

CHAPTER 10

REGULATION OF LOBBYING

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1. INTRODUCTION

Lobbying is an aspect of the public policy-making process in all democratic countries and is not an inherently corrupt practice.¹ Broadly defined, lobbying occurs when special interest groups engage public officials in an effort to influence decision making. Lobbyists may promote corporate interests or advocate for issues of broader public concern. Access to public officials has become a commodity in most developed nations, and the influence industry commands significant resources. When undertaken ethically and under the administration of a robust, transparent regulatory regime, lobbying can promote political rights and improve government decision making. Legitimate lobbying practices facilitate democratic engagement and provide government officials with specialized knowledge.

Involving private interests in the legislative process risks both fostering relationships that perpetuate undue influence, as well as creating routes of preferential access to public officials. The OECD warns that undue influence in policy making constitutes a “persistent risk” in member countries due to the “unbalanced representation of interests in government advisory groups” and the revolving door between government and the lobbying industry.² Where access to decision makers no longer fulfills the public interest, the legitimacy of

¹ OECD, *Lobbyists, Governments and Public Trust, Volume 3: Implementing the OECD Principles for Transparency and Integrity in Lobbying* (OECD, 2014), online: <<http://www.oecd.org/gov/lobbyists-governments-and-public-trust-volume-3-9789264214224-en.htm>>.

² OECD, *Government at a Glance 2015* (OECD, 2015) at 12, online: <http://www.keepeek.com/Digital-Asset-Management/oecd/governance/government-at-a-glance-2015_gov_glance-2015-en#page3>.

lobbying erodes and corruption can follow. A recent study by the OECD suggests that upwards of 60% of citizens do not have confidence in their national governments.³ In an era when trust levels in national governments are declining, lobbying must be perceived by the public as legitimate in order to be effective. The legitimacy challenge is exacerbated by the fact that lobbying is generally understood as a practice that advances special interests.⁴ Transparency in legislative decision making is closely related to levels of public trust in politicians⁵ and addressing concerns about lobbying is therefore a key lever for restoring confidence in government.⁶ As a result, it is important that governments develop lobbying policy that promotes transparency, integrity and impartiality in the legislative process.

Policy should reflect modern growth in the lobbying industry globally:⁷ both the number of lobbyists and the total amount of money spent on lobbying activities have increased significantly in recent years.⁸ This growth has catalyzed social engagement and public concern for greater transparency and oversight. An opaque lobbying process can enable disproportionate access to decision makers and provide unfair advantages for well-funded interests. This inequality suppresses minority interests and stifles public consultation in policy development.⁹ The existence of powerful interests—be they corporate, private or government—and the participatory character of democracy ensure that lobbying will remain an entrenched practice. As efforts to engage public officials and influence decision making continue, concomitant regulation must be maintained.

This chapter surveys lobbying in the context of corruption and anticorruption policy development. The majority of the discussion focuses on relationships between individuals and government, and opportunities for corruption that are created when private interests engage government. While public officials are often bound by legislation and ethical codes of conduct, this chapter addresses primarily the regulation of lobbyists. Section 2 provides a brief introduction to terminology used throughout this chapter and a summary discussion of the challenges related to adopting objective definitions for global phenomena such as corruption and lobbying. Section 3 addresses the relationship between lobbying and democratic governance, and suggests that while lobbying is an integral component of democracy, democracy alone does not prevent corruption. Section 4 situates lobbying policy

³ *Ibid.*

⁴ Joel S. Hellman, Geraint Jones & Daniel Kaufmann, “Seize the State, Seize the Day: State Capture, Corruption and Influence in Transition”, Policy Research Working Paper No. 2444 (World Bank, 2000), online: <<http://elibrary.worldbank.org/doi/abs/10.1596/1813-9450-2444>>.

⁵ Klaus Schwab, *The Global Competitiveness Report 2013-2014* (World Economic Forum, 2013), online: <http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2013-14.pdf>.

⁶ OECD, (2014).

⁷ OECD, *OECD Forum on Transparency and Integrity in Lobbying* (OECD, 2013), online: <<http://www.oecd.org/gov/ethics/lobbying-forum.htm>>.

⁸ OECD, “Fighting Corruption in the Public Sector: Lobbying”, online: <<http://www.oecd.org/gov/ethics/lobbying.htm>>.

⁹ OECD, *Lobbyists, Governments and Public Trust, Volume 1: Increasing Transparency Through Legislation* (OECD Publishing, 2009), online: <<http://www.oecd.org/publications/lobbyists-governments-and-public-trust-volume-1-9789264073371-en.htm>>.

within broader regulatory frameworks, and recommends five basic principles to guide public officials in the development of lobbying policy. Sections 5, 6 and 7 contain a substantive review of lobbying regulatory regimes in the US, the UK and Canada. Finally, Section 8 introduces the regulatory environment in the European Union, contrasting approaches and identifying areas for improvement.

2. TERMINOLOGY

2.1 Defining Lobbying

Although definitions of lobbying abound in academic literature, nongovernmental publications and government directives, there is no global consensus on what constitutes “lobbying” or a “lobbying activity.” However, defining these terms is a prerequisite to developing meaningful policy and identifying the scope of acceptable lobbying conduct. The OECD advises that statutory definitions of lobbying must be “robust, comprehensive and sufficiently explicit to prevent loopholes and misinterpretation.”¹⁰

It has been suggested that “the word ‘lobbying’ has seldom been used the same way twice by those studying the topic.”¹¹ A 2006 survey completed by the OECD found no single definition of lobbying was used across member countries.¹² The Public Relations Institute of Ireland (PRII) suggests a typical and generally useful definition of lobbying:

the specific efforts to influence public decision making either by pressing for change in policy or seeking to prevent such change. It consists of representations to any public officeholder on any aspect of policy or any measure implementing that policy, or any matter being considered, or which is likely to be considered by a public body.¹³

The European Commission provides another general definition, describing lobbying as “any solicited communication, oral or written, with a public official [intended] to influence legislation, policy or administrative decisions.”¹⁴ According to Transparency International

¹⁰ OECD (2014), at 38.

¹¹ Frank Baumgartner & Beth Leech, *Basic Interests: The Importance of Groups in Politics and Political Science* (Princeton University Press, 1998) at 33.

¹² OECD Public Governance and Territorial Development Directorate, “Governance Arrangements to Ensure Transparency in Lobbying: A Comparative Overview”, internal working document (OECD, 2006).

¹³ OECD, *Lobbyists, Governments and Public Trust, Volume 2: Promoting integrity by self-regulation* (OECD, 2012) at 23, online: <<http://www.oecd.org/publications/lobbyists-governments-and-public-trust-volume-2-9789264084940-en.htm>>.

¹⁴ European Commission, “Green Paper on European Transparency Initiative” (COM, 2006), online: <http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/114521_en.htm>.

(TI), lobbying is “any direct or indirect communication with public officials, political decision makers or representatives for the purposes of influencing public decision-making carried out by or on behalf of any organized group,” and includes all activities intended to influence policy and decision making of governmental, bureaucratic or similar institutions.¹⁵ As with corruption, statutory definitions of lobbying must reflect domestic environments.

The broad spectrum of language used to describe lobbying reflects the complexities of the influence industry. Dialogue between citizens and government can manifest directly between interest groups and legislators, or through indirect, grassroots modes of influence intended to affect legislative processes by shifting public opinion.¹⁶ Lobbyists may work on behalf of corporate interests, citizens groups or other organizations advocating for the public interest. A formal distinction can be made between promoters of the general, public interest and lobbying in the corporate, private interest.¹⁷ Individual citizen and collective group access to legislators is a fundamental democratic political right; this right extends to any kind of special interest group, including corporate lobbies. Financial services, energy, chemical and pharmaceutical sectors are among the most commonly represented commercial interests.¹⁸ Public interest groups advocate for trade unions, environmental concerns, industry transparency and regulation, among other civil society interests. Inclusive definitions of ‘lobbyist’ recognize the following as members of the influence industry: lobbying consultancy firms, in-house lobbyists employed by corporations, lawyers working in public affairs departments for law firms and corporations, think tanks, and expert groups created by government for the purpose of policy development.

Identifying who is a lobbyist and what constitutes lobbying is essential for effective regulation; distinguishing between research, advisory and lobbying efforts ensures that policy is neither under-inclusive nor overbroad.¹⁹ It is generally accepted that broad definitions are preferable because under-inclusive legislation can encourage private interests to exploit unregulated alternatives to engage public officials.²⁰

¹⁵ Dieter Zinnbauer, “Corrupting the rules of the game: from legitimate lobbying to capturing regulations and policies” in Dieter Zinnbauer, Rebecca Dobson & Krina Despota, eds, *Global Corruption Report 2009: Corruption and the Private Sector* (Cambridge University Press, 2009) at 32, online: <https://www.transparency.org/research/gcr/gcr_private_sector/0/>.

¹⁶ Secondary tactics may include reorienting political debate and stimulating industry and grassroots opposition to proposed legislation.

¹⁷ Claude Turmes & Fred Thoma, “An act for Parliament” in Helen Burley et al, eds, *Bursting the Brussels Bubble: the battle to expose corporate lobbying at the heart of the EU* (ALTER-EU, 2010) at 162.

¹⁸ Will Dinan & Erik Wesselius, “Brussels: a lobbying paradise” in Burley et al, eds, (2010) at 23.

¹⁹ Categorizing lobbyists and demarcating regulatory boundaries is a challenging task for policymakers. For example, the meta-category of think tanks includes state funded policy research organizations, politically affiliated bodies and largely independent academic associations and institutions.

²⁰ For example, think-tanks and law firms have rejected calls to join the lobbyist registries in the EU. These organizations provide alternatives for individuals who want to engage politicians outside of the regulatory regime.

2.2 Terminology in a Comparative Context

Transnational economic, social and political interdependencies have increased dramatically in recent years. Lobbying strategies and practices are evolving lockstep with the global socio-political landscape.²¹ General constructions of corruption and lobbying are helpful to identify the boundaries of academic and legal inquiry but do not easily accommodate comparative analysis. This is due in part to discourse variability across social, political and economic lines. Unique legal approaches to corruption and lobbying regulation reflect broader social and institutional differences across jurisdictions. Divergent domestic lobbying practices have resulted in different rules for the same actors in different jurisdictions and inconsistent compliance at the international level.²² It is therefore important that policy makers develop specific anticorruption policies. Further, the literature must acknowledge that legal (and extra-judicial) practices are the result of, and operate within, broader social structures.

While regional variation persists, globalization has somewhat standardized expectations of conduct and corruption discourse, largely through the proliferation of global corporations. In addition, as discussed in Chapter 1, the wide application of international instruments, such as UNCAC, suggests that there is an agreed 'core of corruption' generally understood as undesirable and inconsistent with principles of good governance and global economic relations. Still, there is no universal definition of corruption and the terminology common to global economic discourse and comparative study may advance ideological and regional preferences. For example, conceptions of corruption in the context of development rhetoric have been criticized as a "disguise [for] political agendas, or... the interests of the powerful."²³ To this extent, corruption is a normative concept, influenced by regional moral, ethical and institutional traditions and practices. It is important that lawmakers recognize corruption discourse as being used and developed "by particular actors [representing] particular sets of practices," and that anticorruption policies should be harmonious with both domestic needs and global expectations.²⁴

Historically, corruption and lobbying research has focused on single-country case studies. As discussed in Chapter 1, comparative literature on corruption is scarce due to the secrecy of corruption, the lack of a universal definition and cultural differences across countries. While cultural differences may challenge comparative study and the development of objective definitions, domestic policy must reflect the unique "diversity, capacities and resources of lobbying entities."²⁵

²¹ OECD (2014).

²² *Ibid.*

²³ Elizabeth Harrison, "Corruption" (2007) 17 *Development in Practice* 672.

²⁴ *Ibid.*

²⁵ OECD (2014), at 38.

3. LOBBYING AND DEMOCRACY

Lobbying is a centuries-old component of governmental decision making.²⁶ As will be argued in Section 3.1, it is generally considered to be an acceptable and necessary practice in modern democracy and lobbying regulation is widely recognized to be in the best interests of the public and government.²⁷ When undertaken appropriately, lobbying can “strengthen accountability in government and the participation of citizens in policymaking”²⁸ by providing a valuable source of dialogue between citizens and public officials.²⁹ Lobbyists operate as guides, intermediaries and interlocutors, providing services to interest groups by navigating the complexities of modern democratic decision making. Not only do lobbyists provide an important conduit for citizens to communicate with government, they also promulgate valuable and often specialized information that advances informed decision making and sound policy development.

