THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Revised *Lobbyists' Code of Conduct*

NATIONAL ADMINISTRATIVE LAW SECTION
CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Administrative Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Administrative Law Section of the Canadian Bar Association.

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I. INTRODUCTION

The National Administrative Law Section of the Canadian Bar Association (CBA Section) is pleased to have the opportunity to provide comment on the revised *Lobbyists' Code of Conduct* (the Code) proposed by the Commissioner of Lobbying of Canada. This submission was prepared by the CBA Section's Law of Lobbying and Ethics Committee, whose members have particular expertise providing advice under the *Lobbying Act* (the Act).

The CBA Section believes the amendments released for consultation in October 2014 more effectively match the rules to the Act and offer greater certainty about the ethical obligations and conduct expected of registered lobbyists. A number of the proposed revisions reflect the comments offered by the CBA Section in its January 2014 submission.

This submission addresses some of the concerns raised by stakeholders in the course of this most recent consultation and makes additional suggestions to clarify the revised Code. We have limited our comments to those aspects most significant to those governed by the Act and legal counsel who advise them.

II. LEGAL CONTEXT AND BACKGROUND

In 1993, the Government introduced Bill C-43, *An Act to amend the Lobbyists Registration Act and to make related amendments to other Acts*. The Act created the position of Ethics Counsellor, who was responsible for developing a code of ethics for lobbyists. According to the Minister who introduced the legislation, the code "would define behaviour standards in the industry."[1] He anticipated that the Code would address "improper influences," "appropriate conduct" and "what kinds of contacts [between lobbyists and officials are appropriate,"[2] and

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1 Hon. John Manley, in House of Commons, 35th Parliament, 1st Session, *Debates*, No. 88 (June 17, 1994), at 5503.

2 Hon. John Manley in Minutes of Proceedings and Evidence of the Sub-Committee on Bill C-43, An Act to amend the Lobbyist Registration Act and to make related amendments to other Acts of the Standing Committee on Industry (September 27, 1994), at 2:14.

described the type of perceived improper influence that might be exerted based on a lobbyist's connection to government officials:

> Concern arises when there can be a perception that improper influences are exercised on government because of the identity of the representative agent, perhaps because they have had a political affiliation with the government in power …[3]

The Minister also noted the relationship between the Ethics Counsellor's responsibility under Bill C-43 to create and enforce the Code and their responsibility for public office holders' ethics:

> The Prime Minister also announced that he wanted someone he could consult on conflicts of interest and ethics. The ethics counsellor deals with ethics issues within the government. Bill C-43 proposes that the ethics counsellor be entrusted with more responsibilities. He would be responsible, among other things, for developing a lobbyists' code of conduct and would be given considerable powers to investigate alleged breaches. In other words, this code would provide for outside supervision of lobbyists' activities.[4]

The parliamentary committee considering Bill C-43 agreed that the Ethics Counsellor's dual responsibilities for the lobbyists' Code and for conflicts of interest among public officials would be compatible and complementary:

> We do not see how combining responsibilities relating to lobbyists' ethics and responsibilities relating to conflicts of interest on the part of office holders would create, in itself, a conflict of interest. In fact, these two responsibilities fit well together. The Ethics Counsellor will help to keep order inside the government in the areas covered by the Conflict of Interest Code, and he would also deal with lobbying from outside in, under the powers proposed in C-43….
>
> More broadly, the trustworthiness of government can only be enhanced by addressing both the conduct of public office holders and the conduct of lobbyists. It is necessary to take a holistic view of the decision-making process, which involves various stakeholders including public office holders, the public and lobbyists. It makes sense to combine responsibilities for both areas in the hands of a single official, who would thus be in a position to tackle issues systematically and channel resources and effort to the areas where they will achieve the greatest benefits.[5]

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3 *Ibid*.

4 Hon. John Manley, in House of Commons, 35th Parliament, 1st Session, *Debates*, No. 190 (April 28, 1995), at 11923.

5 House of Commons, Standing Committee on Industry, Sub-Committee on Bill C-43, *Building Trust* (March 1995), at 46 [emphasis added].

Parliament identified the need for a code following several years of experience with registration of federal lobbyists under the initial Act.[6] As Professor Paul Pross explains:

> With the identification of a field of regulation, it became possible to determine the population of the lobbying community and to obtain some understanding of how lobbyists interacted with government. As a result, the second iteration recognized the need for a code of conduct and for providing officials with some authority, albeit limited, to monitor compliance with the Act and, through the Ethics Counsellor, to carry out investigations into lobbying behaviour.[7]

After Bill C-43 became law, the Ethics Counsellor developed a Code of Conduct with a rule (now Rule 8) addressing relations between individual lobbyists and individual public office holders. To the parliamentary committee reviewing the draft Code, the Ethics Counsellor explained the symmetry inherent in Rule 8: "This rule clarifies that lobbyists cannot place public office holders in a conflict of interest. This obligation affects public office holders and ministers as well as lobbyists."[8]

The Ethics Counsellor stressed the fact that both parties to the relationship between lobbyists and public office holders were subject to respective codes:

> Secondly, we noted in the preamble that public office holders and ministers must comply with their own codes. Therefore, the lobbyists do have a relationship with public office holders. There are two sides involved, the public office holders and the ministers, and the lobbyists. Two codes apply in an effort to ensure that ethics standards are upheld.[9]

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6 Subsection 10.2 of the Act mandates that the Commissioner establish a code of conduct. This provision was first enacted by S.C. 1995, c. 12, s. 5, and has since been amended four times. Two amendments (2004, c. 7, s. 22 and S.C. 2006, c. 9, s. 81) related to the transfer of responsibility under the Act from the Ethics Counsellor to the registrar, and subsequently to the Commissioner. The other amendments (S.C. 2003, c. 10, s. 8, and S.C. 2004, c. 7, s. 39) were technical changes to reflect the collapsing of two types of in-house lobbyists into a single category of in-house lobbyist.

