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GOVERNMENT RELATIONS AND PUBLIC AFFAIRS INC.

Submission by
TACTIX Government Relations and Public Affairs

Consultation on
Revised Lobbyists' Code of Conduct

Submitted to:
Office of the Commissioner of Lobbying of Canada
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Introduction

TACTIX Government Relations and Public Affairs (TACTIX) is pleased to participate in the public consultations launched in October 2014 by the Commissioner of Lobbying (the "Commissioner") regarding proposed amendments to the *Lobbyists' Code of Conduct* (the "*Code*"). Our consultants provide professional government relations and public affairs consulting services to a broad range of Canadian and international clients in the capacity of consultant lobbyists. As such, we comply as individuals with the provisions of the *Lobbying Act*, the *Lobbyists Registration Regulations* and the *Lobbyists' Code of Conduct*.

This submission reflects the personal views of TACTIX' senior management, Co-Presidents Howard Mains and Alan Young.

Proposed Changes to the Code

The Background Paper released by the Commissioner in October 2014 outlines a number of proposed changes to the *Code*. Our submission responds to the issues raised in the Background Paper but not necessarily in the order in which they are presented therein.

1. Scope

We concur with the proposal to remove the rules of the existing *Code* relating to the relationship between lobbyists and their clients. The *Lobbying Act* (the "*Act*") does not govern the business relationship between consultant lobbyists and their clients; it is appropriate, therefore, to align the *Code* with the provisions of the *Act*. We offer one possible exception to this general principle – we would not oppose maintaining existing Rule 6 regarding the representation of conflicting or competing interests without the informed consent of the client. This is a *sine qua non* of ethical business conduct.

2. New Principle: Respect for Democratic Institutions

It is reasonable to expect that all who participate in the development, implementation and application of public policy, laws and regulations will conduct their affairs in a manner that demonstrates respect for Canada's democratic institutions and that does not diminish public confidence and trust in government. Lobbyists are legitimate and integral participants in the public policy process and therefore should be held to the same high standards expected of Public Office Holders (POHs). Respect for democratic institutions is an important new principle to add to the *Code* and we support its inclusion.

3. Gifts

We believe it is important to align the provisions of the *Act* with those of the *Conflict of Interest Act* wherever possible. Logic and common sense dictate that this be so, given the interaction that can occur between lobbyists and POHs. Accordingly, we are supportive of the proposed Rule 10 which would prohibit a lobbyist from providing or promising a gift, hospitality or other benefit that a POH is not allowed to accept.

4. Clarifying the Role of the Responsible Officer

As a firm of consultant lobbyists this proposed change to the *Code* does not directly affect our operations or personnel. We do, however, offer the following comment for consideration. It is unclear what requiring the most senior paid employee of an organization to inform her/his employees who lobby on the organization's behalf of their respective obligations under the *Code* is intended to achieve. Proposed Rule 4 appears to be an unnecessary additional burden being placed on organizations, large and small, with no discernible benefit to the operation of the lobbyists' registration system. It is difficult to see how the additional

regulatory burden leads to greater transparency or encourages a higher ethical standard of conduct on the part of an organization.

5. Confidential Information

We support the addition of proposed new Rule 5 regarding the use and/or disclosure of confidential information received from a POH.

6. Preferential Access

Proposed Rules 7 and 8 regarding preferential access are unduly vague, raising great uncertainty with regard to their scope and application. Lobbyists should not have to resort to judicial interpretation to understand the rules governing their professional conduct.

We have two serious concerns with these proposed Rules:

a. Friend

Proposed Rules 7 and 8 seek to govern activities amongst friends. This raises a host of concerns. What exactly is a "friend"? This question is fraught with challenges and varied interpretations and is so lacking in precision as to be nearly impossible for those governed by the *Code* to understand and therefore comply with as well as for the Commissioner's Office to enforce.

For example, we have neighbours who are POHs. When they go on vacation we cut their lawn, water their plants and take in their mail. They do the same for us when we go away. We recently were invited to an open house in their home to celebrate the holiday season with other neighbours, some of whom are also POHs. Does this make our neighbours friends for purposes of interpreting proposed Rules 7 and 8? Does a connection through LinkedIn border on friendship? Is a Facebook friend truly a friend for purposes of the proposed Rules? How will a lobbyist and a POH know where "acquaintance" ends and "friendship" begins?

Moreover, different cultures have different understandings of what constitutes friendship. How can the interpretation and application of the *Code* possibly be nuanced sufficiently to understand and be respectful of such cultural differences? When considering a specific case, would the Commissioner's interpretation of "friend" depend upon the respective cultural backgrounds of the lobbyist and the POH?