Legitimate lobbying activities therefore improve the quality of public decision making and promote the democratic right to petition government.³⁰ Unfettered access to public officials, however, presents opportunities for private interests to exercise undue influence. Influence peddling perpetuates corruption and is a major threat to democratic governance founded on equality and popular representation.³¹ When the procurement of government favour becomes the province of vested and well-funded interests, lobbying can significantly damage public trust in the integrity of democratic institutions. Without effective regulation, the influence industry can become an “exclusive and elite pursuit.”³² Without adequate oversight and enforcement, regulation is ineffective.

3.1 Democracy as an Indicator of Transparency

Corruption, in the sense of the misuse of public office for private gain, is inherently inconsistent with basic principles of democracy: openness and equality.³³ Democratic processes empower citizens to detect and punish corruption.³⁴ In order for lobbying to maintain legitimacy and align with democratic principles, it must operate subject to disclosure and transparency requirements. Legitimate lobbying practices democratize the

²⁶ OECD Public Governance and Territorial Development Directorate, “Lobbying: Key Policy Issues”, internal working document (OECD, 2006).

²⁷ OECD (2012).

²⁸ *Ibid* at 14.

²⁹ Will Dinan & Erik Wesselius, “Brussels: a lobbying paradise” in Burley et al, eds, (2010).

³⁰ OECD (2014), at 40.

³¹ OECD (2012), at 11.

³² Craig Holman, “Obama & K Street – lobbying reform in the US” in Burley et al, eds, (2010) at 125.

³³ Porta D. Della & A. Pizzorno, “The Business Politicians: Reflections from a Study of Political Corruption” in M. Levi & D. Nelken, eds, *The Corruption of Politics and the Politics of Corruption* (Blackwell, 1996).

³⁴ Zinnbauer (2009) at 32.

flow of information between voters and public officials and mobilize citizen engagement in the legislative process. Dialogue is an essential component of effective democratic governance, and lobbying is an “important element of the democratic discussion and decision-making process.”³⁵

While theoretically consistent, the relationship between ethical lobbying practices and democracy is imperfect. As expected, according to Transparency International’s Corruption Perceptions Index, the least corrupt nations are, almost without exception, democratic.³⁶ However, corruption has been found to persist despite democratization, economic liberalization and the adoption of transnational laws and domestic enforcement designed to eliminate it.³⁷ Corruption levels in democratic states are moderated by the state’s degree of poverty, national culture and perceptions towards corruption,³⁸ and strength of key social institutions.³⁹

Various studies indicate an association between economic underdevelopment and corruption regardless of whether a state is democratic or non-democratic; however, the types of corruption may vary depending on governance types. Countries with more economic opportunities than political ones, such as China, experience different types of corruption than countries with more political opportunities than economic ones, like India. These disparities engender different relationships between citizens and government. Economic problems encourage patronage. Patronage in turn encourages personal relationships with individual decision makers, rather than broad affiliations with political parties.⁴⁰ Where there is restricted individual economic freedom, economic success depends less on market forces and more on the ability to influence decision makers.⁴¹ In contrast, systems that feature limited political access tend to centralize transactions among small groups of local government actors. These officials are typically appointed bureaucrats who do not rely on personal followings.

Strong social ties between corporations and government increase the likelihood of corruption.⁴² Robust disclosure and transparency rules are often resisted by political leaders

³⁵ *Ibid.*

³⁶ Transparency International, “Corruption Perceptions Index: 2017”, online: <https://www.transparency.org/news/feature/corruption_perceptions_index_2017>.

³⁷ Wayne Sandholtz & William Koetzle, “Accounting for Corruption: Economic Structure, Democracy and Trade” (2000) 44 *International Studies Quarterly* 31 at 32.

³⁸ R Fisman, “Estimating the Value of Political Connections” (2000) 91 *American Economic Review*.

³⁹ A Curervo-Cazurra, “The Effectiveness of Laws against Bribery Abroad” (2008) 39 *J of Int’l Bus Studies*.

⁴⁰ Yan Sun & Michael Johnston, “Does Democracy Check Corruption? Insights from China and India” (2009) *Comparative Politics* 1.

⁴¹ Wayne Sandholtz & William Koetzle, “Accounting for Corruption: Economic Structure, Democracy and Trade” (2000) 44 *International Studies Quarterly* 31.

⁴² Jamie D Collins, Klaus Uhlenbruck & Peter Rodriguez, “Why Firms Engage in Corruption: A Top Management Perspective” (2009) 87 *Journal of Business Ethics* 89.

out of self-interest.⁴³ Further, enforcement faces significant challenges because these political-private relations often operate behind closed doors. Increased transparency through disclosure would subject these interactions to scrutiny and reduce opportunities for corruption.

Transparency International has documented a number of immediate measures that can be adopted to reduce the risk of interest groups exerting undue influence on public policy development:

- regulations on lobbying;
- regulations on the movement of individuals between the administration and the private sector (revolving door);
- regulations on conflict of interest;
- regulations on political finance;
- regulation on private sector competition;
- rules on transparent decision making and access to information; and
- civil society and media oversight.

4. REGULATORY SCHEMES

4.1 Lobbying and the Broader Regulatory Framework

Most regulatory regimes distinguish unscrupulous lobbying activity from criminal conduct. Distinct statutory instruments address lobbying as opposed to criminal conduct, such as bribery, government fraud and extortion. In addition to criminal law, other areas of law and practice work alongside lobbying rules to create a broad regulatory regime aimed at promoting government integrity. These include election campaign and party funding rules (see Chapter 13), government procurement rules (see Chapter 11), conflict of interest rules (see Chapter 9), whistleblower protection (see Chapter 12) and access to government information infrastructure.

4.2 Principles of Lobbying Regulation

Public authorities have the primary responsibility to establish standards of conduct for public officials who may be targeted by lobbying and to enact legislation that regulates the lobbying industry.⁴⁴ Authorities must not only ensure that they act in accordance with these obligations, but also that the lobbyists they engage operate ethically and legally and adhere

⁴³ Craig Holman, "Obama & K Street – lobbying reform in the US" in Burley et al., eds, (2010) at 125.

⁴⁴ OECD (2009).

to relevant principles, rules and procedures. This dual responsibility reflects the role of public officials in promoting impartiality, integrity and transparency in government.

Robust regulation and ethical standards are necessary to maintain integrity in the decision-making process and, consequently, public confidence in government institutions. If lobbyist registration and disclosure are not mandatory, transparency is compromised and lobbying activities risk undermining public trust in government. As discussed above, undisclosed relationships with and disproportionate access to public officials can lead to corruption.⁴⁵ Lobbying commands the mobilization of significant private resources; the application of these resources may enable unfettered access to public officials that can lead to powerful private interests gaining influence at the expense of the public interest.⁴⁶

Corporate lobbies have significantly greater resources at their disposal compared to public interest groups. Without effective regulation, financial disparity provides well-funded lobby groups privileged access to decision makers. Deep pockets and preferential access allow corporate lobbies to engage comprehensive and prolonged lobbying efforts that are difficult for public interest groups to match.⁴⁷ These inequalities undermine democratic decision making because those with greater resources become more capable of influencing policy.⁴⁸ In the interest of generating confidence in government, lobbying rules, policies and practices should level the playing field by promoting integrity, fairness in public policy making, openness and inclusiveness, reliability, and responsiveness.⁴⁹ Effective regulation will leverage citizen engagement,⁵⁰ access to information and principles of open government.⁵¹

States face a number of choices when developing standards and procedures for lobbying, such as:

- Definition of lobbyist;
- Definition of lobbying;
- Regulatory scheme (voluntary/mandatory/self-regulated); and
- Enforcement mechanisms.

⁴⁵ Hellman, Jones & Kaufmann (2000).

⁴⁶ OECD, *OECD Forum on Transparency and Integrity in Lobbying* (OECD, 2013), online: <<http://www.oecd.org/gov/ethics/lobbying-forum.htm>>.

⁴⁷ Anne Therese Gullberg, "Strategy counts, resources decide: Lobbying European Union climate policy" in Burley et al, eds, (2010) 29.

⁴⁸ Will Dinan & Erik Wesselius, "Brussels: a lobbying paradise" in Burley et al, eds, (2010) 23.

⁴⁹ OECD (2014).

⁵⁰ Lobbying is one of many tools that can promote inclusive decision making. For an example of an innovative project, see Canada's "Open Government Initiative": Government of Canada (2011), Open Government Initiative, online: <<http://open.gc.ca/open-ouvert/aop-apgo-eng.asp>>; Government of Canada, Consulting with Canadians, online: <www.consultingcanadians.gc.ca/>; Treasury Board of Canada, Government-Wide Forward Regulatory Plans, online: <<http://www.tbs-sct.gc.ca/hgw-gcf/priorities-priorites/rtrap-parfa/gwfrp-ppreg-eng.asp>>.

⁵¹ OECD, "Open government" in OECD, *Modernising Government: The Way Forward* (OECD, 2009) 29.

There is no single appropriate approach to regulation. A review of experiences in North America and Europe suggests that effective regulation results from an incremental process of political learning and reflects domestic cultural, political and constitutional norms.⁵² Policies from one jurisdiction cannot be uncritically transplanted to another. Nevertheless, while approaches to regulation may vary, effective policies contain many common elements.

In 2010, the OECD released the Recommendation of the Council on Principles for Transparency and Integrity in Lobbying. These principles are intended to guide executive and legislative decision makers in the development of regulatory and policy options that meet public expectations for transparency and integrity in lobbying. Adherence to the OECD principles will strengthen public confidence in government and contribute to stronger and fairer economies by promoting accountability. The OECD principles are:

1. Standards and rules that adequately address public concerns and conform to the socio-political, legal and administrative context;
2. Scope of legislation or regulation that suitably defines the actors and activities covered;
3. Standards and procedures for disclosing information on key aspects of lobbying such as its intent, beneficiaries and targets;
4. Enforceable standards of conduct for fostering a culture of integrity in lobbying;
5. Enhancing effective regulation by putting in place a coherent spectrum of strategies and practices for securing compliance.

These principles do not suggest a “one size fits all” approach to regulation. Instead, they provide the fundamental building blocks from which legislators can develop meaningful policy tailored to political, legal and cultural circumstances. The following section elaborates on these principles.

4.2.1 Standards Consistent with Socio-Political, Legal and Administrative Context

Legislation and policy must consider constitutional traditions and rights, including the expectations of civil society regarding access to government and participation in the decision-making process. Across many countries, social expectations and codified rights vary widely, affecting the manner in which citizens petition government, seek interest representation and develop social relationships with government.⁵³ Effective standards reflect a country’s democratic and constitutional traditions and interact with wider legal and administrative frameworks (including codes of conduct for public officials, rules on election campaign financing, provisions providing protection for whistleblowers, access to

⁵² OECD (2009).

⁵³ *Ibid.*

information laws and conflict of interest rules).⁵⁴ The regulatory framework and its constituent parts should foster integrity, transparency, accountability and accessibility in government.⁵⁵

Public concern surrounding integrity in the lobby industry may arise for various reasons. Understanding public concern allows legislators to appropriately define the parameters of policy development and respond meaningfully to the impetus for regulation. The OECD has identified three primary social concerns: (1) accessibility to decision makers; (2) integrity of government decision making; and (3) conduct in lobbying. Each of these concerns demands unique policy solutions. Considering the root causes of public concern will help identify the most appropriate regulatory response and measures for achieving compliance.

4.2.2 Clearly Defined Scope of Policy on Lobbying

The efficacy of lobbying regulation depends largely on how lobbying is defined and who is considered a lobbyist. Policy should consider the different types of entities and individuals that may engage public officials and the theatres where lobbying activities may occur. Regulation should reflect the complexities of modern legislative decision making and the need to promote fairness among all stakeholders. Regulations should primarily target individuals or organizations who receive remuneration for lobbying activities.⁵⁶ However, varying levels of public concern may demand a more encapsulating definition. According to the OECD, “where transparency and integrity are the principle goals of legislation, effectiveness is best achieved if definitions are broad and inclusive” and capture formal and informal lobbying in traditional and modern theatres of lobby activity.⁵⁷ Inclusive policies promote equal access to decision makers and address public concern over integrity in the lobby industry.

Policy should balance the public’s interest in transparency and integrity with the government’s interest in soliciting outside expertise. Broad definitions and rigorous disclosure requirements risk deterring informed members of the public from approaching government.⁵⁸ Regulations overburdened by excessive disclosure and reporting requirements will encourage non-compliance and consequently fail to meet their objectives.⁵⁹ Lobbyists may be hesitant to meet registration requirements out of a concern

⁵⁴ *Ibid.* For more information on lobbying and conflict of interest, see: M Malone, “Regulation of Lobbyists in Developed Countries: Current Rules and Practices” Report (2004) at 3, online: <http://www.housing.gov.ie/sites/default/files/migrated-files/en/Publications/LocalGovernment/Administration/FileDownload%2C2048%2Cen.pdf>.