7 A. Paul Pross, "The Lobbyists Registration Act: Its Application and Effectiveness," in Donald Savoie (ed.) Commission of Inquiry to the Sponsorship Program and Advertising Activities, Restoring Accountability, Research Studies, Volume 2, (Ottawa: Public Works and Government Services, 2006), 163 at 184.

8 Howard Wilson, in House of Commons, 35th Parliament, 2nd Session, Standing Committee on Procedure and House Affairs, *Evidence of the Committee*, Meeting 33 (November 19, 1996).

9 *Ibid*.

When asked as to whether there was any conflict between the two codes, he responded:

> No. The code of conduct for public office holders is a code that applies to ministers, secretaries of state, parliamentary secretaries, the political staff in ministers' offices, and essentially all Governor in Council appointees. That would include deputy ministers and the heads and members of various agencies and tribunals and the heads of crown corporations. But in fact it only deals with the obligations of public office holders in that sense.
>
> This code is going to apply then to lobbyists, those who are in fact lobbying. In the second to last paragraph of our preamble, we have language that was intended to put the two in the same context. It says:
>
> > To this end, public office holders, when they deal with the public and with lobbyists, are required to honour the standards set out for them in their own codes of conduct.
>
> That one is an important one.[10]

The public officials' conflict code to which the lobbyists' Code corresponded was the *Conflict of Interest and Post-Employment Code for Public Office Holders* issued on June 16, 1994, the same day as Bill C-43 was introduced. It did not apply to everyone defined as a public office holder under the *Lobbying Act*, but only to Ministers, parliamentary secretaries, ministerial staff members, Governor in Council appointees, and certain other officials.[11] Subsequent Prime

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10 House of Commons, 35th Parliament, 2nd Session, Standing Committee on Procedure and House Affairs, *Evidence of the Committee*, Meeting 33 (November 19, 1996) [emphasis added].

11 "Public office holder" was defined as:

(a) a Minister of the Crown, including a Secretary of State;

(b) a parliamentary secretary;

(c) a member of ministerial staff, except public servants;

(d) a full-time Governor in Council appointee, other than:

(i) a Lieutenant-Governor of a province,

(ii) officers and staff of the Senate, House of Commons and Library of Parliament,

(iii) a public servant who is a head of mission as defined in the Department of Foreign Affairs and International Trade Act [amended September 25, 1998],

(iv) a judge who receives a salary under the Judges Act, and

(v) a commissioned officer of the Royal Canadian Mounted Police, other than the Commissioner of the Royal Canadian Mounted Police,

or

(e) a full-time ministerial appointee designated by the appropriate Minister of the Crown as a public office holder. [Canada, Office of the Ethics Counsellor, *Conflict of Interest and Post-Employment Code for Public Office Holders* (June 1994), subsection 4(1)]

Ministers issued substantially similar versions of the conflict code. The conflict code was replaced with the *Conflict of Interest Act*,[12] effective July 9, 2007.

The Ethics Counsellor maintained responsibility for administering both the lobbyists' Code and the conflict code for public office holders until 2004, when Bill C-4 replaced the position of Ethics Counsellor with the office of Ethics Commissioner under the *Parliament of Canada Act*.[13] The Ethics Commissioner (later replaced by the Conflict of Interest and Ethics Commissioner) became responsible for the conflict code for public office holders,[14] and responsibility to make and to enforce the lobbyists' Code was assigned to the lobbyist registrar[15] (later to the Commissioner of Lobbying).[16]

There is no legislative history indicating whether, at the time these responsibilities were divided, Parliament intended to deviate from its original intent that the lobbyists' Code and the conflict of interest rules for public officials harmoniously co-exist as part of a holistic approach to upholding integrity in government decision making.

This legislative history forms part of the context in which the current Rule 8 must be situated. Another part of this context is the number of other jurisdictions that also prohibit a lobbyist from placing a government official in a conflict of interest, contrary to the rules applying to that official. For example, the *Lobbyists Registration Act* (Ontario) makes it an offence for a lobbyist knowingly to place a public office holder in a position of conflict of interest, defined as an activity prohibited by section 2, 3 or 4 or subsection 6 (1) of the *Members' Integrity Act, 1994*, or that would be so prohibited if the public office holder were a member of the Legislative Assembly.[17] The *Code of Conduct for Lobbyists* (Quebec) provides that, "Lobbyists shall not induce a public office holder to contravene the standards of conduct applicable to him or her."[18] Similar prohibitions exist in New Brunswick,[19] Newfoundland and Labrador,[20] Nova Scotia,[21] Toronto[22] and Ottawa.[23]

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12 S.C. 2006, c. 9, s. 2.

13 *Parliament of Canada Act*, s. 72.01 [since repealed], enacted by S.C. 2004, c. 7, s. 4.

14 *Parliament of Canada Act*, ss. 72.07-72.08 [since repealed], enacted by S.C. 2004, c. 7, s. 4.

15 2004, c. 7, s. 22.

