

Big Changes Coming – Lobbyists Take Note

Canada's new regime regulating the activities of lobbyists comes into force on July 2, 2008. Prime Minister Harper's flagship legislation, the 2006 *Federal Accountability Act*, includes several changes to the way in which those who lobby the Government of Canada must conduct their business. Whether one lobbies as a consultant, or as an employee or director of a corporation or organization, it is essential to understand, and comply with, the new rules set out in the *Lobbying Act*.

One of the subtle, yet fundamentally important, changes to note is signaled by changing the name of the legislation from the *Lobbyists Registration Act* to the *Lobbying Act* (hereafter referred to as the *Act*). The law is no longer simply about registering lobbying activity in Ottawa. The underlying premise that a public registry identifying lobbyists, their clients and the issues and departments they were lobbying would satisfy the public's need to know is gone. Although registration is still required, the *Lobbying Act* is more squarely aimed at regulating the lobbying profession. Two provisions in the *Lobbying Act*, discussed in more detail below, particularly reinforce the observation that the new law is aimed at regulating lobbyists: the requirement for monthly reporting, and the strict liability offence for failing to file a return completely and accurately. But there are many other changes to the law and regulations of which careful note should be taken.

First Things First – What Did Not Change?

The *Lobbying Act* does not define lobbying, but neither did its predecessor. Moreover, the new *Act* does not change the activities that trigger the application of the legislation. Undertaking to communicate with a public office holder in respect of an enumerated list of activities or to arrange a meeting between a public office holder and any other person continue as the triggering points for consultant lobbyists (and as will be noted below, corporate and organization directors) to register. Corporations and organizations continue to be captured by the *Act* if they employ one or more people whose duties include communicating with public office holders regarding a list of activities where those duties constitute a significant part – 20 per cent of overall duties – of the duties of one employee (whether performed by one or more employees in aggregate). Furthermore, the registry of lobbyists will continue to be publicly available.

While some of the core elements of the old lobbying regime remain in place, a number of significant changes have been made that will alter lobbying practices in Canada. This Commentary examines some, but not all, of these changes. Corporate government affairs staff are advised to become familiar with all of the changes and to be prepared to comply with the new regime coming into force on July 2, 2008.

What Is New?

The *Lobbying Act* and *Regulations* introduce a key new definition and impose additional obligations on lobbyists. Some of these key changes are outlined below.

Designated Public Office Holder

A new class of public office holder has been added to the legislation. A Designated Public Office Holder (DPOH) includes a Minister of the Crown, a Minister of State, as well as any person employed in his or her office (i.e., exempt ministerial office staff), senior executive public servants with the title of Deputy Minister, Chief Executive Officer, Associate Deputy Minister (or comparable rank), Assistant Deputy Minister (or comparable rank), and any other person who is designated in regulations. Several DPOHs have been designated, including the Chief and the Vice Chief of the Defence Staff, Senior Advisors to the Privy Council Office appointed by the Governor in Council, and the Comptroller General of Canada.

It is interesting to note that the position of Director General (called General Director at Finance Canada) is not designated as a DPOH under the *Act*. Those who occupy the position of Director General (DG) across government are often experienced public servants and in many cases, key drivers and implementers of public policy or program changes. A meeting with a DG does not normally trigger the monthly return requirement. However, if this person is meeting with a lobbyist and the DG is in an acting capacity for an Assistant Deputy Minister or other level official who is included in the definition of a DPOH, then it will be necessary to file a monthly return. Therefore, one should be sure to inquire when meeting with a DG if they are in an “acting” capacity.

It is imperative that lobbyists know whether or not they are meeting with a DPOH because doing so triggers an important new requirement to report on such meetings, as discussed below.

Monthly Returns

Possibly the single-most important new requirement in the *Act* is that lobbyists must report on a monthly basis if they have communicated with a DPOH. This is a strong indicator of Parliament’s move to regulate the lobbying profession. Moreover, it is important to note that some of the reportable communications may be initiated by a DPOH rather than by a lobbyist, namely a communication regarding the awarding of a grant, contribution or other financial benefit and the awarding of a contract by the government.

