Lobbying federal officials and the new Code of Conduct

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Background

Following over two years of consultations with over 90 stakeholders, the federal Lobbying Commissioner of Canada has released its proposed revisions to the Lobbyists' Code of Conduct (the Code), which are expected to come into force in the coming months.

Originally scheduled to enter force by January 2023, the Commissioner delayed the new Code's implementation in response to significant criticism from parliamentarians on the Standing Committee on Access to Information, Privacy and Ethics. That committee is now holding hearings to review the new Code. In its current form, the new Code will require paid federal lobbyists to comply with a new and expanded set of rules.

This article highlights the most significant changes to the Code since its past iteration, last amended in 2015. The Code remains applicable only to paid lobbyists (*i.e.*, consultant and in-house lobbyists) who must be listed in the federal lobbying registry. Lobbyists who provide their services free-of-charge and who are thus not registered will not be bound by the Code.

What you need to know about the new Code

1. The rules surrounding conflicts of interest have been clarified and expanded to include close family, personal, and working relationships. The new Code will prohibit lobbying government officials with whom one shares a relationship close enough to create a "sense of obligation" between the lobbyist and government official.
2. The cooling-off period for former campaign workers has been reduced significantly and now involves an assessment of the type of activities performed for an electoral candidate, official, or political party.
3. The Commissioner has introduced a "low value" limit on the provision of gifts and hospitality to government officials of C$80 per year, per government official.

Conflicts of interests

The biggest change in the new Code is the reformulation of the conflict-of-interest rules. The previous rules prohibited a lobbyist from doing anything that could place a government official in a conflict-of-interest. This required the Commissioner to assess whether the actions of the lobbyist resulted in a real or apparent conflict of interest on the part of the government official.

The new Code develops the “sense of obligation” test which instead focuses on the conduct of the lobbyist and whether the government official could have a sense of obligation towards the lobbyist. If a personal, business, or other relationship creates a sense of obligation between the government official and lobbyist, then the lobbyist is prohibited from lobbying the official, including arranging any meetings with that official.

The Commissioner has attempted to clarify when a sense of obligation may arise by providing examples of relationships likely to create a sense of obligation, including the following.

- Close family relationships, such as close family by blood, birth, marriage, adoption, or common law, or any relative or other person permanently residing in the same household.
- Close personal relationships, such as close or best friends, intimate or romantic partners (excludes people known only through broad social circles or networks).
- Close working relationships, such as a prominent or longstanding professional relation developed by working closely together. The Commissioner has clarified that merely working for the same organization in a strictly professional capacity does not, on its own, qualify as having a close relationship.
- Close business relationships, such as owning or closely collaborating with someone in a business or in a consortium of businesses.
- Close financial relationships, such as sharing ownership in property or co-managing shared investments with someone.

As well, political work undertaken by the lobbyists for a government official may create a sense of obligation and prohibit a lobbyist from lobbying the official and others unless certain cooling-off periods have expired.

Cooling off periods for campaign workers

The Code has made important changes to the rules regarding cooling-off periods for formerly active election campaign workers.

Previously, lobbyists could not lobby an elected official if they had worked on a political campaign for that person, until a full election cycle was complete.

Now, the Code has reduced this cooling-off period to one to two years, depending on the lobbyist’s level of involvement in the official’s campaign. The cooling-off period can be understood as follows.

- Lobbyists will be subject to a two-year cooling-off period if they engage in “strategic, high-profile or important” work for a candidate, official, or political party. The Commissioner provides examples such as serving as a spokesperson, manager, or in a senior position of a campaign, or as an executive of an electoral

district association. Additionally, work such as preparing a candidate for an appearance, organizing political fundraising or events, developing advertising, or directing research or data analysis activities will also be included.
- Lobbyists will be subject to a one-year cooling-off period if they engage in “other political work” that involves frequent interaction with a candidate or official or that is performed on a full or near-full time basis for a candidate, official, or political party. The Commissioner suggests this type of political work would include canvassing, soliciting donations, distributing campaign materials, coordinating campaign logistics, or performing political research and data analysis.
- Lobbyists will not be subject to a cooling-off period if they display lawn signs, make personal donations of up to C$1,650, attend fundraisers or campaign events, express their personal political views, or conduct purely administrative tasks.

Importantly, the Commissioner will have the discretion to reduce or eliminate a cooling-off period pursuant to a request made by a lobbyist, taking into consideration the importance, prominence, frequency, extent, and duration of the political work.

New notification obligations

The Code will impose several new requirements regarding communications expected of lobbyists.

- Consultant lobbyists must now inform their clients when they lobby on their behalf and notify them that they may have their own compliance requirements under the appropriate lobbying legislation.
- In-house lobbyists must inform the appropriate senior members of their organization (where applicable) about their lobbying activities to ensure accurate registration and reporting.
- Designated filers must also ensure that information about lobbying requirements is shared with their employees.

In the 2015 iteration of the Code, organizations who employed internal policies or “best practices” surrounding the training and the close tracking of lobbying activities of their employees, were described as best equipped to comply with their lobbying registration obligations. This has not changed in the new Code.

Lobbyists must also make sure they act and communicate with honesty and good faith, and do not use or share confidential information unless the appropriate consents are received.

Gifts and hospitality

The Code has made significant changes and clarifications to the rules surrounding gifts and hospitality by introducing a low-value limit of C$40 per gift and/or per instance of hospitality. Annual limits of C$80 each for gifts and hospitality will also apply. The previous iteration of the Code did not impose a specific dollar cap and instead focused on what was reasonable in the circumstances.

While the Commissioner has discretion to provide exemptions from these limits and to revise them to reflect inflation or regional pricing, they nonetheless will likely be inadequate for lobbyists, organizations, or charities hosting events (*e.g.*, galas, conferences, or receptions), where catered meals and drinks quickly exceed C$40.

Enforcement and sanctions

The Code remains a non-statutory (but mandatory) tool intended to complement the federal lobbying statute. While no penal sanctions or fines can be administered for breaches of the Code, the reputational risks to a lobbyist and their clients for breaching the Code can be immense.

The Commissioner's analysis of past iterations of the Code may inform how the Code will be enforced going forward. In previous decisions, the Commissioner has adjudicated cases involving Rules 2-3, 6, 8-9, and the "Principles" (i.e., the preamble of the Code). More recently, the Commissioner expressed dissatisfaction at the limited scope of certain rules relating to conflicts of interest and the "sense of obligation" test. With the expanded definition of the conflict-of-interest rules within the Code, we may see wider enforcement when breaches of the same occur.

On a final note, for past iterations of the Code, courts have found that only breaches of the "Rules" of the Code rather than breaches of its "Principles" were found to be enforceable contraventions. However, in the new Code, the "Principles" section has been removed and replaced with an "Objectives" section. While presumably the same enforcement regime would apply to the "Objectives" of the Code, this has yet to be confirmed by the Commissioner or any court.

For more information, please reach out to any of the key contacts listed below.

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