16 S.C. 2006, c. 9, s. 81.

17 S. O. 1998, c. 27, Sched., s. 18 (5), (6), (7).

18 R.R.Q., c. T-11.011, r. 2, s. 9.

19 S.N.B. 2014, c. 11, ss. 37(3) and (4). [passed but not yet proclaimed in effect]

The current Rule 8 was interpreted by the Federal Court of Appeal in *Democracy Watch v. Campbell*.[24] There, Justice Pelletier explained that Rule 8 operates broadly to prohibit a lobbyist from placing a public office holder in any conflict of interest, because "[a]ny conflict of interest impairs public confidence in government decision-making."[25] The Court cited several authorities for the proposition that a conflict of interest is one where a public office holder may prefer private interests to the public interest. It expressly approved the ruling in one case that, "Conflict of interest does not require proof of actual influence by the personal interest upon the professional duty any more than it requires proof of actual receipt of a benefit."[26]

Justice Pelletier then explained specifically what it means for a lobbyist to place a public official in a conflict of interest, thereby contravening Rule 8:

> Improper influence has to be assessed in the context of conflict of interest, where the issue is divided loyalties. Since a public office holder has, by definition, a public duty, one can only place a public office holder in a conflict of interest by creating a competing private interest. That private interest, which claims or could claim the public office holder's loyalty, is the improper influence to which the Rule refers.
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> … A lobbyist's stock in trade is his or her ability to gain access to decision makers, so as to attempt to influence them directly by persuasion and facts. Where the lobbyist's effectiveness depends upon the decision-maker's personal sense of obligation to the lobbyist, or on some other private interest created or facilitated by the lobbyist, the line between legitimate lobbying and illegitimate lobbying has been crossed. The conduct proscribed by Rule 8 is the cultivation of such a sense of personal obligation, or the creation of such private interests.[27]

The Federal Court of Appeal instructed the registrar (now the Commissioner) "to develop his own approach to the interpretation and application of Rule 8, in light of the principles set out in

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20 S.N.L. 2004, c. L-24.1, ss. 31(3) and (4).

21 S.N.S. 2001, c. 34, ss. 18(3) and (4).

22 *Toronto Municipal Code*, Chapter 140 (Lobbying), §140-45.

23 City of Ottawa, By-Law No. 2012-309, Appendix A, subs. 6(2).

24 2009 FCA 79, [2010] 2 F.C.R. 139.

25 *Ibid*., at para. 48.

26 *Ibid*., at para. 50, citing *Cox v. College of Optometrists of Ontario* (1988), 65 O.R. (2d) 461 (Div. Ct.) at 469.

27 *Ibid*., at paras. 52-53 [emphasis added].

these reasons."[28] However, the Commissioner's attempts to apply the *Democracy Watch* principles have been criticized, including by the CBA, for their vagueness and lack of clarity.

The CBA Section supports a rule that prohibits lobbyists from exercising undue influence on officials. As it said in a 2010 constitutional opinion on rule 8, "in a society of unequal resources, the regulation of lobbyists and law-makers is required to proscribe improper influence. Law must not be for sale to the highest bidder."[29] Moreover:

> It is difficult to suggest that seeking to regulate the conduct of lobbyists in their dealing with public office holders is not a pressing and substantial governmental objective. … seeking to ensure that lobbyists do not compromise the integrity of public office holders through a conflict of interest is an important public good and a pressing and substantial objective.[30]

While the CBA Section has never opposed the content of Rule 8, it has, however, strongly objected to interpretive guidance for Rule 8 that is "unclear," "vague," "not sufficiently precise," "not capable of interpretation," and "uncertain," and "does not provide sufficient direction."[31]

The CBA Section's concerns about uncertainty and lack of clarity have been shared by other stakeholders, including the Government Relations Institute of Canada (GRIC) and the Public Affairs Association of Canada (PAAC). To address the problems of uncertainty and lack of clarify, GRIC and PAAC have recommended that:

> [T]he test for determining whether a politician has been placed in a conflict of interest by a lobbyist should be the same as determining whether a lobbyist has placed a politician in conflict of interest. The way to achieve this parity in the system is by synching key definitions and concepts among the enabling statutes that cover conflict of interest and political activities by public servants. DPOHs, and lobbyists.[32]

The CBA Section agrees that the conflict of interest obligations on public office holders and the Code for lobbyists should not be contradictory. We see value in the suggestion that the obligations should be symmetrical and harmonious, but this principle must be balanced against

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28 *Ibid.,* at paras. 54.

29 Canadian Bar Association, Opinion Respecting the Constitutionality of Rule 8 of the Lobbyists' Code of Conduct (June 2010), at 2.

30 *Ibid*., at 10.

31 Ibid., passim.

32 Government Relations Institute of Canada and Public Affairs Association of Canada, *GRIC-PAAC Submission – OCL Lobbyists' Code of Conduct Consultation* (December 20, 2013), at 7, para. 37.

the different roles of each group. Public office holders have, and are expected to have, a better sense of the standards that apply to public office holders than lobbyists, especially occasional lobbyists.

The desire of some stakeholders for more specific rules and increased clarity is legitimate. However, the experience of many regulated fields has been that where rules become more specific, more guidance and interpretation are demanded. Regulatory detail often begets more detail. As a matter of public policy, the Commissioner should consider how much rule making should be done in the *Lobbyists' Code of Conduct*, with accompanying guidelines and interpretation notes, and how much rule making should be undertaken by Parliament by amending the Act.