According to the *Regulations*, a reportable communication with a DPOH is one that is “made orally and in advance of the communication.” Orally and in advance are the two key components of the test as to whether a return is required or not. Unfortunately, questions arise as to what specific scenarios may be caught and it will take time and experience to sort this out. For example, it is not known if voice mail messages left at a time when a conference call has been pre-arranged with a DPOH will be included, and similarly if a conversation with a DPOH at a planned event must be reported. It may be helpful to consider the question in terms of a contact: was an oral offer of a meeting made and was

that offer accepted by a DPOH? If so, it is almost certainly a reportable communication. Hopefully, the Commissioner of Lobbying will issue an interpretation bulletin offering guidance on this critical matter.

The monthly return requirement has been the source of concern in the private sector because of the possibility that meetings to advise Ministers and Deputy Ministers of sensitive transactions might become public knowledge through the lobby registry. This left the Government of Canada potentially vulnerable to being blindsided by major transactions and developments that might occur without their advance knowledge due to concern by corporate leaders regarding highly confidential information being available to the public. Furthermore, monthly returns can be a treasure trove for companies and organizations wanting to learn the “who, what, when, where and why” of their competitors’ lobbying activities.

The *Regulations* require monthly returns to include the following information:

- The name of the DPOH with whom the meeting took place.
- The position title of the DPOH.
- The branch or unit and department to which the DPOH belongs.
- The date of the communication.
- The subject matter of the communication selected from a pre-set list. The list is set out in the *Regulations* and, fortunately, includes broad categories of subject matter, such as “Energy”, “Environment”, “Taxation and Finance”, rather than demanding greater granularity. However, the Office of the Commissioner of Lobbying will be checking monthly reports against the underlying registration of the lobbyist filing a monthly report to ensure they are congruent. Accordingly, it may be possible for competitors to “put two and two together” and figure out what was discussed at a meeting.

Returns must be filed no later than 15 days after the end of every month in which a reportable communication took place. Other matters require a monthly report, including if information contained in a lobbyist’s file is no longer correct, if lobbying activities have terminated, or if five months have elapsed since the end of the last month for which a return was filed. Thus, returns are not required monthly if none of these conditions exist, but six months is the maximum period that can elapse without a return being filed.

Verifying Monthly Returns

The onus is placed on lobbyists to file monthly returns whenever they have a communication with a DPOH that is made orally and in advance of the communication. However, as a practical matter, DPOHs will also have to keep track of such meetings with lobbyists. The Commissioner of Lobbying can contact DPOHs directly to ask them to verify the information that has been filed by a lobbyist. DPOHs will be given 30 days to respond to a verification request. Where the Commissioner finds inconsistency between what the lobbyist has filed and what the DPOH reports, the Commissioner will pursue the issue with the lobbyist.

Commissioner of Lobbying

The official responsible for overseeing lobbying activities is now an Officer of Parliament whereas the former Registrar of Lobbyists was housed in the Treasury Board Secretariat. As an Officer of Parliament similar to the Auditor General of Canada, the Commissioner will have independence from the government of the day in fulfilling his or her duties. In addition, the Commissioner will table an annual report before Parliament.

Commissioner's Investigative Powers

The former Registrar was limited to investigating possible breaches of the Lobbyists Code of Conduct included in the *Act* rather than all provisions of the legislation. This odd limitation on investigative powers has been removed. Under the new *Act*, the Commissioner is empowered to enforce both the *Act* and the Lobbyists Code of Conduct. Importantly, the threshold test triggering an investigation by the Commissioner has been lowered from that of "believes on reasonable grounds" to "if he or she has reason to believe." This subtle but noteworthy change sends an important signal to lobbyists that Parliament has given a strong enforcement mandate to the Commissioner of Lobbying.

Offences, Penalties and the Limitation Period

A strict liability offence has been created for failing to file a return or for filing a return that is inaccurate or incomplete. In other words, it is now possible for a lobbyist to be imprisoned for such an offence even if the inaccuracy or incompleteness of a filing was not done knowingly. Further, the penalties for failing to file are the same as for knowingly making a false or misleading filing: \$50,000 fine or six months imprisonment or both on summary conviction; \$200,000 fine or two years imprisonment or both on indictment.

Five-Year Ban on Lobbying

One of the most well known provisions of the new lobbying regime is the prohibition on DPOHs engaging in lobbying activities for five years after they leave public office. What is not as well known is that, for reasons defying sound policy rationale, former DPOHs working for corporations are treated differently than those working for organizations. A former DPOH working for an organization is prohibited from engaging in any amount of lobbying for five years whereas a former DPOH working for a corporation may engage in registrable activity so long as it does not constitute 20 per cent or more of that individual's duties.