Finally, regulating who lobbyists can lobby is not nor should it be within the purview of the Commissioner. The *Act* and the *Code* are framed around transparency, not around forbidding communications or restricting who can be lobbied.

b. Area of Responsibility

A POH's "area of responsibility" as set out in proposed Rules 7 and 8 is not defined. Compounding the vagueness and uncertainty of the concept of "friend" is the prohibition against lobbying other POHs who work within a "friend" POH's area of responsibility. Does "area of responsibility" extend to an entire Department or Agency of the Government of Canada? Does it depend upon the level of responsibility of the POH? Does it depend upon the size of the Department or Agency? If the friend works in the Privy Council Office or in the Prime Minister's Office would the area of responsibility be the Government of Canada?

The potential scope of this proposed prohibition is ill-defined, unnecessarily broad and potentially harmful to the interests of clients and organizations that engage in what Parliament has unequivocally stated in the *Act* is "a legitimate activity."

When a person's livelihood and professional reputation are on the line it is not acceptable to have such a high degree of uncertainty regarding their legal obligations. Accordingly, we respectfully submit that proposed Rules 7 and 8 should not be included in the revised *Code*.

7. Political Activities

The question of political activities engaged in by lobbyists has long been a highly contentious issue. Rather than delivering greater clarity, proposed Rule 9 simply perpetuates the existing problem and, we believe, infringes lobbyists' rights under the *Charter of Rights and Freedoms*.

It may well be that the primary problem with the Commissioner's position on current Rule 8 (and proposed Rule 9) lies in the fact that the Office relies solely upon the 2009 decision of the Federal Court of Appeal in *Democracy Watch v. Barry Campbell* to justify the restrictions imposed on lobbyists' political activity.

The *Campbell* case involved the organization of a fund raiser for a Minister of the Crown. This is a particular and unique set of facts that does not involve the myriad other political activities that all Canadians, including lobbyists, might choose to engage in, including being a member of an Electoral District Association, contributing money to a political party and/or electoral candidates, putting up lawn signs, canvassing with candidates during an election campaign, making phone calls on behalf of candidates, serving as media spokespersons for a political party, preparing party leaders for debates etc.

It is very easy to distinguish the facts of the *Campbell* decision. Instead, it is used as a blunt instrument to unduly limit, if not to squash entirely, lobbyists' *Charter* rights to freedom of expression and association.

Exacerbating this problem, we believe, is the apparent misunderstanding of the Federal Court of Appeal in describing what lobbying is. Mr. Justice Pelletier wrote that "… 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." This is an unfortunate mischaracterization of the vast majority of the work that lobbyists do, certainly in our firm. We do not sell access to POHs. Rather, we coach our clients to be their own advocates because we firmly believe that government officials prefer to hear from those who have problems or solutions, not their lobbyists.

We would hope that the Office of the Commissioner understands the true nature of the work undertaken by those who they regulate. It would indeed be unfortunate if their actions are informed by the belief that lobbying is necessarily equated with selling access.

The problems inherent in proposed Rule 9 are compounded by the inclusion of "area of responsibility" in the rule. As noted above, the concept of area of responsibility is fraught with uncertainty and raises important questions of scope and application.

We respectfully submit that proposed Rule 9 should be excluded from the revised *Code*. If, however, the Commissioner includes Rule 9 in the *Code*, it is imperative that it be accompanied by a system of advance rulings established by the Office of the Commissioner. Advance rulings would provide necessary guidance to individuals' specific sets of facts and protect the interests of lobbyists who choose to express their *Charter* rights and freedoms by engaging in political activities.

Conclusion

It is critically important that the *Lobbyists' Code of Conduct* provides a clear and unambiguous set of rules to guide the lobbying profession as it undertakes its legitimate work. Where clarity is lacking, a rule should not be put in place. In the case of the proposed *Code*, we believe that some, but not all, of the proposed Rules meet this key test.

In summary:

- We support the proposed new Principle of Respect for Democratic Institutions.
- We support proposed Rules 1, 2, 3, 5, 6 and 10.
- Proposed Rule 4 is unnecessarily burdensome on organizations large and small without providing a countervailing benefit and should, therefore, be modified.
- Proposed Rules 7, 8 and 9 raise serious questions and concerns as articulated above and, therefore, we respectfully submit that they should not be included in the *Code*.
- In the alternative, if proposed Rule 9 is included in the *Code*, it is imperative that the Office of the Commissioner establishes a system of advance rulings to provide guidance in individual cases.

Thank you for the opportunity to participate in this important consultation process.