An example of another jurisdiction favouring the latter type of approach is British Columbia. In 2013, following extensive consultation, the British Columbia Registrar of Lobbyists recommended against creating "a stand alone code of conduct at this time. … [Instead,] BC should embed aspects of other jurisdictions' codes of conduct into the existing LRA [*Lobbyists Registration Act*]."[33] In rewriting the Code, the Commissioner of Lobbying (and the government) could also take some comfort that many registered lobbyists have codes of conduct governing their behaviour[34] that would not allow or permit undue or improper influence being brought to bear on public office holders as a result of their communication with such public officials.

The recommendations below take into account the apparent holistic approach the governments wished to see between the codes governing public office holders and lobbyists, our cautionary comment that the Code not become more rules-based, and our suggestion that if specific, serious conduct issues must be addressed, the Act could be amended as appropriate.

III. OCCASIONAL VERSUS PROFESSIONAL LOBBYISTS

While the Act creates two statutory categories of lobbyists (consultant lobbyists and in-house lobbyists), another distinction is relevant to the Code. Some lobbyists routinely lobby federal

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33 British Columbia, Office of the Registrar of Lobbyists, "Lobbying in British Columbia: The Way Forward: Report on Province-Wide Consultations and Recommendations for Reform" (Jan. 21, 2013), at 3. See also recommendation 3, at 11.

34 For instance, GRIC, with 122 member entities (companies, organizations and consulting firms), has had a voluntary Code of Professional Conduct since 2010. PAAC also has a Statement of Principles that addresses ethical conduct.

public office holders. They can reasonably be described as professional lobbyists. Others, such as the lawyer who engages in one-time registrable activity for a client, or the employee who lobbies infrequently for an employer, are occasional lobbyists. Lawyers are often involved in meetings between their clients and government representatives, in making submissions to government and to government committees and in advocating for legislative change on behalf of their clients.

The principle of harmony between the lobbyists' Code and the conflict rules for public officials has different implications for these two kinds of lobbyists. The professional lobbyist can easily become familiar with the standards applying to government officials. The occasional lobbyist may be less fluent in what constitutes public-sector conflict of interest. Nonetheless, in most Canadian jurisdictions, both professional lobbyists and occasional lobbyists are prohibited from placing officials in a conflict of interest.[35]

Contravention of the Code is not an offence and does not trigger a penalty. Enforcement occurs through reporting to Parliament, and in this process the Commissioner should take into account the individual lobbyist's experience and familiarity with government. The occasional lobbyist who errs through inadvertence differs from a professional lobbyist who is knowledgeable about the workings of federal offices. The most effective way to maintain standards and to uphold the Code will be through outreach and education, with special attention paid to those who lobby occasionally and those located outside the National Capital Region. We urge the Commissioner to address the unique needs of occasional lobbyists and provide support for them to comply.

The greater the complexity of the Code, the more difficult this challenge will be. If the Code takes a principles-based approach, the Commissioner would have more discretion to address more egregious abuses, leaving policy decisions on prohibition of specific activities to Parliament through legislative amendment.

The recommendations that follow are to be read subject to the above considerations.

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35 Federal, New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario, Quebec, Toronto and Ottawa. See notes 17 to 23. As for the recommendation of the British Columbia Registrar, see note 33.

IV. CONFIDENTIAL INFORMATION

In the revised Code, Rule 5 would provide that "[a] lobbyist shall neither use nor disclose confidential information received from a public office holder, without the consent of the originating authority." This may be difficult to interpret, apply and enforce absent further clarification. The terms "confidential information", "consent" and "originating authority" may not be sufficiently clear to ensure compliance.

Revised Rule 5 is intended to address the circumstance where a lobbyist receives confidential government information that should not have been disclosed. Under the existing Code, the only mention of confidential information relates to information from clients – an anomaly which should be corrected.

The challenge, however, is defining confidential information. Public office holders frequently possess information that is not in the public domain or is subject to restrictions on grounds of national security or official secrecy. A lobbyist may not be aware whether information received from a public office holder is 'confidential', unless it is expressly described or labelled as such. Information that would be disclosed to anyone on request, even if it is not in already the public domain, should not be considered confidential. The CBA Section urges the Commissioner to adopt the commonly accepted dictionary definition of confidential, namely, information that is "intended to be kept secret."

RECOMMENDATION:

1. **In Rule 5, the Commissioner should adopt the commonly accepted dictionary definition of confidential, namely, information that is "intended to be kept secret."**

It is not clear in proposed Rule 5 what form of consent would be sufficient to allow a lobbyist to use or disclose confidential information received from a public office holder. For instance, it may not be clear whether the official providing the information is authorized to consent to its use. The mere act of disclosing information to a lobbyist might, however inaccurately, imply consent for the information to be used in some manner.

The CBA Section recommends that Rule 5 be modified to read: "A lobbyist shall neither use nor disclose information which he or she knows to be confidential except with the express consent of the public office holder from whom it is received." This would properly place the onus of determining, establishing and declaring confidentiality on public office holders – the

originators of the information – instead of the recipient lobbyists. For clarity, the public office holder's obligation is to indicate to the lobbyist that the information about to be disclosed is confidential and perhaps ask for a non-disclosure undertaking from the lobbyist. The lobbyist can then decide whether to accept the restriction and receive the information.

