December 20, 2013

Lobbyists' Code of Conduct Consultations
Office of the Commissioner of Lobbying
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Executive Summary

1. These comments are jointly submitted by the Government Relations Institute of Canada (GRIC) and the Public Affairs Association of Canada (PAAC).

2. Overall, the principles of the *Lobbyists' Code of Conduct* (the Code) remain valid, and are reflective of GRIC's own *Code of Conduct*, and PAAC's *Statement of Principles*, which require members of our organizations to conduct their affairs in accordance with the highest standards of integrity, honesty, openness, and professionalism.

3. The objectives of the Code should be (i) to identify the principles we need for a free and open dialogue between government and its stakeholders, (ii) to permit interpretation in a way that is consistent with the *Charter of Rights and Freedoms*, (iii) to not create undue red tape for stakeholders, and (iv) above all else, to ensure public confidence in the framework administered by the Office of the Commissioner of Lobbying (OCL).

4. The current format and structure of the Code remains appropriate. It should be as straightforward as possible. Too many sections and sub-sections and sub-sub-sections detract from efficiency of interpretation and application.

5. The scope of the Code does not need to be expanded. Clients who are not lobbyists, and who are not subsequently captured under the *Lobbying Act* in their role as lobbyists, should not be subject to the provisions of the Code.

6. The clarity of the Code could be improved by providing more concrete guidance around certain concepts like 'political activities', including: (i) synching its key definitions with those that govern political activities by public servants, and (ii) issuing advance rulings that reflect the reality that

volunteering for an electoral district association (EDA) or a national party are not personal donations to a candidate. Under these revised definitions, the five year limitation on lobbying restrictions by a designated public office holder (DPOH) would stand as a model for a five year limitation on any consideration of a lobbyist's political activities in a conflict of interest scenario: if these legal definitions and restrictions are sufficient to ensure the public that public office holders remain free of any conflict arising from political activities and/or their time in office, they should also be sufficient to ensure the public that lobbyists are free of any conflict arising from political activities.

Introduction

7. GRIC was founded in 1994 by government relations professionals in response to the growth and maturing of the industry over the past several decades. GRIC fosters high standards of practice through professional development and adherence to a code of business conduct. GRIC also speaks on behalf of Canada's government relations community on matters pertaining to the relationship between the lobbying industry and government. GRIC's membership includes consultant and in-house lobbyists from nongovernmental organizations (NGOs), national trade associations, universities, and private companies (both domestic and multinational), extending across the breadth and depth of the Canadian economy.

8. PAAC is a national, not-for-profit organization founded in 1984. Its principal objective is to help public affairs professionals succeed in their work by providing them with forums for professional development, the exchange of new ideas and networking. PAAC's growing membership represents a cross-section of the many disciplines involved in public affairs including policy development, government relations, lobbying, communications, opinion research and public relations. PAAC's members come from both the private and public sectors, in areas such as industrial and financial companies, crown corporations, consulting firms, small business, ministries and municipalities, PR organizations, trade associations, educational institutions, law and accounting firms.

9. The wide ranging activities of GRIC and PAAC's members reflect the fact that governments remain a heavy presence in today's economy. Whether as legislators, regulators, or customers, governments interact constantly with every sector of the economy, and vice versa. Efforts to ensure that these interactions are carried out in a transparent and ethical fashion are to be applauded. Efforts to curtail or limit interactions between stakeholders and government should be avoided. Rules that limit individual Canadians' involvement in the democratic process that chooses governments are unconstitutional, and should be addressed on a priority basis in this proceeding.

10. Governments' legislative, regulatory and spending decisions impact every Canadian, every day. Lobbyists are a fundamental part of the process by which government and business, charities, NGOs, academia and civil society interact. Government and public relations professionals provide advice and analysis to assist government and their clients in their interactions with each other. They are translators, explaining government's needs to their clients, and their clients' needs to government.

11. In recognition of this relationship, GRIC and PAAC work together on numerous events and issues of interest to our members. In 2013, we signed a memorandum of agreement, committing the organizations to collaborate on a range of activities, including where possible, developing joint submissions in response to government consultations. As such, we are pleased to jointly submit the following comments in response to this important consultation.

Principles

12. The principles that underpin the Code remain valid. GRIC and PAAC note that as currently presented, the Preamble to the Code (which reflects four concepts stated in the *Lobbying Act*), as well as its Principles (of integrity, openness and professionalism), and the main areas under which its rules are divided (transparency, confidentiality, and conflict of interest) are reflective of both organizations' own guidelines for our members.