In addition to restricting post-government career options for former DPOHs, the five-year ban could have at least two important repercussions. First, it may alter the type of individuals hired to work in Ministers' offices. It will be increasingly difficult to recruit experienced people in mid-career to take a few years out of their career to devote to public service. Second, it will diminish the pool of qualified candidates normally recruited by companies and organizations to assist with their lobbying activities.

Outside Directors of Corporations and Organizations

It was not clear under the previous legislation how corporate and non-profit organization directors were affected. The Registrar of Lobbyists issued an advisory opinion in June 2005 that stated outside directors who received remuneration beyond reimbursement of expenses were required to register as consultant lobbyists whenever they engaged in lobbying

activities. While the *Act* does not explicitly state that outside directors receiving remuneration and who lobby must file as consultant lobbyists, the *Regulations* attempt to draw more attention to this issue by requiring persons filing in the public registry to indicate if they are directors.

Ban on Contingency Fees

Consultant lobbyists are prohibited from charging contingency fees or success fees and it is illegal for clients to pay contingency fees. The new regime does not, however, prohibit employees or officers from receiving bonuses that are contingent upon obtaining a successful outcome of their lobbying efforts on behalf of their company or organization.

Compliance – Things to Think About

Corporations and organizations interacting with the Government of Canada will be affected by the changes to the lobbying laws that take effect on July 2, 2008. It is incumbent on them to ensure they are fully compliant with the new regime. The change that is perhaps the most significant and potentially troublesome, and that will demand the attention of corporate and organizational leaders, is the monthly reporting requirement for certain communications with Designated Public Office Holders. Although all existing registrations in the public lobby registry will be considered incomplete as of July 2, 2008, the good news is that there is time to consider and put into place mechanisms for complying with this, and all other, new requirements.

August 15, 2008 is the date by which all registrations in the public lobby registry must be brought up to date, including any reportable meetings with DPOHs that occurred in the month of July. Be sure to mark this date in your calendars.

Although it will take time to adjust to the new lobbying rules, educate employees and members, and develop and implement appropriate practices to ensure compliance, there are several things that corporations and organizations should think about today to be better prepared for tomorrow. We recommend the following for your consideration:

- Ensure that directors who receive remuneration and who may engage in lobbying activity are aware of their obligation to register as consultant lobbyists. While failure to comply with the lobbying laws could lead to significant sanctions against the individual director, considerable harm could also be done to the reputation of the company or organization.
- Be aware that, while the substantive rules regarding the disclosure of corporate employees who lobby have not changed, the *Act* now requires corporations to file two lists: one list will include the names of senior officers and employees whose registrable activities constitute at least 20 per cent of their duties; the second list will include any other senior officer who engages in registrable activity in any amount.

- Put in place an information system that tracks all meetings with DPOHs by employees or members. A robust mechanism will be required to ensure that all registrable meetings are included in monthly filings.
- Note that neither the *Act* nor the *Regulations* require corporations or organizations to identify the individual officer or employee who communicated with a DPOH in a manner triggering a monthly filing. A monthly report must nevertheless be posted by the officer responsible for filing.
- When putting together a “lobby day on Parliament Hill”, organizations often use their members to meet with politicians and public servants. If any member receives compensation (other than expenses) and meets with a DPOH, it will be necessary for the organization to report the meeting(s) in its monthly filing.
- Be aware that, when completing the registry requirement to identify if a client, company or organization receives government funding, the new *Regulations* ask if funding is expected in the current financial year. This “expectation” of receiving funding is new and raises an interesting compliance challenge, particularly if the filing is done near the beginning of the fiscal year and a request for government funding is pending or is in the planning stages.
- All existing registrations are considered incomplete as of July 2, 2008. Therefore, it will be necessary for all of those currently registered to file a new return no later than August 15, 2008.

Finally, remember that at all times that “*lobbying public office holders is a legitimate activity.*” It says so in the preamble to the *Lobbying Act*. It has always been so, and it continues to be so. Lobbying is a legitimate activity, but ignorance of the law governing lobbyists is not a defense.

Information about the new regime and how it will be implemented can be found at:

http://www.orl-bdl.gc.ca/epic/site/lobbyist-lobbyiste.nsf/en/h_nx00161e.html

Furthermore, the professionals at TACTIX Government Consulting Inc. would be pleased to respond to questions you may have regarding the content of this Commentary.

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