This revision would also relieve lobbyists of the burden of determining whether a public office holder has the authority to disclose the information or consent to its further use. A lobbyist would only need to seek express consent when informed that the information is confidential or explicit indicia would let the lobbyist know that it is (*e.g.*, a document explicitly marked 'Confidential'). Finally, our proposal would prevent lobbyists receiving information that the Code forbids them to share with their employers or clients despite requirements to provide it under their duties of loyalty or their fiduciary obligations.

As a general proposition, there are instances where a public office holder may legitimately disclose confidential information to a particular lobbyist (and their employer or client in turn) that would not be provided to other parties. These circumstances include when a government conducts private consultations on new legislation, regulations, or a policy change; or is tendering bids for a contract. The Code should not prohibit stakeholders (including a lobbyist who represents them) from being party to these communications and consultations.

RECOMMENDATIONS:

2. **Rule 5 should be modified to read: "A lobbyist shall neither use nor disclose information which he or she knows to be confidential except with the express consent of the public office holder from whom it is received."**
3. **The Code should not prohibit stakeholders (including a lobbyist who represents them) from being party to communications and consultations involving confidential information that could legitimately be disclosed in the public interest.**

V. PREFERENTIAL ACCESS – DEFINITION OF FRIEND

The *Conflict of Interest Act* provides:

> 4. For the purposes of this Act, a public office holder is in a conflict of interest when he or she exercises an official power, duty or function that provides an opportunity to further his or her private interests or those of his or her relatives or friends or to improperly further another person's private interests.

> 8. No public office holder shall use information that is obtained in his or her position as a public office holder and that is not available to the public to further or seek to further the public office holder's private interests or those of the public office holder's relatives or friends or to improperly further or to seek to improperly further another person's private interests.
>
> 9. No public office holder shall use his or her position as a public office holder to seek to influence a decision of another person so as to further the public office holder's private interests or those of the public office holder's relatives or friends or to improperly further another person's private interests.

Obviously, a lobbyist who lobbies a public office holder who is the lobbyist's friend, relative or who has financial dealings with the lobbyist could place the public office holder in a conflict of interest. The situation is already addressed by current Rule 8, but not clearly or explicitly, and some stakeholders have asked for greater certainty and clarity.

Lobbying a close friend would also contravene the principles outlined by the Federal Court of Appeal in *Democracy Watch*:

> Since a public office holder has, by definition, a public duty, one can only place a public office holder in a conflict of interest by creating a competing private interest … which claims or could claim the public office holder's loyalty …
>
> Where the lobbyist's effectiveness depends upon the decision-maker's personal sense of obligation to the lobbyist … the line between lobbying and illegitimate lobbying has been crossed.[36]

In the proposed Code, Rule 7 would state that "[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." The proposed wording of Rule 7 mirrors the language proposed by the CBA Section in its January 2014 submission. On further reflection, we recommend that the wording be revised to read: "A consultant lobbyist shall not arrange a meeting between a client and a public office holder who is a relative or friend of the lobbyist or has financial or business dealings with the lobbyist." The *Lobbying Act* requires registration only where a meeting is arranged by a consultant lobbyist for payment.

Proposed Rule 8 would state, in part, "[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." The interpretation, application and enforcement of both proposed Rules hinge on the definition of 'friend'. Almost all submissions from lobbyists and companies and organizations that lobby

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36 *Democracy Watch v. Campbell*, note 24, at paras. 52-53.

have raised concerns about the inclusion of the word "friend" in the new Rule. Some state the term "friend" may be interpreted differently by different people. The premise of the argument seems to be that the terminology must enjoy universally-accepted meaning. The fact that not everyone might interpret "friend" the same way is not by itself reason to exclude it from the Code. However, it highlights the practical problem of interpretation of the term. The definition must be clear, the interpretation consistent and made by a single authority, and the meaning and application adequately communicated to everyone affected.

As explained in Part II, the ethical rules governing the conduct of both lobbyists and public office holders should be symmetrical and harmonized up to a point, or at least not be inconsistent. In this spirit, and consistent with a holistic approach to upholding integrity in government decision-making, we have considered whether the Code should expressly state that "relative" and "friend" have the same meanings as under the *Conflict of Interest Act*.

In the *Watson Report*, the Conflict of Interest and Ethics Commissioner interpreted "friend":

> I do not think that this prohibition was intended to relate to individuals other than those who have a close bond of friendship, a feeling of affection or a special kinship with the public office holder concerned. It does not include members of a broad social circle or business associates.
>
> This office has interpreted friend, for the purposes of the Act, to mean a person with whom one has some history of mutual personal regard beyond simple association. While acquaintances can become friends, they do not do so simply because of frequent interactions.[37]

Under the *Conflict of Interest Act*, a public office holder and a lobbyist would not be considered friends merely because they grew up or lived in the same neighbourhood, went to the same school or previously worked together. A "mutual personal regard beyond simple association" is required. Put another way, there must be a mutual acknowledgment or recognition of the friendship beyond shared personal history or a high frequency of personal interaction.

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37 Canada, Conflict of Interest and Ethics Commissioner, *The Watson Report* (June 25, 2009), at 15-16.

Nonetheless, having the Code refer to *Conflict of Interest Act* meaning of "friend" is not a preferable solution. First, the term is undefined in the *Conflict of Interest Act*.[38] Second, the Act provides that the Conflict of Interest and Ethics Commissioner's role is to give *confidential* advice to public office holders, on a case by case basis. She also reports to Parliament on alleged breaches on a case by case basis. It is impractical under this regime to use her interpretations as the basis for interpreting the terms in the Code.