13. GRIC's *Code of Conduct*, and PAAC's *Statement of Principles,* both reflect fundamental concepts of ethical behaviour, and are cited in OCL's consultation document. As such, GRIC and PAAC submit that the current principles (as captured by the Code's preamble, statement of principles and structural headings) remain valid, and do not need to be supplemented or changed.

14. In particular, GRIC and PAAC note that questions have arisen around treatment of confidential government information (cabinet documents, parliamentary reports, etc.) by lobbyists. Without reference to previous cases, GRIC and PAAC submit that the Code's original intent in underlining the principle of confidentiality was to protect the confidence of information <u>obtained from a client</u>. Should the outcome of this process be to expand that principle to the confidence of information <u>obtained from government</u>, such a distinction should be made clear.

15. At the end of the day, GR or PR professionals who do not operate in an ethical fashion do not stay in business for very long. It is not in the interest of clients or government to engage with unethical practitioners, period.

Objectives

16. The objectives of the Code should be (i) to identify the principles we need for a free and open dialogue between government and its stakeholders, (ii) to permit interpretation in a way that is consistent with the *Charter of Rights and Freedoms*, (iii) to not create undue red tape for stakeholders, and (iv) above all else, to ensure public confidence in the framework administered by the Office of the Commissioner of Lobbying (OCL).

17. First, as noted above, GRIC and PAAC remain supportive of the current principles as reflected in the preamble, statement of principles, and structural headings in the Code.

18. Second, GRIC and PAAC respectfully note that credible interveners (including the Canadian Bar Association) have questioned whether OCL's interpretation and application of certain sections of the Code have been fully consistent with the Charter of Rights and Freedoms.[i] The primary objective of this proceeding should be to correct this situation. We make detailed recommendations to this effect below.

19. Third, GRIC and PAAC submit that this review of the Code should not create undue red tape for business. As such, we further submit that this process must adhere to the tenets of the Government of Canada's *Red Tape Reduction Commission Report*, including the rule requiring that when a new or amended regulation increases administrative burden on stakeholders, regulators will be required to offset – from their existing regulations – an equal amount of administrative burden on stakeholders.

20. Fourth, GRIC and PAAC agree that the ultimate objective of this process should be to enhance public confidence in the framework administered by OCL. By focussing on the existing and still-valid principles in the Code, by ensuring that interpretation and application of the Code is consistent with the Charter of Rights and Freedoms, by ensuring that stakeholders are not saddled with undue red tape as a result of this process, and by working to improve the legality, clarity and predictability around the Code's treatment of 'political activities', OCL can ensure that professional and public confidence in the system remains high.

Format and Structure

21. GRIC and PAAC submit that the current format and structure of the Code remains appropriate. It should be as straightforward as possible. Too many sections and sub-sections and sub-sub-sections detract from efficiency of interpretation and application.

22. While other jurisdictions have seen fit to layer their Codes with introductions, preambles, purposes, objectives, applications, rules, definitions, conclusions etc., we maintain that the substance is more important than the structure.

23. However arranged, the Code should uphold the core principles outlined above, should reflect the objectives outlined above, should remain with the scope envisioned in the *Lobbying Act*, respect the Government's red tape reduction measures, and should be as clear and predictable as possible in interpretation and application. GRIC and PAAC will be supportive of any format and structure that can be leveraged to meet those goals.

Scope

24. GRIC and PAAC strongly submit that the scope of the Code does not need to be expanded. We respectfully disagree with the premise of certain sections of the consultation document suggesting that the current eight rules could be expanded to ten, or that individuals not captured under the *Lobbying Act* could be saddled with new administrative requirements as a result of this process.

25. Presently, clients of registered lobbyists are not subject to regulation under the *Lobbying Act*, except to the extent that may also be registered lobbyists. Therefore clients who are not registered lobbyists should not be subject to the Code. Lobbyists bear ultimate legal responsibility to follow the rules and regulations set out in the Act and the Code. Requiring clients to somehow oversee lobbyists' compliance is not warranted, represents an undue expansion of the objects and powers afforded OCL by Parliament, and would create a new and undue layer of red tape for anyone who engages a lobbyist for help in understanding the work of government. Moreover, it could create an unintended excuse for those who might knowingly avoid the requirements of the Code: "my client never instructed me to."

26. As noted above, any increase in administrative burden that stems from the process must be met with an equal decrease in administrative burden elsewhere in OCL's framework (in keeping with the Government's *Red Tape Reduction Commission Report*). Should OCL determine that the scope of the Code should be expanded in any material fashion, GRIC and PAAC respectfully submit that a separate process would be required, to consult the public on which elements of OCL's framework should be removed to 'make room' for new requirements under an expanded Code.