⁵⁵ OECD (2009).

⁵⁶ OECD (2014).

⁵⁷ OECD (2009).

⁵⁸ J. Greenwood, “Regulation of Interest Representation in the European Union (EU): Research Guide to US and International Interest Groups” (Praeger Publishers, 2004) 379.

⁵⁹ John Warhurst, “Locating the Target: Regulating Lobbying in Australia” (1998) 51:4 Parliamentary Affairs at 538.

that disclosure will provide competitors with proprietary intelligence and indications of their work.⁶⁰ As a result, lobbyists may be encouraged to obscure disclosures or avoid compliance all together. Lawmakers must balance the risks of mandating specific information disclosures with the challenges of accepting only summary descriptions of lobbyists' objectives.

Legislation that provides broad definitions of lobbyists and lobbying may include exclusory provisions that exempt specific actors or activities from disclosure requirements.⁶¹ For example, legislation may exempt representatives of other governments acting in their official capacity, or communications that are undertaken within the public realm. Compliance nonetheless relies on definitions and exclusions that are unambiguous and clearly understood by lobbyists and public officials.

4.2.3 Robust Standards and Procedures for Information Collection and Disclosure

Standards for transparency, accountability and integrity in lobbying are the foundation for the appropriate conduct of public officials and lobbyists. Transparency "enable[s] the public to know who is lobbying for what, in order to allow it to take suitable precautions to protect its interest."⁶² Enhancing transparency is the primary objective of lobbying regulation and effective disclosure is the surest method to promote accountability. Regulations and practices that mandate disclosure of information related to communications between public officials and lobbyists empower citizens to exercise their right of public scrutiny.⁶³ Because transparency enhances the perceived and actual integrity of government, policy must not only target lobbyists but also public officials who make decisions and may be susceptible to bribery and other forms of corruption.⁶⁴

Disclosure rules determine the type of information that must be shared, the nature of registration and reporting, and the manner in which information is communicated to the public. Sparse information will render regulations meaningless, while excessive data may bury meaningful information and encourage non-compliance.⁶⁵ At a minimum, lobbyists should identify their clients, beneficiaries and objectives. Requirements must be harmonized with existing norms and laws related to confidential and privileged information; legitimate expectations of openness must be balanced against privacy rights and economic interests in

⁶⁰ Greenwood, (2004) 379.

⁶¹ A.P. Pross, "The Rise of the Lobbying Issue in Canada" in *Commercial Lobbyists: Politics for Profit in Britain* (University of Aberdeen Press, 1991).

⁶² Frederick M. Hermann, "Lobbying in New Jersey, 2006", paper presented at the Nineteenth Annual Meeting of the Northeastern Regional Conference on Lobbying in Philadelphia, Pennsylvania, New Jersey Election Law Enforcement Commission, August 2006.

⁶³ OECD (2009).

⁶⁴ Grant Jordan, "Towards Regulation in the UK: From 'General Good Sense' to 'Formalised Rules'" (1998) 51:4 Parliamentary Affairs 524.

⁶⁵ OECD (2009).

protecting proprietary information. Regulations that avoid excessive demands and address privacy interests will facilitate disclosure of pertinent but parsimonious information.⁶⁶ Disclosure requirements should solicit lobbyists to identify the intent of their lobbying activity, their employer and beneficiaries and the individuals, offices and institutions targeted by their lobbying.⁶⁷ It is important that disclosure is timely and updates are made periodically. Information should be readily available and technology should be utilized to encourage compliance and facilitate public access. Electronic filing should be used to improve the convenience, flexibility, accessibility and comparability of lobbyist data.

4.2.4 Standards of Conduct that Foster a Culture of Integrity

Lobbying requires the participation of both government and interest groups. As 'it takes two to lobby,' lobbyists and public officials share the responsibility of maintaining the integrity of regulatory schemes. Self-regulation through professional codes may be sufficient to inculcate a culture of professional ethics in the lobby industry; however, the OECD suggests that voluntary codes are ineffective.⁶⁸ Codes of conduct are intended to promote principles of behaviour harmonious with those of good governance – honesty, transparency and professionalism. Without sufficient measures and resources to enforce rules and apply sanctions, self-regulation may fall short of meeting its objectives. Social concern surrounding the conduct of lobbyists may require government intervention through the codification and enforcement of professional standards.

There are three types of codes of conduct that may affect lobbyist operations: professional codes or self-regulation; employment and post-employment codes for current and former public office holders; and, statutory or institutional codes. Together, these instruments help provide the social license and public support that is necessary for lobbyists to operate.

Professional codes are usually created by lobbyists themselves. They promote ethical standards from within, and are often developed and implemented on an ad hoc basis. Because enforcement is limited, the OECD has concluded that professional codes are largely ineffective.⁶⁹ Employment and post-employment codes proscribe the conduct of public officials in their interactions with lobbyists. They often apply during and following an official's term in public office.

These rules and procedures reflect broader democratic principles and promote public confidence in government decision making. Public officials should ensure their engagement with lobbyists avoids preferential treatment, conforms to legal requirements of information

⁶⁶ A possible solution to managing information overload is for regulations to define information requirements according to type of lobbyist. This option may increase legislative complexity but ultimately improve the quality and accessibility of data.

⁶⁷ OECD (2009).

⁶⁸ OECD (2012).

⁶⁹ In Europe, however, some public affairs organisations have introduced reprimands and expulsions into the voluntary codes.

disclosure, enhances transparency and avoids conflicts of interest. Meeting these obligations may require “revolving door” provisions for public officials leaving office. Former public officials equipped with knowledge and access to current decision makers are a valuable commodity for lobbyists. They may maintain favour with former staff and therefore retain the capacity to informally influence decision making. “Revolving door” provisions mandate “cooling-off” periods during which former public officials must not lobby their former organizations. “Reverse revolving door” provisions prevent former lobbyists from influencing policy reform from the inside. Together, these restrictions minimize the transfer of confidential information, ensure lobbyists and government operate at arm’s length and maintain public trust in government.

4.2.5 Mechanisms that Encourage Compliance

It is widely recognized that compliance is greatest where regulators utilize a gamut of enforcement strategies.⁷⁰ Soft measures and incentive-based tools including communication outreach, education programs and access to government buildings should be used together with more coercive sanctions to promote compliance. Communication strategies can be used to raise awareness of expected standards and mobilize conformity among key actors. Education programs, primarily targeting lobbyists and public officials, increase comprehension of rules and policies. Periodic courses complement existing professional curriculums, such as ethics training. These undertakings support formal reporting requirements and encourage compliance. Incentives can be used strategically to encourage compliance. For example, registered lobbyists may be granted access to automatic alert systems for consultation and release of government documents. Traditional sanctions include administrative fines and the removal of lobbyists from registries. Regulators may also develop innovative strategies based on individual experiences and compliance histories. These strategies include public reporting of improprieties by lobbyists.

To maximize their effect, sanctions must be proportionate and timely. Regulatory authorities must operate with sufficient independence and resources to ensure meaningful, objective enforcement. This requires that regulators be insulated from political pressure and delegated sufficient discretion to initiate investigations and allocate resources.

5. COMPARATIVE SUMMARY

For more than a century, the US was the only jurisdiction to formally regulate lobbyists.⁷¹ Before the early 2000s, only three other countries had implemented lobbying regulation:

⁷⁰ OECD (2012).

⁷¹ OECD (2009). However, provisions against bribery, fraud and other forms of corruption and influence peddling were more common.

Australia, Canada, and Germany.⁷² Globalization⁷³ has since led to the adoption of lobbying policy across cultures and continents: Poland, Hungary, Israel, France, Mexico, Slovenia, Austria, Italy, the Netherlands, Chile, the UK, and the EU now boast established regulatory regimes.⁷⁴ Addressing the relationship between civil society and government is “increasingly regarded as a desirable and necessary development in the interests of good government.”⁷⁵

Global economic and political relationships have transferred methods of lobbying between countries and regions; indeed, many lobbying firms and public interest groups are themselves multinational organizations.⁷⁶ However, lobbying standards and rules cannot be borrowed from one jurisdiction and adopted in another without careful consideration. Effective policy must reflect the domestic socio-political, legal and administrative environment. States possess varying degrees of regulatory competency and experience, making “political-learning”⁷⁷ an essential requirement for the development of effective regulation.⁷⁸ While globalization has normalized lobbying techniques, culturally specific lobbying strategies continue to reflect longstanding, localized social relationships between citizens and government.

Domestic approaches to lobbying regulation reflect regional value systems, political structures and legislative objectives. For example, constitutional documents prescribe some limits to lobby regulation in Canada and the US. In order to maintain confidence in government, lawmakers must preserve traditional modes of representation and access to

⁷² S. Clark, *Regulation of Lobbying in Foreign Countries* (Law Library of Congress, 1991).

⁷³ In OECD (2009), the OECD identifies two challenges to lobbying regulation as a result of globalization. First, the rise of transnational corporations has meant that foreign interests now wish to influence decision-making processes abroad. Second, international social movement groups have mobilized public expectations for democratic participation in social policy making.

⁷⁴ OECD (2014) at 40.

⁷⁵ Malone (2004) at 3.

⁷⁶ Interest groups and stakeholders affected by legislative and policy change transcend international borders. This global element has taken on particular significance with the rise of multinational corporations, some of which generate annual revenues that dwarf the GDP of entire countries. Trade policy is developed with the economic best interests of the home country in mind. In the EU, corporate lobbies were integral in the development and implementation of the Global Europe trade strategy. This trade agenda intends to create open markets in developing countries and has the potential to significantly alter the economies of non-EU nations. Subsequent trade deals with South Africa have resulted in a nearly 50 percent increase in European imports, undercutting local producers, triggering unemployment and exacerbating South Africa’s trade deficit. When the balance of power hangs heavily in favour of corporate lobbies, policy development may succumb to business interests at the expense of domestic and global public interests. For more information, see: European Commission, *Global Europe: Competing in the world* (2006).

⁷⁷ In this context, political learning refers to the process whereby lawmakers draft legislation in response to acute incidents, such as corruption scandals. For more information, see Section 4, where it is suggested that lobbying policy should be forward-thinking rather than reactionary.

⁷⁸ OECD (2009).

public officials.⁷⁹ This is increasingly difficult when international trade and governance structures demand globally normalized standards. Nonetheless, effective regulation will be tailored to accommodate the political culture, governmental system, social partnerships and norms of the society in which it operates.⁸⁰

Unlike the experience of the European Union, corporate lobbies in the US, UK, and Canada rarely participate directly in policy making and remain on the periphery of the legislative process. In the EU, lobbyists commonly hold positions on internal working groups and legislative consultative bodies.⁸¹ It is not uncommon for industry to participate in expert groups directly involved in policy development.⁸²

The political and economic systems in the US, and to a lesser extent, Canada and the UK, facilitate easy entry into the lobby industry; motivated and well-resourced individuals should find few barriers. Because it is reasonable for individuals to pay third parties to promote their interests, lobbying undertakings often involve an element of compensation. The flexible and capitalist-driven North American systems necessitate regulation and transparency. The American legislative process endows individual lawmakers with significant influence over legislation. This creates an environment in which lobbyists often target individual public officials, rather than political parties or levels of government. This is particularly the case where the executive branch is the primary source of legislative change, as it is in Canada, the UK and the EU.⁸³ On the other hand, in many European countries, corporatist systems have historically played a significant role in policy development. Lobbying evolved alongside pre-existing relationships between industry and government, and corporate interests therefore continue to enjoy a high level of integration within European policy-making processes.⁸⁴ As such, the impetus for lobbyist registration is less clear for corporate groups, because corporate participation is historically a common and accepted practice.⁸⁵

6. REGULATORY FRAMEWORK AND CONTEXT FOR LOBBYING

In Canada and the US, lobbying regulation also exists in varying degrees at the provincial or state and municipal levels.⁸⁶ In the UK, rules and requirements for lobbyists and public

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ C. Thomas, ed, *Research Guide to US and International Interest Groups* (Praeger Publishers, 2004) 379.

⁸² OECD (2009).

⁸³ OECD (2009).

⁸⁴ K. Ronit & V. Schneider, "The Strange Case of Regulating Lobbying in Germany" (1998) 51:4 *Parliamentary Affairs* 559.

⁸⁵ Clarke (1991).

⁸⁶ At the provincial level, Alberta, British Columbia, Saskatchewan, New Brunswick, Newfoundland and Labrador, Nova Scotia, Manitoba, Ontario, and Quebec have lobbying registration regimes. At the municipal level, Ottawa and Toronto have implemented lobbying registries.

officials vary between the House of Commons, House of Lords and devolved Assemblies and Parliaments in Wales, Northern Ireland, and Scotland. It should be noted that while lobbying schemes below the federal government level are an important source of regulation for the industry, they are outside the scope of this chapter.

