public office holder in question was a Director General?

For our part, Hill+Knowlton respectfully submits that if the term 'area of responsibility' is intended to encompass entire departments or agencies, or even significant parts thereof, it would almost inevitably impede free and open access to government. This would be especially true if the term is combined with a prohibition against lobbying anyone who works with or for a public office holder who is a friend.

If Rule 8 prohibits a consultant or in-house lobbyist from lobbying both a "friend" and/or anyone who works within their "area of responsibility", it would establish a two-pronged subjective test. The lobbyist would first be required to determine whether a given public official is a 'friend'. If so, the lobbyist would then be required to determine all the other officials who fall within their "area of responsibility."

Where lobbyists are personally responsible for ensuring they are in compliance with both the Act and Code, and where your office has not been given sufficient resources or the requisite authority to provide binding advance rulings, the risk to the public interest is that lobbyists will avoid communicating with entire divisions or departments of government due to the uncertainty and ambiguity that the Rules could create.

CONFIDENTIAL INFORMATION

As proposed, the revised Rule 5 states: "A lobbyist shall neither use nor disclose confidential information received from a public office holder, without the consent of the originating authority." The accompanying explanatory notes, in turn, state: "If lobbyists come in contact with such confidential information, they must neither use nor disclose this information without the appropriate authority to do so."

Our concerns arise from the absence of a clear definition of the terms "confidential", "consent" and "originating authority." If the prohibition is intended to address a situation where a lobbyist improperly, accidentally or inadvertently receives information from a public office holder that should not have been disclosed, then the prohibition may well be unobjectionable. Unfortunately, the proposed wording of the Rule is not that clear.

For example, it is not clear whether the "originating authority" is the public office holder who provided the information or, instead, another person who generated it. If the former, then the action of providing the confidential information – whether verbally or in writing – should presumably constitute consent for its further use and disclosure. If the latter, it's not clear how a lobbyist could reasonably secure the requisite consent.

More importantly, the Rule imposes an undue burden on lobbyists to determine whether information received from a public office holder is confidential. While it may be obvious in certain cases, including if the information is contained in a written document which is marked, stamped or otherwise labeled as 'confidential', it does not necessarily follow that any information not in the public domain is automatically or necessarily confidential.

In our view, the intended purpose of the Rule could be satisfied if it stated: "A lobbyist shall neither use nor disclose information which they have been advised is confidential without the consent of the public office holder from whom it is received." This language would place the burden on the public office holder to identify confidential information, while still guarding against unauthorized, inadvertent or accidental disclosures.

In order to ensure that access to government remains truly free and open, it must encompass more than merely the communication of information from a lobbyist to a public official but as well the communication of information from a public office holder to a lobbyist. Lobbying is the reciprocal exchange of information which the Act seeks to promote, and which the Code should protect.

There are many circumstances in which it is in the public interest that confidential information should be shared with a lobbyist. These may include scenarios where the government wants to consult with banks before unveiling new financial regulations, or industry associations within the context of international trade negotiations. The use of confidential information received from a public office holder is not unethical.

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In closing, please allow me to again express our genuine appreciation for this opportunity to provide our views on the proposed revisions to the Code. We share your commitment to ensuring that lobbyists are held, and hold themselves, to the highest possible ethical standards. We look forward to reviewing the summary of the input you receive as a result of this consultation and how they might impact any ultimate revisions.

Yours very truly,
HILL+KNOWLTON STRATEGIES

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