If the concept of "friendship" is included in the Code, the CBA Section recommends that it include a clear and unambiguous definition of "friend," which delineates a close personal relationship between the public office holder and the lobbyist. The definition should provide an objective, bright line for all to understand why the parties (public office holder and lobbyist) should not be engaged with each other in substantive public policy discussions or decisions.

We recognize that a definition will not easy to draft but the CBA Section is willing to work with the Commissioner of Lobbying (and perhaps the Conflict of Interest and Ethics Commissioner) on a common definition that would reduce uncertainty and ambiguity as much as possible for all the stakeholders. While certainty and clarity are essential, it is important that such a definition be based on the Conflict of Interest and Ethics Commissioner's narrow interpretation that distinguishes true friendship from acquaintance, social contact and business association.

RECOMMENDATIONS:

4. **Rule 7 should be revised to read: "A consultant lobbyist shall not arrange a meeting between a client and a public office holder who is a relative or friend of the lobbyist or has financial or business dealings with the lobbyist."**

5. **If the concept of "friendship" is included in the Code, there should be a clear and unambiguous definition of the word "friend," which delineates a close personal relationship between the public office holder and the lobbyist.**

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[38] The *Conflict of Interest Act* defines 'relative' but does so extremely broadly. Subs. 2(3) provides that, "Persons who are related to a public office holder by birth, marriage, common-law partnership, adoption or affinity are the public office holder's relatives for the purposes of this Act unless the Commissioner determines, either generally or in relation to a particular public office holder, that it is not necessary for the purposes of this Act that a person or a class of persons be considered a relative of a public office holder."

6. **The definition should be based on the Conflict of Interest and Ethics Commissioner's narrow interpretation that distinguishes true friendship from acquaintance, social contact and business association.**

VI. PREFERENTIAL ACCESS – AREA OF RESPONSIBILITY

The revised Rule 8 and Rule 9 would prohibit a lobbyist from lobbying not only a public office holder who is a friend, relative, business associate or for whom the lobbyist has undertaken political activities, but also "other public office holders who work within that public office holder's area of responsibility." The term "area of responsibility" should be clarified and its scope clearly delineated.

The prohibition on lobbying others in a public office holder's "area of responsibility" should be limited to only public office holders in a direct reporting relationship with the public office holder who has the relationship with the lobbyist.[39] Further, the restriction should only apply where there is a reasonable prospect that a lobbyist's relationship with one public office holder could improperly influence the actions of another.

While Ministers determine the composition of their office, they do not control the hiring, promotion or termination of the Deputy Minister or departmental officials. A lobbyist prohibited from lobbying a Minister's office on the basis of these rules should not be prohibited from lobbying the entire department. Again, it is important to define "area of responsibility" and to provide an objective test to establish the reasonable prospect of influence by the lobbyist's friend or relation on other public office holders.

The restriction on lobbying would be unnecessary if the Minister or other public office holder has recused themselves from any decision involving or having the potential to benefit the lobbyist in question. A public office holder's recusal under section 21 of the *Conflict of Interest Act*, or declaration of private interest and recusal under sections 12-13 of the *Conflict of Interest Code for Members of the House of Commons,* or sections 12-13 of the *Conflict of Interest Code for Senators*, or making arrangements necessary to prevent a real, apparent or potential conflict of interest under section 4 of Appendix B of the *Policy on Conflict of Interest and Post-Employment*, would eliminate the need for restrictions on lobbying due to a relationship between a public office holder and lobbyist.

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39 For greater clarity, the Minister's office employees should be considered in a direct reporting relationship with the Minister but the Deputy Minister and departmental officials should not.

RECOMMENDATIONS:

7. **The term "area of responsibility" in Rule 8 should be clarified and its scope clearly delineated.**
8. **The prohibition on lobbying others in a public office holder's "area of responsibility" should be limited to only public office holders in a direct reporting relationship with the public office holder who has the relationship with the lobbyist.**
9. **The restriction should only apply where there is a reasonable prospect that a lobbyist's relationship with one public office holder could improperly influence the actions of another.**

VII. ACCEPTABLE GIFTS AND HOSPITALITY

Revised Rule 10 would prohibit lobbyists from providing or promising to provide "a gift, hospitality or other benefit that a public office holder is not allowed to accept." We support this prohibition. However, we suggest revised language: "A lobbyist shall not provide or offer to a public office holder any gift, hospitality or other benefit that the public office holder is not allowed to accept if the lobbyist is registered to lobby the department or governmental institution where the public office holder is employed or serves."

The word "offer" must be interpreted in and a fair and reasonable manner. When a lobbyist offers a gift in good faith, believing the gift to be appropriate, and a public office holder explains that he or she cannot accept, that should be sufficient to end the matter: the system has worked and the public interest is protected. The lobbyist should not be interpreted to have contravened the Code with the offer. The Code or commentary should make this clear.

The Code or commentary should articulate exceptions consistent with existing rules that permit public office holders to accept gifts. While the wording varies in the *Conflict of Interest Act*,[40] the *Conflict of Interest Code for Members of the House of Commons*,[41] the *Conflict of Interest*

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40 "Despite subsection (1), a public office holder or member of his or her family may accept a gift or other advantage (a) that is permitted under the *Canada Elections Act*; (b) that is given by a relative or friend; or (c) 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" (*Conflict of Interest Act*, subs. 11(2)).