6.1 US: Framework and Context

6.1.1 Governance Structure

The US has a republican system of government. At the national level, individual state governments send representatives to the legislative branch (Congress) composed of the House of Representatives and Senate. The President leads the executive branch of the federal government. Power is broadly diffused in the US, and there are many decision-making intervals that present the opportunity for lobbyists to engage public officials.

6.1.2 Regulatory Framework

Lobbying in the US is protected by the first amendment to the Constitution, which states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."⁸⁷ The *Lobbying Disclosure Act (LDA)* took effect in 1996 and constitutes the legal framework governing federal lobbying registration and reporting. In 2007, the *Honest Leadership and Open Government Act (HLOGA)*⁸⁸ was enacted and amended the *LDA*. The *HLOGA* modified the thresholds and definitions of lobbying activities, changed the frequency of reporting for registered lobbyists and lobbying firms and added additional disclosure requirements.⁸⁹ In 2009, a Presidential Executive Order further enhanced lobbying regulation.⁹⁰ Filings are made jointly to the Secretary of the Senate and Clerk of the House of Representatives. These officials have the authority to provide guidance and assistance on the registration and reporting requirements of the *LDA*, and, where necessary, verify and inquire to ensure the accuracy, completeness and timeliness of registrations and reports.⁹¹

⁸⁷ US Const amend 1, § 1.

⁸⁸ *Honest Leadership and Open Government Act of 2007*, Pub L No 110-81, 121 STAT 735, online: <<http://www.fec.gov/law/feca/s1legislation.pdf>>.

⁸⁹ The Congressional Research Service found the impact of the *HLOGA* on the registration, termination, and disclosure of lobbyists and lobbying firms is mixed. For more information, see: Jacob R. Straus, *Lobbying Registration and Disclosure: The Impact of the HLOGA* (Congressional Research Service, 2011), online: <<https://www.fas.org/sgp/crs/misc/R40245.pdf>>.

⁹⁰ US Presidential Documents, *Ethics Commitments by Executive Branch Personnel*, Exec Order No 13490, (CFR, 2009), online: <<https://www.gpo.gov/fdsys/pkg/FR-2009-01-26/pdf/E9-1719.pdf>>.

⁹¹ *Lobbying Disclosure Act*, Pub L No 104-65, 109 STAT 691 (1995), online: <<http://lobbyingdisclosure.house.gov/lda.html>>.

6.1.3 Overview

In 2008, a record US\$3.28 billion was spent on federal lobbying in the US.⁹² In 2009, that record was surpassed by an annual turnover of over US\$3.47 billion.⁹³ At that time, there were over 15,000 registered lobbyists in Washington, DC, which has the highest density of lobbyists in the world.⁹⁴ The US scored 75 on the 2017 TI-CPI and was ranked 16th out of 180 countries surveyed.

6.2 UK: Framework and Context

6.2.1 Governance Structure

The political system in the UK is known as the “Westminster model.” The UK Parliament is comprised of a lower chamber, the House of Commons, and an upper chamber, the House of Lords. The House of Commons is made up of 630 elected Members of Parliament. The party with the most MPs forms the Government and its leader becomes the Prime Minister. The House of Lords is made up of unelected representatives, who can be hereditary peers, bishops, experts or those appointed by the Queen. Cabinet Ministers are appointed from the members of both chambers to head various departments. Bills can be introduced in either chamber by Ministers or MPs and must be approved by both chambers, except financial bills, which need only the approval of the House of Commons. In addition to the House of Lords and House of Commons, in 1997-98, the UK devolved powers to three nations, creating Legislative Assemblies in Wales and Northern Ireland, and a Parliament in Scotland.

6.2.2 Regulatory Framework

Until 2014, the UK depended solely on self-regulation by lobbying professionals to regulate lobbyist conduct. Three professional associations continue to guide self-regulation: the Chartered Institute of Public Relations (CIPR), the Public Relations Consultants Association (PRCA) and the Association of Professional Political Consultants (APPC). Members of the CIPR are individuals, while members of the APPC and the PRCA are organizations. All three associations require members to adhere to a code of conduct.⁹⁵ The CIPR also runs a universal register for all UK lobbyists.

⁹² OECD (2009).

⁹³ “Lobbying Spending Database”, (OpenSecrets), online: <<https://www.opensecrets.org/lobby/methodology.php>>.

⁹⁴ Transparency International, *Lobbying in Europe: Hidden Influence, Privileged Access* (Transparency International, 2015), online: <https://www.transparency.org/whatwedo/publication/lobbying_in_europe>.

⁹⁵ Transparency International UK, *Lifting the Lid on Lobbying: The Hidden Exercise of Power and Influence in the UK* (February 2015) at 28, online: <<http://www.transparency.org.uk/publications/liftthelid/>>.

In a 2009 inquiry, the Public Administration Select Committee deemed the self-regulatory regime inadequate.⁹⁶ In 2010, the government began proactively publishing information on Ministers' meetings with lobbyists, but these disclosures do not include who lobbyists represent. In order to fill this gap and supplement the self-regulatory regime, the *Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014* (*TLA*) was enacted in January 2014.⁹⁷ The *TLA* requires consultant lobbyists to disclose the names of clients through the Register of Consultant Lobbyists, which was launched in March 2015.⁹⁸ To date, 145 organizations and lobbyists have registered under the *TLA*. The Registrar is independent of government and the lobbying industry. The goal of the *TLA* is to balance openness with the freedom of lobbyists to represent others and the encouragement of public engagement with policy making.⁹⁹

In 2016, the *Lobbying (Transparency) Bill*, a private members' bill, was introduced in the House of Lords.¹⁰⁰ The proposed legislation would repeal and replace the current lobbyist regime under the *TLA*.¹⁰¹ The bill broadens the scope of the register to include more in-house lobbyists and expands disclosure requirements for lobbyists.¹⁰² The bill also proposes that the Registrar issue a mandatory code of conduct to replace the current voluntary codes of conduct in the UK.¹⁰³ To date, the bill has not yet been debated in the House of Commons.

The UK also regulates the lobbying activities of Members of Parliament (MPs). Although a tradition of representation of special interests by MPs exists in the UK and many MPs hold paid consultancies related to their roles as parliamentarians, scandals involving lobbying led

Katy Budge & Marina Kaur-Channing, "United Kingdom: Developing lobbying regulation in an open government context" in OECD (2014) at 217.

⁹⁷ *Ibid.*

⁹⁸ Office of the Registrar of Consultant Lobbyists, online: <https://registerofconsultantlobbyists.force.com/CLR_Search>.

⁹⁹ Katy Budge & Marina Kaur-Channing, "United Kingdom: Developing lobbying regulation in an open government context" in OECD (2014) at 217.

¹⁰⁰ Bill 75, *Lobbying (Transparency) Bill* [HL], 2016-2017 series, 2016.

¹⁰¹ *Ibid.*, s. 24.

¹⁰² UK, HL, *Parliamentary Debates*, vol 774, cols 1257-1258 (9 September 2016) (Lord Brooke of Alverthorpe). In the debate, Lord Brooke pointed out problems with the current register: "The current register has been in operation for 18 months, and it has failed abysmally. Three-quarters of the industry working in-house are exempt; of the consultant lobbyists covered, just 136 firms are signed up, a long way from the 700-plus registrants that the Government anticipated when pushing the Bill through. In the last quarter, one-third of the UK's registrants are effectively blank submissions, with no clients having met the very high bar that triggers registration. There is no requirement in current law to provide details of whom they have met in government, nor whom they are seeking to influence. It is little wonder that in the past six months the register has been viewed by the public a total of 363 times, which is an average of just two people visiting the website a day."

¹⁰³ Bill 75, *Lobbying (Transparency) Bill* [HL], 2016-2017 series, 2016.

to debates over consultancies and eventually to regulation.¹⁰⁴ The Resolution of 15 July, 1947, as amended in 1995 and 2002, provides that:

No Member of the House shall, in consideration of any remuneration, fee, payment, reward or benefit in kind, direct or indirect, which the Member or any member of his or her family has received, is receiving, or expects to receive—

- (i) advocate or initiate any cause or matter on behalf or any outside body or individual, or
- (ii) urge any other Member of either House of Parliament, including Ministers, to do so,

by means of any speech, Question, Motion, introduction of a Bill or amendment to a Motion or Bill, or any approach, whether oral or in writing, to Ministers or servants of the Crown.

The code of conduct for MPs also prohibits paid advocacy in any House proceedings and lays out principles to follow relating to integrity, honesty, etc.¹⁰⁵ The House of Lords has a register for “peers consultancies and similar financial interests in lobbying for clients” and peers are not allowed to vote or speak on behalf of consultancy clients if clients have a direct interest in lobbying.¹⁰⁶ Staff of MPs and journalists are also subject to controls due to their access to Westminster and resultant ability to exert influence.¹⁰⁷

6.2.3 Overview

The lobbying industry in the UK employs approximately 4000 lobbyists and is worth £2 billion, making it the third largest lobbying industry in the world.¹⁰⁸ However, caution should be used when quantifying the lobbying industry in the UK. As Transparency International UK notes, “[d]ue to lack of reporting and data, there is no comprehensive information on the scale or nature of lobbying activity in the UK.”¹⁰⁹

¹⁰⁴ OECD (2009) at 74.

¹⁰⁵ *Code of Conduct for Members of Parliament*, prepared pursuant to the Resolution of the House of 19 July 1995, online: <<http://www.publications.parliament.uk/pa/cm201516/cmcode/1076/107602.htm>>.

¹⁰⁶ Nicholls et al, *Corruption and Misuse of Public Office*, 2nd ed (Oxford University Press, 2011) at 364, para 10.54.

¹⁰⁷ OECD (2009) at 74.

¹⁰⁸ Transparency International UK, *Lifting the Lid on Lobbying: The Hidden Exercise of Power and Influence in the UK* (February 2015) at 11, online: <<http://www.transparency.org.uk/publications/liftheid/>>.

¹⁰⁹ *Ibid.* Although numbers of ministerial meetings can provide some measurement, TI UK points out that lobbying can also be informal and take place outside of formal government meetings, such as during political party conferences. Lobbying may also target civil servants who are not required to disclose lobbying activity and meetings.

Lobbying can occur anytime throughout the legislative process, as well as during drafting of a bill and after enactment when secondary regulation is created. Aside from Ministers, both MPs and peers are targeted by lobbyists, since both can influence policy by asking Ministers questions and tabling, scrutinizing and voting on bills. Parliamentary staff, who mainly draft positions on policies and bills, may also be targeted, along with the personal staff of Cabinet Ministers. Members of the civil service may also be subject to lobbying due to their role in drafting bills and secondary regulation.¹¹⁰

The UK's 2017 Transparency International CPI score was 82 and the UK ranked tied for eighth out of 180 countries in terms of the amount of perceived corruption.

6.3 Canada: Framework and Context

6.3.1 Governance Structure

Canada is a federal country with ten provinces and three territories. The Parliament of Canada has two lawmaking bodies: elected members of Parliament in the lower chamber, or the House of Commons, and appointed Senators in the upper chamber, or the Senate. The leader of the party with the majority of seats in the House of Commons appoints a core executive of (usually elected) public officials called the Cabinet. The Cabinet has the greatest lawmaking power subject to the ultimate approval of Parliament. The legislative process is highly centralized and lobbying activities therefore focus on a relatively small number of key actors.

6.3.2 Regulatory Framework

The Canadian Constitution embraces the rule of law, democracy and respect for democratic institutions.¹¹¹ Lobbying regulation must promote these principles, and lobbying undertakings must not compromise the democratic process.¹¹² In 2006, the *Federal Accountability Act (FAA)* received Royal Assent and amended the *Lobbyists Registration Act (LRA)*. Following the enactment of the *FAA*, the *Lobbying Act (LA)* was enacted in 2008 to provide comprehensive lobbying regulation at the federal level in Canada.¹¹³ The *LA* mandates basic registration requirements for individuals paid to communicate with federal public office holders and is supplemented by the *Lobbyists' Code of Conduct (LCC)*. Following

¹¹⁰ *Ibid.*

¹¹¹ Canadian *Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, C 11.

¹¹² The Canadian Bar Association, *Lobbyists' Code of Conduct Consultation* (Canadian Bar Association, 2014), online: <[https://lobbycanada.gc.ca/eic/site/012.nsf/vwapj/CBA - submission - 2014-01-30.pdf/\\$FILE/CBA - submission - 2014-01-30.pdf](https://lobbycanada.gc.ca/eic/site/012.nsf/vwapj/CBA - submission - 2014-01-30.pdf/$FILE/CBA - submission - 2014-01-30.pdf)>.