Clarity and predictability

27. If OCL is to enhance clarity and predictability of any one section of the Code, it must be around its interpretation and application of Rule 8, as it pertains to 'political activities' of lobbyists.

28. As outlined in detail in our February 2012 written submissions to the House of Commons Standing Committee on Access to Information, Privacy and Ethics[ii], GRIC and PAAC maintain that the Code should be revised to reflect the language governing (i) conflict of interest and (ii) permitted and prohibited political activities in the *Public Service Employment Act* and the *Conflict of Interest Act*. The Commissioner of Lobbying should also render advance rulings, in a timely fashion, on questions of possible conflicts of interest arising from lobbyists' political activities. We make additional recommendations below with respect to enhancing clarity and predictability of OCL's treatment of 'political activities' as they relate to the Code.

29. Most of the current Code covers how lobbyists interact with their clients. However, Rule 8 of the current Code states that: "Lobbyists shall not place any public office holders in a conflict of interest

by proposing or undertaking any action that would constitute an improper influence on a public office holder." In this sense, the Code mingles two distinct concepts: day-to-day professional ethics, and conflict of interest arising from political activities.

30. In 2009 the Federal Court of Appeal set aside the then-Registrar of Lobbyists' original interpretation of how this rule applied to lobbyists.[iii] In response, the current Commissioner of Lobbying issued *The Commissioner's Guidance on Conflict of Interest* stating that lobbyists may be in breach of Rule 8 if they create a "competing obligation or private interest" which could arise from such factors as (among other things), "political activities," which were left undefined.

31. In June 2010, the Canadian Bar Association (CBA) issued its *Opinion Respecting the Constitutionality of Rule 8 of the Lobbyists' Code of Conduct*. In its opinion, CBA expresses its "… fundamental concern with the Guidance, and in particular, questions whether the Guidance on Rule 8 is consistent with the Charter of Rights and Freedoms." Ultimately CBA finds that OCL's treatment of political activities under Rule 8 to be a violation of "lobbyists' freedom of expression under s2(b) of the Charter and . . . not reasonably justified in a free and democratic society under s. 1 (of the Charter)."

32. In August 2010, OCL issued Clarifications about political activities in the context of Rule 8. This document provided general examples of activities that "would not," "could be," and "would likely be" breaches of Rule 8. The examples provided are not exhaustive, and turn on whether a lobbyists' political activities "advance the private interest" of a public office holder.

33. In March 2011, the OCL issued a "reminder concerning the participation of lobbyists in political activities" which includes the statement that "Working on a political campaign to support the election of a public office holder is, in (the Commissioner's) opinion, advancing the private interest of that public office holder." In other words, OCL is of the view that Members of Parliament run for office chiefly to further their private interests – a remarkably cynical view.

34. GRIC and PAAC share the concerns of other commentators who have criticised OCL's interpretation, which is not supported by the Canada Elections Act or its supporting framework. An electoral district association (EDA) is not a personal asset of a candidate. Candidates do not only seek elected office to further their private interests, and thus political activity by a campaign volunteer is not a personal contribution to the personal assets of the candidate. The administration and interpretation of Rule 8 must reflect the legal reality that EDAs are not personal property of candidates or Members of Parliament. Therefore it cannot logically stand that volunteering for an EDA is the same as a personal loan or gift to the candidate.

35. GRIC and PAAC further maintain that voluntary work by registered lobbyists on behalf of national party organizations should not be factored into Rule 8 considerations at all. Even if one agrees with OCL's interpretation that volunteering on an EDA is equivalent to a personal contribution to a

candidate, work on behalf of a national party cannot reasonably be held to be a 'personal' contribution to 300+ candidates running on a national party slate.

36. With reference to one of the few cases to be handled by OCL under Rule 8, GRIC and PAAC reiterate that it is patently unreasonable for a lobbyist to be found by OCL to have placed a public office holder in a conflict of interest, after the public office holder has been found by the Conflict of Interest Commissioner not to have been in a conflict of interest in the first place, based on the same set of facts.

37. We maintain that 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. 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.