41 "(2) Despite subsection (1), a Member or a member of a Member's family may accept gifts or other benefits received as a normal expression of courtesy or protocol, or within the

Code for Senators[42] and the *Policy on Conflict of Interest and Post Employment*,[43] in general, a gift may be accepted if it is received as a normal expression of courtesy or protocol, or is within the customary standards of hospitality that normally accompany the public office holder's position.

Some stakeholders have said that public office holders alone should bear responsibility for avoiding improper gifts. Their position misperceives the mutual and corresponding responsibilities of lobbyists and public officials to uphold the integrity of, and maintain public confidence, in democratic institutions. In the words of the sub-committee on Bill C-43, "the trustworthiness of government can only be enhanced by addressing both the conduct of public office holders and the conduct of lobbyists. It is necessary to take a holistic view of the decision-making process …"[44]

As a general principle, when a transaction is contrary to public policy, both parties should be enjoined from taking part. As GRIC and PAAC have argued, "the test for determining whether a politician has been placed in a conflict of interest by a lobbyist should be the same as determining whether a lobbyist has placed a politician in a conflict of interest."[45]

Others have suggested that restrictions on gifts are already addressed by the bribery provisions of the *Criminal Code*. This argument confuses conflict of interest with corruption – precisely the logical error identified and overruled by the Federal Court of Appeal in *Democracy Watch*.[46] The Rules in the Code should concern avoidance of conflicts of interest arising from relations between lobbyists and public office holders, as corruption and bribery are already addressed in criminal law.

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customary standards of hospitality that normally accompany the Member's position" (*Conflict of Interest Code for Members of the House of Commons*, subs. 14(2)).

42 "A Senator, and a family member, may, however, accept gifts or other benefits received as a normal expression of courtesy or protocol, or within the customary standards of hospitality that normally accompany the Senator's position" (*Conflict of Interest Code for Senators*, subs. 17(2)).

43 "The acceptance of gifts, hospitality and other benefits is permissible if they are infrequent and of minimal value, within the normal standards of courtesy or protocol, arise out of activities or events related to the official duties of the public servant concerned, and do not compromise or appear to compromise the integrity of the public servant concerned or of his or her organization" (Canada, Treasury Board Secretariat, *Policy on Conflict of Interest and Post-Employment*, Appendix B, section 2.3).

44 Sub-Committee on Bill C-43, note 5, at 46.

45 Government Relations Institute of Canada and Public Affairs Association of Canada, note 32.

46 *Democracy Watch*, note 24, at para. 51.

Giving a gift that a public office holder cannot accept due to conflict rules, would already contravene the current Rule 8. Indeed, when in 1996 the Ethics Counsellor was asked, in committee, what sort of activity might be captured by Rule 8, he used hospitality as the example.[47] With the CBA, GRIC, PAAC and other stakeholders calling for greater clarity, it would be appropriate to provide some specific language about gifts and hospitality.

Consistent with the legislative history of section 10.2 of the Act, and submissions of GRIC and PAAC, the CBA Section believes that public office holders and lobbyists should be held to harmonious and complementary ethical standards. Under the *Conflict of Interest Act*, public office holders receive clear guidance about the circumstances in which a gift, hospitality or other benefit can be accepted. The ethical obligations of lobbyists should mirror that guidance.

Pursuant to the *Conflict of Interest Act* and the *Conflict of Interest Code for Members of the House of Commons*, the Ethics Commissioner advises public office holders to reject any gift, hospitality or other benefit if the identity of the donor might reasonably be seen to suggest that the gift was given to influence the public office holder's decision-making. She stated that concerns might reasonably arise if the donor is a lobbyist registered to lobby the public office holder or the public sector entity of the public office holder.

Under these laws, the value of a gift is not determinative nor is it even a criterion of acceptability. It is more important to consider who is offering the gift and why it is being offered: "If a gift is being offered by someone whose interests could be affected by a decision the public office holder is called upon to make, then the [*Conflict of Interest*] *Act* will likely apply and prohibit its acceptance."[48] In the CBA Section's view, the reverse should be true for lobbyists.

In administering these Rules, the Commissioner should strive to provide all lobbyists, but especially occasional lobbyists, with education and other supports to achieve compliance.

RECOMMENDATIONS:

10. **Rule 10 should be revised to state, "A lobbyist shall not provide or offer to a public office holder any gift, hospitality or other benefit that the public office holder is not allowed to accept if the lobbyist is registered to lobby**

47 Howard Wilson, note 8.

48 Office of the Conflict of Interest and Ethics Commissioner, Guideline, "Gifts (including Invitations, Fundraisers and Business Lunches)" (July 2011).

the department or governmental institution where the public office holder is employed or serves."

11. **The Code or commentary should make clear that the prohibition on "offering" a gift or hospitality does not capture the circumstance where the offer is made in good faith and the public office holder declines.**
12. **The Code or commentary should clearly articulate exceptions consistent with existing rules that permit public office holders to accept gifts.**
13. **The ethical obligations pertaining to gifts and hospitality provided by lobbyists should mirror the guidance public office holders receive about the circumstances in which a gift, hospitality or other benefit can be accepted.**

VIII. APPLICATION OF CODE TO IN-HOUSE LOBBYISTS

Some stakeholders have raised questions and concerns about the application of the Code to in-house lobbyists. They have sought clarification as to who within a registered corporation or organization is subject to the Code, its Principles and Rules. Pursuant to subsection 10.3(1)(b), only employees named in an in-house registration filed by a corporation or organization are required to comply with the Code. The Commissioner has, however, directed that the officer responsible for filing returns shall advise all employees of the Code and its obligations.