¹¹³ On 12 December 2006, Bill C-2, the *Federal Accountability Act (FAA)*, received Royal Assent. Under the *FAA*, the *Lobbyists Registration Act* was renamed the *Lobbying Act*.

extensive consultation, the current version of the *LCC* came into force on December 1, 2015.¹¹⁴ The purpose of the *LCC* is to promote transparency and integrity in government decision making by adopting mandatory ethical standards for lobbyists.¹¹⁵ The Commissioner of Lobbying is an independent Officer of Parliament under the *LA* and has a mandate to develop and ensure compliance with the *LCC* and maintain the Registry of Lobbyists.¹¹⁶

6.3.3 Overview

In 2008, lobbying employed over 5,000 registered lobbyists in Canada.¹¹⁷ In 2013-2014, there were over 8,500 active lobbyists listed in the Registry of Lobbyists.¹¹⁸ Most registrants are consultant lobbyists, followed by in-house lobbyists for organizations and in-house lobbyists for corporations. Consultant lobbyists must file one return per client and it is therefore not uncommon for consultants to have multiple active registrations. The House of Commons is the most common target of lobbying undertakings, followed by Industry Canada and Foreign Affairs, Trade and Development Canada. The Prime Minister's Office was the sixth most contacted government institution in 2013-2014. The first budget for the Office of the Commissioner of Lobbying was CAD\$467,000 in 1989.¹¹⁹ As of 2013-14, commensurate with an expanded mandate, the budget has grown to CAD\$4.7 million.¹²⁰ Canada scored 82 on the 2017 TI-CPI and was ranked tied for eighth out of 180 countries surveyed.

7. MAIN ELEMENTS OF LOBBYING REGULATION

Each country's laws and policies must define the activities that constitute lobbying and the actors involved in lobbying undertakings. Theatres of lobbying may be limited to formal engagements such as consultative committees, or extend to include informal discussions and meetings. Generally, two classes of actors are targeted by regulation: public officials and lobbyists. Government officials captured by legislation are usually identified expressly in

¹¹⁴ Officer of the Commissioner of Lobbying of Canada, *The Lobbyists' Code of Conduct* (Office of the Commissioner of Lobbying of Canada, 2015), online: <https://lobbycanada.gc.ca/eic/site/012.nsf/eng/h_00013.html>.

¹¹⁵ Office of the Commissioner of Lobbying, Annual Report 2013-14, (Office of the Commissioner of Lobbying, 2014), online: <https://lobbycanada.gc.ca/eic/site/012.nsf/eng/h_00918.html>.

¹¹⁶ Under s. 68 of the *Federal Accountability Act*, the Government must consult with Parliament before appointing the Commissioner of Lobbying. This process promotes autonomy of the Office and minimizes partisanship.

¹¹⁷ OECD (2009).

¹¹⁸ Office of the Commissioner of Lobbying, Annual Report 2013-14, [OCL Annual Report], (Office of the Commissioner of Lobbying, 2014), online: <https://lobbycanada.gc.ca/eic/site/012.nsf/eng/h_00918.html>.

¹¹⁹ Then called the Office of the Registrar of Lobbyists.

¹²⁰ OCL Annual Report

the statute that governs their conduct. Lobbyists are usually defined according to their conduct or engagement with government officials.

7.1 Definition of Government Officials

7.1.1 US

The *LDA* defines Public Officials (POs), Executive Branch Officials (EBOs) and Legislative Branch Officials (LBOs). POs are any elected or appointed officials, or an employee of a federal, state or local unit of government.¹²¹ EBOs include: the President; the Vice-President; officers and employees of the Executive Office of the President; any official serving in an Executive Level I-V position; any members of the uniformed services serving at grade 0-7 or above; and Schedule C employees.¹²² LBOs include: members of Congress; elected officers of either the House or the Senate; employees or any other individual functioning in the capacity of an employee who works for a Member, committee, leadership staff of either the Senate or House; a joint committee of Congress; a working group or caucus organized to provide services to Members; and any other Legislative Branch employee serving in a position described under section 10(1) of the *Ethics in Government Act (EGA)*, 1978.¹²³

7.1.2 UK

The *TLA* disclosure requirements only apply when lobbyists communicate on behalf of a client with “a Minister of the Crown or permanent secretaries,” or an equivalent listed in the *TLA*.¹²⁴ The communication must be made while the official holds the post in order to trigger the legislation. A Minister of the Crown is defined in section 2(6) as a “holder of an office in the government, and includes the Treasury.” Equivalents to permanent secretaries include, for example, the Director of Public Prosecutions and the Chief Executive of Her Majesty’s Revenue and Customs. TI UK criticizes this narrow definition, which excludes communications with parliamentarians, Assembly members and less senior civil servants.¹²⁵

7.1.3 Canada

The *LA* has broad application and distinguishes between public office holders (POHs) and designated public office holders (DPOHs). POHs refer to virtually all persons occupying an

¹²¹ *Lobbying Disclosure Act*, Pub L No 104-65, § 3(15), 109 STAT 691 (1995), online: <<http://lobbyingdisclosure.house.gov/lda.html>>.

¹²² *Ibid*, § 3(3), 109 STAT 691 (1995), online: <<http://lobbyingdisclosure.house.gov/lda.html>>.

¹²³ *Lobbying Disclosure Act*, Pub L No 104-65, § 3(4), 109 STAT 691 (1995), online: <<http://lobbyingdisclosure.house.gov/lda.html>>.

¹²⁴ *Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014* (UK), c. 4, s. 2(3).

¹²⁵ Transparency International UK, *How open is the UK government? UK open governance scorecard results* (March 2015) at 17, online: <<http://www.transparency.org.uk/publications/uk-open-governance-scorecard-results-excel/>>.

elected or appointed position in the federal government, including members of the House of Commons, the Senate and their staff.¹²⁶ DPOHs include key decision makers within government, senior public officials, senators and certain staff of the Leader of the Official Opposition.¹²⁷ DPOHs are subject to post-employment, or revolving door, limitations and lobbyists have particular disclosure requirements for undertakings with DPOHs.

7.2 Definition of Lobbyist

Lobbying is no longer restricted to firm or consultancy lobbyists. Lobbyist ranks now include employees of corporations engaged in government relations, employees of public interest organizations, lawyers, think tanks and governments from other jurisdictions.

7.2.1 US

The *LDA* defines a “lobbyist” as:

any individual who is employed or retained by a client for financial or other compensation for services that include more than one lobbying contact, other than an individual whose lobbying activities constitute less than 20 percent of the time engaged in the services provided by such individual to that client or a six month period.¹²⁸

7.2.2 UK

The *TLA* only applies to “consultant lobbyists,” which are defined as individuals who make communications with senior decision makers about the workings of Government in exchange for payment.¹²⁹ Only lobbyists registered under the *Value Added Tax Act 1994* are within the scope of the definition, which excludes smaller businesses. Further exclusions are discussed below.

7.2.3 Canada

The *LA* identifies three types of lobbyists:

- consultant lobbyists are individuals who lobby on behalf of clients and must register;

¹²⁶ *Lobbying Act*, RSC 1985, c. 44, s. 2(1).

¹²⁷ *Ibid*; *Designated Public Office Holder Regulations*, SOR/2008-117, Schedule 1.

¹²⁸ *Lobbying Disclosure Act*, Pub L No 104-65, § 3(10), 109 STAT 691.

¹²⁹ Office of the Registrar of Consultant Lobbyists, *Guidance on the requirements for registration* (November 2015) at 9, online: <<http://registrarofconsultantlobbyists.org.uk/wp-content/uploads/2015/12/20151111Guidance-on-the-requirement-for-registration1.pdf>>.

- in-house lobbyists (corporate) are senior office holders of corporations who carry on commercial activities for financial gain and must register when one or more employees lobby and lobby undertakings constitute 20% or more of their duties;
- in-house lobbyists (organizations) are senior officers of organizations that pursue non-profit objectives and must register when one or more employees lobby and lobby undertakings constitute 20% or more of their duties.¹³⁰

7.3 Definition of Lobbying Activity

7.3.1 US

Under the *LDA*, “lobbying activities” include:

lobbying contacts and efforts in support of such contacts, including preparation and planning activities, research and other background work that is intended, at the time it is performed, for use in contacts and coordination with the lobbying activities of others.¹³¹

“Lobbying contacts” are “oral or written communications” with executive or legislative branch officials.¹³² Unlike in Canada,¹³³ grass-roots activities that do not directly target public officials do not require registration.¹³⁴

7.3.2 UK

“Consultant lobbying” in the *TLA* is defined as follows in the Registrar’s guidance:

Organisations and individuals are considered to be carrying out the business of consultant lobbying if they fulfil the following criteria:

¹³⁰ Library of Parliament, “Background Paper: The Federal Lobbying System: The Lobbying Act and the Lobbyists’ Code of Conduct” (Ottawa, 2011), online:

<<http://www.parl.gc.ca/content/lop/researchpublications/2011-73-e.htm>>. The unique requirements for in-house lobbyists ensure that responsibility for the actions of lobbyists rest at the highest levels of corporate management.

¹³¹ *Lobbying Disclosure Act*, Pub L No 104-65, § 3(7), 109 STAT 691.

¹³² *Lobbying Disclosure Act*, Pub L No 104-65, § 3(8), 109 STAT 691.

¹³³ *Lobbying Act*, RSC 1985, c. 44, s. 5(2)(j)

¹³⁴ There is one exception. The *LDA*, § 15, permits organizations that are required to file under § 6033(b)(8) of the *Internal Revenue Code* to use tax law definitions of lobbying in lieu of *LDA* definitions. Tax law definitions include grass-roots lobbying.

They have made direct oral, written or electronic communications personally to:

a Minister of the Crown, Permanent Secretary (or equivalents) currently in post, referred to as “Government Representatives.”

relating to:

- The development, adoption or modification of any proposal of the Government to make or amend primary or subordinate legislation;
- The development, adoption or modification of any other policy of the Government;
- The taking of any steps by the Government in relation to any contract, grant, financial assistance, licence or authorisation; or
- The exercise of any other function of Government.

This communication is made in the course of a business and in return for payment on behalf of a client, or payment is received with the expectation that the communication will be made at a later date.¹³⁵

They are registered under the *Value Added Tax Act 1994*.

TI UK has criticized the ambiguity surrounding “direct contact” with a Minister or Permanent Secretary.¹³⁶ The Registrar’s guidance states that “[m]aking communications personally means communicating directly with a Government Representative by name or by title, using oral, written or electronic communication. An example would be writing an email to a Minister of the Crown in which the email is addressed to the Minister specifically.”¹³⁷ Communications with a government department, special adviser, administrator or a private secretary are not covered by the *Act*. It is irrelevant whether the government official or lobbyist initiates communication.¹³⁸

The CIPR’s voluntary and universal UK Lobbying Register defines “lobbying services” as:

activities which are carried out in the course of a business for the purpose of:

- a) influencing government, or
- b) advising others how to influence government.

¹³⁵ Office of the Registrar of Consultant Lobbyists, *Guidance on the requirements for registration* (November 2015) at 9, online: <<http://registrarofconsultantlobbyists.org.uk/wp-content/uploads/2015/12/20151111Guidance-on-the-requirement-for-registration1.pdf>>.

¹³⁶ Transparency International UK, *Lifting the Lid on Lobbying: The Hidden Exercise of Power and Influence in the UK* (February 2015) at 31, online: <<http://www.transparency.org.uk/publications/lifftthelid/>>.

¹³⁷ *Ibid* at 9.

¹³⁸ *Ibid*.

7.3.3 Canada

The *LA* designates certain activities as lobbying only when carried out for compensation.¹³⁹ Activities that must be reported include communicating with a POH in respect of:¹⁴⁰

- the development of any legislative proposal by the Government of Canada or by a member of the Senate or House of Commons;
- the introduction of any Bill or resolution in either House of Parliament of the passage, defeat or amendment of any Bill or resolution that is before either House of Parliament;
- the making or amendment of any regulation as defined in subsection 2(1) of the *Statutory Instruments Act*;
- the development or amendment of any policy or program of the Government of Canada;
- the awarding of any grant, contribution or other financial benefit by or on behalf of Her Majesty in right of Canada; and
- the awarding of any contract by or on behalf of Her Majesty in right of Canada.