38. Specifically, GRIC and PAAC recommend the following:

    a. The Commissioner's *Guidance on Conflict of Interest* should be withdrawn, and Rule 8 should be revised to reflect the language currently found in the *Public Service Employment Act*, and in the *Conflict of Interest Act*.[iv] By harmonizing Rule 8 with existing legislation governing political activities by public office holders, lobbyists' charter rights would not be unreasonably trenched by the Code, while at the same time, OCL could ensure that lobbyists are held to the same high ethical standards as public servants and DPOHs.

    b. Additionally, the Commissioner of Lobbying should render advance rulings on specific questions of possible conflicts of interest arising from lobbyists' political activities, within a 24 to 48 hour timeframe (similar to the window in which most professional ethics bodies render decisions). This measure would significantly reduce the unacceptable level of guesswork on the part of lobbyists who must determine – in the absence of any meaningful guidance from OCL – whether their political activities may be found, years later, to be offside with Rule 8.

    c. Moreover, GRIC and PAAC submit that the Code should parallel the legislative post employment 'cooling off period' for designated public office holders (DPOHs). The Act holds that the risk of post-employment conflict of interest by a DPOH elapses after five years, such that the DPOH is permitted to register as a lobbyist, without additional restrictions. Rule 8 should similarly hold that considerations of conflict of interest arising from political activities (as aligned with language in the *Public Service Employment Act* and the *Conflict of Interest Act*, as recommended above) elapses after five years. This is not to say that a lobbyist would not be permitted to lobby any MP who happens to be elected from a riding in which they volunteered on an EDA within

that five year period: it is to say that any consideration of possible conflict arising political activities would elapse after five years. If five years is sufficient to ensure the public that no conflict will arise as a result of lobbying from a former DPOH, it should also be sufficient to ensure the public that no conflict will arise as a result of lobbying by a former campaign volunteer. Should Parliament see fit in the future to adjust the five year restriction on lobbying by a former DPOH, the same revised limitation should also apply to Rule 8.

d. In keeping with all of the above, OCL should issue a revised Guidance ahead of the next federal election, to the effect that volunteers to an EDA or a national party organization are not considered to be making a personal donation to a candidate, and as such, are not subject to consideration under Rule 8 for these actions.

Conclusion

39. In conclusion, GRIC and PAAC respectfully submit that:

a. Overall, the principles of the *Lobbyists' Code of Conduct* (the Code) remain valid, and are reflective of GRIC's own *Code of Conduct*, and PAAC's *Statement of Principles*, which require members of our organizations to conduct their affairs in accordance with the highest standards of integrity, honesty, openness, and professionalism.

b. The objectives of the Code should be (i) to identify the principles we need for a free and open dialogue between government and business, (ii) to permit interpretation in a way that is consistent with the *Charter of Rights and Freedoms*, (iii) to not create undue red tape for business, and (iv) above all else, to ensure public confidence in the framework administered by the Office of the Commissioner of Lobbying (OCL).

c. The current format and structure of the Code remains appropriate. It should be as straightforward as possible. Too many sections and sub-sections and sub-sub-sections detract from efficiency of interpretation and application.

d. The scope of the Code does not need to be expanded. Clients who are not lobbyists, and who are not captured under the *Lobbying Act* in their role as lobbyists, should not be subject to the provisions of the Code.

e. The clarity of the Code could be improved by providing more concrete guidance around the concept of 'political activities', including: (i) synching its key definitions with those that govern political activities by public servants, and (ii) issuing advance rulings that reflect the fact that volunteering for an EDA or a national party are not contributions to the personal interests of a candidate. The five year limitation on lobbying by a DPOH

would further stand as a model for a five year limitation on any consideration of a lobbyist's political activities in a conflict of interest scenario. If these definitions and timeframes are sufficient to ensure Canadians that public office holders remain free of conflict arising from political activities and/or their time in office, they should be sufficient to ensure the public that lobbyists are free of any conflict arising from their political activities as well.

40. GRIC and PAAC welcome the opportunity to participate in this important process.

End of Document

[i] Opinion Respecting the Constitutionality of Rule 8 of the Lobbyists' Code of Conduct; and "Are Lobbyists Citizens?" Michael Osborne, *Hill Times*, September 6, 2010.

[ii] GRIC's February 2 2012 submission to ETHI; and PAAC's February 2 2012 submission to ETHI.

[iii] 2009 FCA per Pelletier J.A. for the Court. *Democracy Watch v. Campbell and Attorney General of Canada (Registrar of Lobbyists).*

[iv] Part 7 section 112 of the *Public Service Employment Act* recognizes the right of public servants to engage in political activities while maintaining the principle of political impartiality in the public service. The Act defines "Political activity" as: (a) carrying on any activity in support of, within or in opposition to a political party; (b) carrying on any activity in support of or in opposition to a candidate before or during an election period; or (c) seeking nomination as or being a candidate in an election before or during the election period. Section 15 of the *Conflict of Interest Act* deals with prohibited political activities of public office holders. Section 15(4) states that: "Nothing in this section prohibits or restricts the political activities of a reporting public office holder." Section 16 specifically deals with fundraising and goes on to state that: "No public office holder shall personally solicit funds from any person or organization if it would place the public office holder in a conflict of interest."