From a practical perspective, the CBA Section believes that further clarity is needed to explain how the revised Code would apply to lobbyists (especially in-house lobbyists) employed in large companies and organizations. For example, clear principles should indicate in which circumstances and to what extent the prohibition against lobbying a public official who is a lobbyist's friend, relative or business associate should apply to *another* in-house lobbyist working for the same employer or *another* consultant lobbyist in the same firm.

RECOMMENDATION:

14. **Further clarity should be provided to explain how the revised Code would apply to lobbyists (especially in-house lobbyists) employed in large companies and organizations. For example, clear principles should indicate in which circumstances and to what extent the prohibition against lobbying a public official who is a lobbyist's friend, relative or business associate**

should apply to *another* in-house lobbyist working for the same employer or *another* consultant lobbyist within the same firm.

IX. INVESTIGATIONS AND PROCEDURAL FAIRNESS

In the proposed introduction to the revised Code, the Commissioner outlines the process for an investigation to ensure compliance with the Act or Code. The Commissioner should specify at what stage an individual would be informed of an investigation and how the individual would participate.

The introduction also notes that, "At the end of the investigation [of an alleged breach of the Code], the Commissioner shall table a Report in both Houses of Parliament, detailing the findings and conclusions and reasons for these conclusions." Where a report finds no breach of the Code, the Commissioner should ensure that the report does not cause unfair damage to the reputation of the persons who complied with their obligations.

RECOMMENDATIONS:

15. **In the introduction to the revised Code, the Commissioner should specify at what stage an individual would be informed of an investigation and how the individual would participate.**

16. **Where a report tabled in Parliament finds no breach of the Code, the Commissioner should ensure that the report does not cause unfair damage to the reputation of the persons who complied with their obligations.**

X. CONSISTENT INTERPRETATION

The legislative history reveals a clear intention, in the words of the Bill C-43 sub-committee, to "take a holistic view of the decision-making process, which involves various stakeholders including public office holders, the public and lobbyists."[49] To achieve consistency and harmony in administration, the Lobbyists' Code of Conduct and the conflict rules for public officials should be interpreted and administered by a single authority. While this recommendation is beyond the scope of the Code, we believe it to be fundamentally important.

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49 Sub-Committee on Bill C-43, note 5, at 46.

RECOMMENDATION:

17. The Lobbyists' Code of Conduct and the conflict rules for public officials should be interpreted and administered by a single authority.

XI. CONCLUSION

The CBA Section would like to thank the Commissioner of Lobbying for the chance to contribute to the consultation on revisions to the Lobbyists' Code of Conduct, and would welcome the opportunity to elaborate on any element of our submission.

XII. SUMMARY OF RECOMMENDATIONS

1. In Rule 5, the Commissioner should adopt the commonly accepted dictionary definition of confidential, namely, information that is "intended to be kept secret."
2. Rule 5 should be modified to read: "A lobbyist shall neither use nor disclose information which he or she knows to be confidential except with the express consent of the public office holder from whom it is received."
3. The Code should not prohibit stakeholders (including a lobbyist who represents them) from being party to communications and consultations involving confidential information that could legitimately be disclosed in the public interest.
4. Rule 7 should be revised to read: "A consultant lobbyist shall not arrange a meeting between a client and a public office holder who is a relative or friend of the lobbyist or has financial or business dealings with the lobbyist."
5. If the concept of "friendship" is included in the Code, there should be a clear and unambiguous definition of the word "friend," which delineates a close personal relationship between the public office holder and the lobbyist.
6. The definition should be based on the Conflict of Interest and Ethics Commissioner's narrow interpretation that distinguishes true friendship from acquaintance, social contact and business association.
7. The term "area of responsibility" in Rule 8 should be clarified and its scope clearly delineated.
8. The prohibition on lobbying others in a public office holder's "area of responsibility" should be limited to only public office holders in a direct reporting relationship with the public office holder who has the relationship with the lobbyist.
9. The restriction should only apply where there is a reasonable prospect that a lobbyist's relationship with one public office holder could improperly influence the actions of another.

10. Rule 10 should be revised to state, "A lobbyist shall not provide or offer to a public office holder any gift, hospitality or other benefit that the public office holder is not allowed to accept if the lobbyist is registered to lobby the department or governmental institution where the public office holder is employed or serves."
11. The Code or commentary should make clear that the prohibition on "offering" a gift or hospitality does not capture the circumstance where the offer is made in good faith and the public office holder declines.
12. The Code or commentary should clearly articulate exceptions consistent with existing rules that permit public office holders to accept gifts.
13. The ethical obligations pertaining to gifts and hospitality provided by lobbyists should mirror the guidance public office holders receive about the circumstances in which a gift, hospitality or other benefit can be accepted.
14. Further clarity should be provided to explain how the revised Code would apply to lobbyists (especially in-house lobbyists) employed in large companies and organizations. For example, clear principles should indicate in which circumstances and to what extent the prohibition against lobbying a public official who is a lobbyist's friend, relative or business associate should apply to another in-house lobbyist working for the same employer or another consultant lobbyist within the same firm.
15. In the introduction to the revised Code, the Commissioner should specify at what stage an individual would be informed of an investigation and how the individual would participate.
16. Where a report tabled in Parliament finds no breach of the Code, the Commissioner should ensure that the report does not cause unfair damage to the reputation of the persons who complied with their obligations.
17. The Lobbyists' Code of Conduct and the conflict rules for public officials should be interpreted and administered by a single authority.