Individuals must also file a return if they undertake to arrange a meeting between a POH and any other person.¹⁴¹

The Canadian experience demonstrates the importance of precise vocabulary in achieving regulatory compliance. Legislation preceding the *LA* defined lobbyist activity as communication with public office holders “in an attempt to influence.” Enforcement was stymied by the evidentiary burdens of establishing that an “attempt to influence” had occurred. As a result, the *LA* instead describes lobbying activities as communications “in respect of” legislation and policies.¹⁴²

7.4 Exclusions from the Definitions of Lobbyist and Lobbying Activities

Exclusions provide greater certainty in the application of laws and must therefore be clearly defined and unambiguous. Exclusionary provisions identify either classes of actors or specific activities that are exempt from registration and disclosure requirements. Activities commonly excluded include those that involve a pre-existing element of public disclosure, such as appearances before legislative committees or commissions, and other activities of an inherently public nature.

¹³⁹ *Lobbying Act*, RSC 1985, c. 44 s. 5(1).

¹⁴⁰ *Lobbying Act*, RSC 1985, c. 44 s. 5(a)(i-vi).

¹⁴¹ *Lobbying Act*, RSC 1985, c. 44 s. 5(b).

¹⁴² *Lobbying Act*, RSC 1985, c. 44 s. 5(1)(a).

7.4.1 US

The LDA's definition of "lobbying contact" excludes communications that are:¹⁴³

- made by a public official acting in his or her capacity as a public official;
- made by a media representative, if the purpose of the communication is to gather and disseminate news and information to the public;
- made in materials that are available to the public through a medium of mass communication;
- made on behalf of a foreign government, country or political party and disclosed under the *Foreign Agents Registration Act*;
- administrative requests for meetings, etc., that do not attempt to influence a covered official;
- made during participation in an advisory committee subject to the *Federal Advisory Committee Act*;
- testimony given before a committee, subcommittee, or task force of Congress;
- information provided in writing in response to a request for specific information from a covered official;
- communications that are compelled by statute, such as those required by subpoena;
- impossible to report without disclosing information that is not permitted to be disclosed by law;
- made to an official in an agency regarding a) criminal or civil inquiries, investigations or proceedings or b) filings that the government is required to keep confidential, if the agency is responsible for the proceedings or filings;
- made on the record in a public proceeding;
- petitions to agencies that are intended to be on the public record;
- made on behalf of an individual that only relates to that individual's personal matters, unless the communication is made to a covered executive branch official, or a legislative branch official in the case of communications regarding legislation for the relief of the individual;
- disclosures protected under the *Whistle Blower Protection Act*, the *Inspector General Act* or other statutes;
- made by churches and religious orders that are exempt from filing federal income tax returns;
- made by officials of self-regulatory organizations registered with the Securities Exchange Commission or the Commodities Future Trading Commission; or

¹⁴³ *Lobbying Disclosure Act*, Pub L No 104-65, § 3(8)(B), 109 STAT 694-695.

- made by the SEC or Commodities Future Trading Commission in relation to their regulatory responsibilities under statute.

If an individual's communications fall into the above exceptions, they will not be considered a lobbyist under the *LDA* and will not be required to register. The definition of "lobbyist" also excludes individuals whose lobbying activities constitute less than 20% of the time spent working for a particular client over a six-month period, although that individual may still fit the description of a lobbyist in relation to other clients. Finally, even if an individual meets the definition of "lobbyist," they are not required to register if the total income from their lobbying activities on behalf of a particular client does not exceed \$5000, or if their total expenses for lobbying activities do not exceed \$20,000 within six months.

7.4.2 UK

The *TLA* lists a number of exclusions from its definition of consultant lobbyists. The Registrar's guidance summarizes these exclusions as follows:

- Individuals and organisations not registered under the *Value Added Tax Act 1994*;
- Individuals making communications in the course of their employer's business (only the employer is required to be registered);
- Officials or employees of governments of countries other than the United Kingdom;
- International organisations as defined by section 1 of the *International Organisations Act 1968* such as the United Nations;
- 'In-house' lobbyists defined as those who are lobbying on behalf of their own organisation;
- Organisations that carry on a business which is mainly non-lobbying and communicate with Ministers in a way that is incidental to the main course of their business; and
- Organisations that represent a particular class or body of people and whose income is derived wholly from those people, and where the lobbying is incidental to their general activity.¹⁴⁴

The last exemption listed would apply, for example, to a workers' group lobbying on behalf of its own members. Charities are also excluded unless they receive payment from another person for lobbying on that person's behalf.¹⁴⁵ The definition of "consultancy lobbying" has been heavily criticized for its narrow scope by groups such as TI UK. Particularly contentious are the exclusions of in-house lobbyists and those whose business is not primarily comprised

¹⁴⁴ Office of the Registrar of Consultant Lobbyists, *Guidance on the requirements for registration* (November 2015) at 13, online: <<http://registrarofconsultantlobbyists.org.uk/wp-content/uploads/2015/12/20151111Guidance-on-the-requirement-for-registration1.pdf>>.

¹⁴⁵ *Ibid.*

of lobbying. TI UK argues that the *TLA*'s inadequate scope "will prevent it from regulating the majority of lobbying that occurs."¹⁴⁶ The APPC, one of the UK's self-regulating professional associations, estimates that the *TLA* will capture only 1% of all lobbying activity in the UK.¹⁴⁷ The CIPR agrees that the definitions are too narrow and is launching a new universal voluntary register in July 2015, which will be open to all lobbyists and bind them under a code of conduct.¹⁴⁸ The current Registrar has also noted that the law is "very narrowly drafted."¹⁴⁹ By contrast, some commentators view the *TLA*'s minimal scope as "proportionate" to the problem and important for promoting healthy lobbying.¹⁵⁰

7.4.3 Canada

Canada's exclusions reflect its constitutional and social environment. Exclusions for representatives of provincial governments¹⁵¹ reflect Canadian federalism, and exclusions for Aboriginal councils and governments¹⁵² reflect Canada's colonial history and constitutional protection of Aboriginal rights. The following communications are also exempt from the *LA*'s application:¹⁵³

- submissions to Parliamentary committees that are a matter of public record;
- communications on behalf of an individual or group to a POH about the enforcement, interpretation or application of a statute by that POH in relation to that individual or group; and
- requests for information submitted to a POH.

7.5 Disclosure Requirements

Disclosure must satisfy the transparency objectives of regulation. Policy should require lobbyists to provide information that facilitates public scrutiny of their activity and provides public officials with sufficient knowledge to balance the competing interests of lobbyists and the public at large. As discussed, meaningful disclosure must be concise. Satisfying the public interest in transparency may necessitate disclosure of the beneficiaries of lobbyists' efforts. The OECD has provided guidance for minimum requirements of disclosure rules:

¹⁴⁶ Transparency International UK, *How open is the UK government? UK open governance scorecard results* (March 2015) at 17, online: <<http://www.transparency.org.uk/publications/uk-open-governance-scorecard-results-excel/>>.

¹⁴⁷ *Ibid.*

¹⁴⁸ See the CIPR website for more information at:

<<http://www.cipr.co.uk/content/resources/policy/lobbying-regulation>>.

¹⁴⁹ Tom Moseley, "Lobbying register will have few applicants, registrar predicts", *BBC News* (24 February 2015), online: <<http://www.bbc.com/news/uk-politics-31151820>>.

¹⁵⁰ Katy Budge & Marina Kaur-Channing, "United Kingdom: Developing lobbying regulation in an open government context" in OECD (2014) at 217.

¹⁵¹ *Lobbying Act*, RSC 1985, c. 44 s. 4(1).

¹⁵² *Ibid.*

¹⁵³ *Lobbying Act*, RSC 1985, c. 44 s. 4(2).

information must be relevant to legislative goals of transparency, integrity and efficacy; demands must result in information that is pertinent, yet parsimonious; and technology must be utilized to create accessible information infrastructure.¹⁵⁴ Identifying the direct beneficiaries of lobbying is much simpler for corporate interest lobbyists compared to public interest lobbyists. Nonetheless, policy should favour transparency from all lobbyists¹⁵⁵ and require disclosure of clients, lobbying objectives and how the undertaking is funded.¹⁵⁶ Ultimately, the usefulness of disclosure requirements depends on the manner in which information is to be used and collected.¹⁵⁷ Under the relevant statutory instruments in Canada, the US and UK, disclosure is mandatory.¹⁵⁸

7.5.1 Content

Lobbyists must be required to disclose all relevant information in a manner conducive to public reporting. Legislation that intends to uncover who is behind lobbying often provides financial thresholds for reporting.¹⁵⁹ Expenditures may provide a useful metric by which the public can comprehend the stakes involved and public officials can identify disparities in access between public interests and well-funded lobby groups.¹⁶⁰ The *LDA* applies earnings thresholds that trigger registration requirements and estimates of income and expenditures. The prevailing view in Canada is that the complexities of analyzing and monitoring financial disclosure outweigh the public benefit achieved through transparency.¹⁶¹ There have been calls in Europe to strengthen disclosure requirements surrounding financial information.¹⁶² Financial disclosure is viewed as necessary for overall lobbying transparency, the identification of lobbyists and beneficiaries and the prevention of misleading and unethical lobbying.¹⁶³ However, financial regulations are difficult to assess¹⁶⁴ and exhaustive regulations may frustrate compliance and overburden regulators.¹⁶⁵

Requiring registrants to disclose the targets of lobbying efforts advances the public interest in transparency. In order to define “lobbying activities” with sufficient precision and

¹⁵⁴ OECD (2009).

¹⁵⁵ *Ibid.*

¹⁵⁶ European Commission, “Green Paper of the European Transparency Initiative” (2006) at 194, online: <http://ec.europa.eu/archives/transparency/eti/index_en.htm>.

¹⁵⁷ For example, information that may be used in criminal prosecutions may be subject to more rigorous disclosure and data retention rules.

¹⁵⁸ In the EU, registration is voluntary but attaches mandatory disclosure obligations.

¹⁵⁹ OECD (2009).

¹⁶⁰ John Chenier, ed., 1 *The Lobby Monitor* (Ottawa: 2003) at 13.

¹⁶¹ Standing Committee on Elections, Privileges and Procedure. “First Report to the House”, Minutes of Proceedings and Evidence (Ottawa: 1985-86) at 4.

¹⁶² Rachel Tansey & Vicky Cann, “New and Improved? Why the EU Lobby register still fails to deliver” (ALTER-EU, 2015).

¹⁶³ *Ibid.*

¹⁶⁴ OECD (2009).

¹⁶⁵ OECD (2006).

delineate the theatres of lobbying captured under regulation, policy should identify the decision-making points where lobbyists commonly attempt to exert influence.

7.5.1.1 US

In the US, lobbyists must report any oral or written communication to a “covered executive branch official or a covered legislative branch official” made on behalf of a client.¹⁶⁶ Lobbyists must also identify the Houses of Congress and federal agencies contacted on behalf of clients.¹⁶⁷

Lobbying firms must file separate registrations for each client if total income from that client for lobbying activities is equal to or greater than US\$2,500 during a quarterly period.¹⁶⁸ Organizations employing in-house lobbyists must file a single registration if total expenses for lobbying activities are equal to or greater than US\$10,000 during a quarterly period.¹⁶⁹ Registrants must disclose:

- the name, address, business telephone number, and principal place of business of the registrant and a general description of its business or activities;
- the name, address and principal place of business of the registrant’s client and a general description of its business or activities;
- the name, address and principal place of business of any organization, other than the client, that contributes more than US\$10,000 toward the lobbying activities of the registrant in a semi-annual period and in whole or in major part plans, supervises, or controls such lobbying activities;
- a statement on the general issue areas the registrant expects to engage in lobbying activities on behalf of the client;
- the names of the registrant’s employees who have acted or who will act as a lobbyist on behalf of the client and whether those employees have been a covered executive or legislative branch official in the past twenty years;
- whether the client is a State or local government or a department, agency, special purpose district, or other instrumentality controlled by one or more State or local governments; and
- details of their relationship with foreign entities, including the name, address, principal place of business, amount of contribution exceeding US\$5000 to lobbying activities, and approximate percentage of ownership in the client of any foreign entity.¹⁷⁰

¹⁶⁶ *Lobbying Disclosure Act*, Pub L No 104-65, § 14, 109 STAT 691.

¹⁶⁷ *Lobbying Disclosure Act*, Pub L No 104-65, §§ 3(8)(a); 5(b)(2)(b), 109 STAT 691.

¹⁶⁸ *Honest Leadership and Open Government Act of 2007*, Pub L No 110-81, § 201(b)(5)(A), 121 STAT 735.

¹⁶⁹ *Ibid*, Pub L No 110-81, § 201(b)(5)(B), 121 STAT 735. Notably, registration is not required for pro bono clients since the monetary thresholds would not be met.

¹⁷⁰ *Lobbying Disclosure Act*, Pub L No 104-65, § 4(b)(1-4), 109 STAT 691; *Honest Leadership and Open Government Act of 2007*, Pub L No 110-81, § 202, 121 STAT 735.

The *HLOGA* amended the *LDA* to require semi-annual disclosure of campaign and presidential library contributions. These reports are due within 30 days of the end of the semi-annual reporting period.¹⁷¹ The *LDA* is unique in its financial disclosure requirements; Canada's *LA* does not adequately address transparency concerns related to campaign financing.

7.5.1.2 UK

The disclosure requirements under the *TLA* are minimal. As noted above, registration requirements under the *TLA* are only triggered when a lobbyist or lobbying firm fits the narrow definition of "consultant lobbyist." Registrants submit quarterly returns disclosing clients for whom they have made communications amounting to consultant lobbying in the previous three months. Individual communications and the number of communications on behalf of particular clients are not disclosed.¹⁷² Upon registration, lobbyists and lobbying firms must also disclose contact information, the name of any parent company, alternative trading names and the names of directors or partners. Finally, consultant lobbyists must declare whether they follow a code of conduct and where to find that code of conduct. Lobbyists are not required to disclose whom they are lobbying or the subject matter of their advocacy.

The APPC and PRCA maintain their own publicly available disclosure registries with client identities. The APPC also requires disclosure of the identities of lobbying entities, lobbyists and staff.¹⁷³ In July 2015, the CIPR launched the UK Lobbying Register (UKLR). Any lobbyists, including in-house lobbyists and non-CIPR members, may register. The register is accessible to the public for free online.¹⁷⁴

Outside of legislative requirements, UK government departments proactively disclose quarterly data on lobbyist meetings of government ministers and permanent secretaries and

¹⁷¹ *Honest Leadership and Open Government Act of 2007*, Pub L No 110-81, § 203, 121 STAT 735.

According to the Congressional Research Service: "Items reported under this provision include funds donated to pay the cost of an event to honor or recognize a covered legislative branch official or covered executive branch official; to an entity that is named for a covered legislative branch official, or to a person or entity in recognition of such official; to an entity established, financed, maintained, or controlled by a covered legislative branch official, or to an entity designated by such official; or to pay the costs of a meeting, retreat, conference, or other similar event held by, or in the name of, one or more covered legislative branch officials or covered executive branch officials."

¹⁷² Office of the Registrar of Consultant Lobbyists, *Guidance on the requirements for registration* (November 2015) at 6, online: <<http://registrarofconsultantlobbyists.org.uk/wp-content/uploads/2015/12/20151111Guidance-on-the-requirement-for-registration1.pdf>>.

¹⁷³ Association of Professional Political Consultants Register, online: <<http://www.appc.org.uk/members/register/>>.

¹⁷⁴ UK Lobbying Register, online: <<http://www.lobbying-register.uk/>>.

have done so since 2010. Data is available online.¹⁷⁵ The Cabinet Office monitors compliance with disclosure requirements and makes reports to Parliament on each department every six months, producing some pressure to comply.¹⁷⁶ However, TI UK argues that “data quality and depth of information is very poor” because disclosure of data is often delayed, only formal meetings are disclosed and information on the subject matter of meetings is scarce.¹⁷⁷ Parliamentarians, Assembly members, less senior civil servants, local government officials and public agencies are not required to publish any information on meetings.¹⁷⁸ These gaps have led TI UK to conclude that “[t]he level of transparency over lobbying meetings with legislators and the civil service is negligible to non-existent.”¹⁷⁹

In terms of lobbying by UK legislators, the Resolution of 6 November, 1947, as amended in 1995 and 2002, requires MPs to disclose any consultancies or undertakings which might involve remuneration for the provision of advice on lobbying. MPs are not prohibited from entering into agreements to provide services in their parliamentary capacity, but must register these agreements. The House of Lords also has a register for peers’ consultancies or other financial interests in lobbying for clients.¹⁸⁰ MPs’ support staff must register any gainful occupation that might be advantaged due to their access to Parliament, and journalists must report any other paid employment that is relevant to their privileged access to Parliament.¹⁸¹

Finally, All-Party Parliamentary Groups in the UK, which meet to discuss certain issue areas, must register the names of officers of the group, benefits received by the group and the source of those benefits.¹⁸² These disclosure requirements respond to the ability of lobby groups to gain access to all-party groups and improperly influence the MPs involved through financing and provision of hospitality.¹⁸³

¹⁷⁵ For an example, see data on ministerial gifts, hospitality and meetings for the Department of Business, Innovation and Skills, online: <<http://data.gov.uk/dataset/disclosure-ministerial-hospitality-received-department-for-business>>.

¹⁷⁶ Transparency International UK, *Lifting the Lid on Lobbying: The Hidden Exercise of Power and Influence in the UK* (February 2015) at 53, online: <<http://www.transparency.org.uk/publications/liftthelid/>>.

¹⁷⁷ *Ibid* at 52.

¹⁷⁸ *Ibid* at 22.

¹⁷⁹ *Ibid* at 52.

¹⁸⁰ Nicholls et al, *Corruption and Misuse of Public Office*, 2nd ed (Oxford University Press, 2011) at 364, para 14.28.

¹⁸¹ OECD (2009) at 75-76.

¹⁸² *Ibid*.

¹⁸³ *Ibid*.

7.5.1.3 Canada

Canada's reporting requirements are expansive, requiring lobbyists to identify communication or intent to communicate with "any department or other governmental institution."¹⁸⁴

Under the *LA*, all three categories of lobbyists must disclose:

- the name and business address of the individual and, if applicable, the name and business address of the firm where the individual is engaged in business;
- the name and business address of the client and the name and business address of any person or organization that, to the knowledge of the individual, controls or directs the activities of the client and has a direct interest in the outcome of the individual's activities on behalf of the client;
- where the client is a corporation, the name and business address of each subsidiary of the corporation that, to the knowledge of the individual, has a direct interest in the outcome of the individual's activities on behalf of the client;
- where the client is a corporation that is a subsidiary of any other corporation, the name and business address of that other corporation;
- where the client is a coalition, the name and business address of each corporation or organization that is a member of the coalition;
- where the client is funded in whole or in part by a government or government agency, the name of the government or agency and the amount of funding received;
- particulars to identify the subject-matter in respect of which the individual undertakes to communicate with a public office holder or to arrange a meeting, and any other information respecting the subject-matter that is prescribed;
- particulars to identify any relevant legislative proposal, bill, resolution, regulation, policy, program, grant, contribution, financial benefit or contract;
- if the individual is a former public office holder, a description of the offices held, which of those offices, if any, qualified the individual as a designated public office holder and the date on which the individual last ceased to hold such a designated public office;
- the name of any department or other governmental institution in which any public office holder with whom the individual communicates in respect of a matter regulated by the *LA* or expects to communicate or with whom a meeting is, or is to be, arranged, is employed or serves; and
- if the individual undertakes to communicate with a public office holder in respect of any matter regulated by the *LA*, particulars to identify any communication technique that the individual uses or expects to use in connection with the

¹⁸⁴ *Lobbying Act*, RSC 1985, c. 44, s. 5(2).

communication with the public office holder, including any appeals to members of the public through the mass media or by direct communication that seek to persuade those members of the public to communicate directly with a public office holder in an attempt to place pressure on the public office holder to endorse a particular opinion (grass-roots communication);¹⁸⁵

The *Lobbyists Registration Regulations* provide the form and manner in which lobbyists must file returns under the *LA*.¹⁸⁶

7.5.2 Timing

Unambiguous and strict reporting deadlines are as important as the content of reporting. In order to provide the public with meaningful information and the opportunity to mobilize counter-lobby initiatives, disclosure must be made and updated in a timely fashion.

7.5.2.1 US

The *LDA* requires registration within 20 days of either: (1) the date that the employee/lobbyist was retained to make more than one lobbying contact (and meets the 20% of time threshold); or, (2) the date the employee/lobbyist makes a second lobbying contact (and meets the 20% of time threshold). Communications with executive branch officials and Congressional support staff “serving in the position of a confidential, policy-determining, policy-making or policy-advocating character” qualify as lobbying contacts.¹⁸⁷ Following initial disclosure, reports must be updated semi-annually thereafter.¹⁸⁸

7.5.2.2 UK

Under the *TLA*, any organization that intends to engage in consultancy lobbying must apply to join the Register before doing so.¹⁸⁹ Registrants must submit a return listing clients for the pre-registration quarter.¹⁹⁰ Lists of client names are updated quarterly and registrants must submit returns within two weeks of the end of each quarter.

¹⁸⁵ *Lobbying Act*, RSC 1985, c. 44, s. 5(2)(a-k).

¹⁸⁶ *Lobbyist Registration Regulations*, SOR/2008-116.

¹⁸⁷ Committee on the Judiciary Report: The Lobbying Disclosure Act of 1995 (US House of Representatives, 1995) Report 104.

¹⁸⁸ *Honest Leadership and Open Government Act of 2007*, Pub L No 110-81, § 201(a)(1)(A-D), 121 STAT 735.

¹⁸⁹ Office of the Registrar of Consultant Lobbyists, *Guidance on the requirements for registration* (November 2015) at 5, online: <<http://registrarofconsultantlobbyists.org.uk/wp-content/uploads/2015/12/20151111Guidance-on-the-requirement-for-registration1.pdf>>.

¹⁹⁰ *Ibid* at 6.

7.5.2.3 Canada

In Canada, initial reporting is required within ten days of entering into a lobbying undertaking,¹⁹¹ and communications with senior public officer holders must be updated monthly thereafter.¹⁹² These communications include telephone calls, in-person meetings and video conferences.¹⁹³ Oral communication with a designated public office holder that is initiated by someone other than the public office holder and arranged in advance must be reported. However, communications that are initiated by the public office holder do not generally require reporting.¹⁹⁴

7.5.3 Procedures for Collection and Disclosure

As mentioned, lobbying regulation has proliferated incrementally around the world. A consequence of this sporadic development is the creation and adoption of specific requirements and separate registries for certain industries and different levels of government. Responding to modern demands for transparency, it is important that reporting and disclosure mechanisms maximize efficiency while encouraging compliance and facilitating access to information.

One way to promote compliance and improve accessibility is to utilize electronic filing and reporting. There are many benefits to electronic filing: lobbyists can submit information remotely; forms can solicit quantifiable information amenable to data analysis; data store costs are reduced and archival and retrieval simplified; and, electronic filing facilitates the use of the internet to decentralize information and improve public access.¹⁹⁵ Policies regarding electronic filing should respect established rules and norms regarding the publication of private and privileged information, mitigate the risks of information overload and balance incentives for compliance with risks of disclosing proprietary corporate intelligence.

7.5.3.1 US

All documents required by the *LDA* must be filed electronically.¹⁹⁶ The Secretary of the Senate and Clerk of the House of Representatives are required to maintain all registrations and reports filed under the *LDA* and make them accessible to the public over the internet, free of charge and in “a searchable, sortable and downloadable manner.”¹⁹⁷

¹⁹¹ *Lobbying Act*, RSC 1985, c. 44, s. 5(1.1).

¹⁹² *Lobbying Act*, RSC 1985, c. 44, s. 5(3).

¹⁹³ Office of the Commissioner of Lobbying, Annual Report 2013-14, (Office of the Commissioner of Lobbying, 2014), online: <https://lobbycanada.gc.ca/eic/site/012.nsf/eng/h_00918.html>.

¹⁹⁴ *Ibid.*

¹⁹⁵ OECD (2009).

¹⁹⁶ *Honest Leadership and Open Government Act of 2007*, Pub L No 110-81, § 205 121 STAT 735.

¹⁹⁷ *Honest Leadership and Open Government Act of 2007*, Pub L No 110-81, § 209(a)(3), 121 STAT 735.

7.5.3.2 UK

Applications to join the UK Register can be completed online or on paper. The Register is available online and searchable by lobbyist and client name. Client lists from previous quarters are available.

7.5.3.3 Canada

In Canada, the Registry of Lobbyists is the *LA*'s core instrument of transparency.¹⁹⁸ Lobbyists may file their returns electronically and the application process is provided in both official Canadian languages (English and French). To encourage electronic return, online filings are offered free of charge while paper returns are subject to a processing fee. Over 99% of all transactions are filed electronically.¹⁹⁹ Information collected under the *LA* is a matter of public record accessible over the internet. Anyone may search the database and generate reports from their personal computer. There were over 175,000 user searches of the Registry database in 2013-14.²⁰⁰

7.6 Codes of Conduct

Lobbying involves two principal parties: government and interest groups. Because 'it takes two to lobby,' lobbyists share responsibility with public officials for maintaining the integrity of lobby regulatory schemes. As noted in Section 4.2.4, there are three types of codes. The Canadian system provides an example of a statutory code. The UK and the US provide examples of professional codes or self-regulation. Meaningful lobbying policy requires oversight of the conduct of public officials that is commensurate with regulation of lobbyists' behaviour. Many jurisdictions, including Canada, the US and the EU, have developed codes of conduct that apply to public officials in their interactions with lobbyists.²⁰¹

¹⁹⁸ Office of the Commissioner of Lobbying, "The Registry of Lobbyists", (Office of the Commissioner of Lobbying, 2015), online: <https://lobbycanada.gc.ca/eic/site/012.nsf/eng/h_00950.html>.

¹⁹⁹ *Ibid.*

²⁰⁰ Office of the Commissioner of Lobbying, Annual Report 2013-14 (Office of the Commissioner of Lobbying, 2014), online: <https://lobbycanada.gc.ca/eic/site/012.nsf/eng/h_00918.html>.

²⁰¹ For public officials in Canada, see: Values and Ethics Code for the Public Sector, 2011, online: <<http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=25049§ion=HTML>>. For public officials in the US, see: United States Office of Government Ethics, Employee Standards of Conduct, online: <<https://www.oge.gov/Web/oge.nsf/Resources/Standards+of+Ethical+Conduct+for+Employees+of+the+Executive+Branch>>; Rules of the House of Representatives, 2015, online: <<http://clerk.house.gov/legislative/house-rules.pdf>>; Standing Rules of the Senate, 2015, online: <<http://www.rules.senate.gov/public/index.cfm?p=RulesOfSenateHome>>. For public officials in the EU see: European Parliament Code of Conduct for Members, online: <<http://www.europarl.europa.eu/atyourservice/en/20150201PVL00050/Ethics-andtransparency>>.

7.6.1 US

Various professional associations for lobbyists in the US require their members to abide by codes of ethics. Members of the Public Relations Society of America must pledge to abide by the Society's Code of Ethics, which lists professional values, such as honesty, independence and fairness, and provisions of conduct.²⁰² For example, the Code requires members to reveal causes and sponsors for interests represented, disclose financial interests in a client's organization and disclose potential conflicts of interest. The Code also includes examples of improper conduct. The Code is supplemented by Ethical Standards Advisories, which provide guidance on specific timely issues (e.g., "The Ethical Use of Interns"). The National Institute for Lobbying and Ethics (NILE) also requires members to abide by a Code of Ethics.²⁰³ The Code endorsed by the NILE is more general and emphasizes principles like honesty, integrity and avoiding conflicts of interest.

7.6.2 UK

The UK relies on professional associations to provide codes of conduct for lobbyists. Each of the three associations for UK lobbyists has its own code to which members must adhere. The CIPR's code is fairly general and consists of best practices, not prohibitions.²⁰⁴ Principles such as integrity, honesty and competency are emphasized. The CIPR's code does not prohibit the exchange of gifts or compensation between lobbyists and public officials or the employment of public officials, and also does not provide for client identity disclosure.²⁰⁵ The APPC code of conduct is more potent and prohibits lobbyists from providing financial inducements and employment to public officials.²⁰⁶ It also requires registration of clients and lobbying staff on its own registry. The PRCA's code is aimed specifically at lobbyists and requires public disclosure of clients' names.²⁰⁷ Like the APPC, the PRCA code prohibits members from hiring MPs, peers or Assembly members.²⁰⁸ The UKLR requires registrants to abide by either the APPC or CIPR codes of conduct.

²⁰² Public Relations Society of America, *PRSA Member Code of Ethics*, online: <http://www.prsa.org/AboutPRSA/Ethics/CodeEnglish/#.Vafp4_IViko>.

²⁰³ The National Institute for Lobbying and Ethics has, for the time being, adopted the Code of Ethics used by the now defunct Association of Government Relations Professionals. The code can be found online at: <<https://lobbyinginstitute.com/professional-association/about/code-of-ethics/>>.

²⁰⁴ Chartered Institute of Public Relations, "Professionalism and ethics", online: <<http://www.cipr.co.uk/content/about-us/our-organisation/code-conduct>>.

²⁰⁵ OECD (2012) at 44.

²⁰⁶ Association of Professional Political Consultants, "APPC Code of Conduct" (November 2014), online: <<http://www.appc.org.uk/code-of-conduct/appc-code-of-conduct/>>.

²⁰⁷ Public Relations and Communications Association, "Professional Charter and Codes of Conduct" (2017), online: <<https://www.prca.org.uk/about-us/pr-standards/professional-charter-and-codes-conduct>>.

²⁰⁸ Transparency International UK, *Lifting the Lid on Lobbying: The Hidden Exercise of Power and Influence in the UK* (February 2015) at 28, online: <<http://www.transparency.org.uk/publications/liftthelid/>>.

7.6.3 Canada

The first *LCC* came into force in 1997. The new *LCC* was published in the *Canada Gazette* and came into force on December 1, 2015.²⁰⁹ The recent amendments were enacted to ensure that the *LCC* was consistent with the *LA*. As with the *LA*, the objective of the *LCC* is to ensure transparency of communications between lobbyists and government. It is for this reason that the new *LCC* does not contain provisions that regulate the interactions between lobbyists and their clients. The new *LCC* also mandates respect for Canada's democratic institutions and enhanced rules regarding conflict of interest, preferential access, political activities and the provision of gifts. Under the *LA*, the Commissioner of Lobbying is required to develop a lobbyists' code of conduct²¹⁰ and has authority to "conduct an investigation if he or she has reason to believe ... that an investigation is necessary to ensure compliance with the Act or Code."²¹¹ Canada is the only jurisdiction to legislate a mandatory code of conduct for lobbyists and the *LCC* is a statutory component of the lobbyist regulation regime.²¹² The purpose of the *LCC* is to "assure the Canadian public that lobbying is done ethically and with the highest standards with a view to conserving and enhancing public confidence and trust in the integrity, objectivity and impartiality of decision-making."²¹³ Breaches of the *Code* are subject to the Commissioner's Reports on Investigation to Parliament, but the Commissioner does not have the authority to impose charges or sanctions under the *LA*.²¹⁴ The Commissioner's investigative authority extends beyond registered lobbyists and applies to all individuals who are engaged in lobbying activity that is subject to registration.²¹⁵

The Canadian Code is structured around three guiding principles: respect for democratic institutions; openness, integrity, and honesty; and professionalism. These principles animate a series of related rules:

Transparency

Identity and purpose

1. Lobbyists shall, when making a representation to a public office holder, disclose the identity of the person or organization on whose behalf the representation is made, as well as the reasons for the approach.

²⁰⁹ *Lobbyists' Code of Conduct* (2015), online <https://lobbycanada.gc.ca/eic/site/012.nsf/vwapj/LobbyistsCodeofConduct2015_En.pdf/%24FILE/LobbyistsCodeofConduct2015_En.pdf>.

²¹⁰ *Lobbying Act*, RSC 1985, c. 44 s. 10.4(1).

²¹¹ *Lobbying Act*, RSC 1985, c. 44 s. 10.2(1).

²¹² OECD (2009).

²¹³ Office of the Commissioner of Lobbying, Annual Report 2013-14 (Office of the Commissioner of Lobbying, 2014), online: <https://lobbycanada.gc.ca/eic/site/012.nsf/eng/h_00918.html>.

²¹⁴ *Makhija v Canada (Attorney General)*, 2010 FCA 342 at paras 7, 18, 414 NR 158.

²¹⁵ Office of the Commissioner of Lobbying, Annual Report 2013-14 (Office of the Commissioner of Lobbying, 2014), online: <https://lobbycanada.gc.ca/eic/site/012.nsf/eng/h_00918.html>.

Accurate information

2. Lobbyists shall provide information that is accurate and factual to public office holders. Moreover, lobbyists shall not knowingly mislead anyone and shall use proper care to avoid doing so inadvertently.

Duty to Disclose

3. Lobbyists shall inform each client of their obligations as a lobbyist under the *Lobbying Act* and the *Lobbyists' Code of Conduct*.
4. The responsible officer (the most senior paid employee) of an organization or corporation shall ensure that employees who lobby on the organization's or corporation's behalf are informed of their obligations under the *Lobbying Act* and the *Lobbyists' Code of Conduct*.

Use of Information

5. A lobbyist shall use and disclose information received from a public office holder only in the manner consistent with the purpose for which it was shared. If a lobbyist obtains a government document they should not have, they shall neither use nor disclose it.

Conflict of Interest

6. A lobbyist shall not propose or undertake any action that would place a public office holder in a real or apparent conflict of interest.

In particular:

Preferential access

7. A lobbyist shall not arrange for another person a meeting with a public office holder when the lobbyist and public office holder share a relationship that could reasonably be seen to create a sense of obligations.
8. A lobbyist shall not lobby a public office holder with whom they share a relationship that could reasonably be seen to create a sense of obligation.

Political activities

9. When a lobbyist undertakes political activities on behalf of a person which could reasonably be seen to create a sense of obligation, they may not lobby that person for a specified period if that person is or becomes a public office holder. If that person is an elected official, the lobbyist shall also not lobby staff in their office(s).

Gifts

10. To avoid the creation of a sense of obligation, a lobbyist shall not provide or promise a gift, favour, or other benefit to a public office holder, whom they are lobbying or will lobby, which the public officer holder is not allowed to accept.

7.7 Compliance and Enforcement

Sanctions are an essential component of lobbying regulation but are rarely severe enough to constitute a true deterrent.²¹⁶ Enforcement must be impartial, predictable and timely in order to be effective. Regulatory authorities must operate at arm's length from government, be sufficiently resourced and be endowed with sufficient powers to investigate infractions and enforce policy. Lax enforcement of regulation can lead to a "culture of entitlement" in government decision making.²¹⁷ Where illicit lobbying practices and corruption have become normalized or are viewed as a cost of doing business, sanctions must be paired with educational initiatives to facilitate the slow process of developing a culture of integrity. Different systems of government will generate fewer or greater opportunities for lobbying; opportunities for corruption will be correspondingly few or abundant. For example, the openness of the American legislative process fosters not only a competitive advocacy environment but also increased opportunities for illegitimate lobbying practices. It is important that legislators routinely look for evidence that those who lobby are authorized to do so.²¹⁸

In order for regulations to effectively limit corrupt practices, regulators must have the authority to investigate contraventions and apply sanctions. Sanctions may take the form of fines, imprisonment or the removal of privileges such as access to public officials. The separation between regulatory and criminal law regimes will often require regulatory authorities to hand off investigations when criminal activity is uncovered. The implications of this relationship are two-fold. Disclosure requirements must provide regulatory bodies with adequate information to assist law enforcement agencies in their investigations. In turn, law enforcement agencies must follow through with investigations and ensure that corruption offences are not overtaken by more urgent priorities.

²¹⁶ OECD (2014).

²¹⁷ Commission of Inquiry into the Sponsorship Program and Advertising Activities, Reports (Ottawa, 2005-2006) in "The Lobbyists Registration Act, its Application and Effectiveness" (2006) 2 Restoring Accountability: Research Studies 163.

²¹⁸ OECD (2009).

7.7.1 Sanctions

7.7.1.1 US

The *HLOGA* instituted a prohibition of gifts or travel by registered lobbyists to members of Congress and Congressional employees.²¹⁹ The Secretary of the Senate and Clerk of the House of Representatives are responsible for verifying the accuracy, completeness and timeliness of registration and reports.²²⁰ They must notify any lobbyist in writing that may be in non-compliance.²²¹ If the lobbyist or lobbying firm fails to provide an appropriate response, the United States Attorney for the District of Columbia must be alerted within 60 days of the original notice.²²² The aggregate number of registrants cited for non-compliance is publically available online.²²³ Any individual who fails to remedy a defective filing within 60 days of notice, or otherwise fails to comply with the *LDA*, may be subject to a fine not exceeding US\$200,000.²²⁴ Any individual who knowingly and corruptly violates the *LDA* may be subject to a period of incarceration not exceeding five years.²²⁵

The Public Relations Society of America and the National Institute for Lobbying and Ethics have no enforcement mechanisms for their codes of ethics. Both will revoke membership if an individual is convicted of an offense involving lobbying activities. The Society justifies its lack of internal enforcement and punishment by pointing out the expense and difficulty of enforcement in the past. Instead, the Society now focuses on promoting and inspiring ethical values through its Code of Ethics and professional development programs.

7.7.1.2 UK

Under the *TLA*, lobbyists commit an offence if they engage in consultancy lobbying without joining the registry or while their entry in the register is incomplete or inaccurate.²²⁶ Failing to submit complete, accurate quarterly returns on time is also an offence.²²⁷ If convicted of an offence under the *Act*, offenders are liable for a fine. The Registrar may also impose civil penalties for conduct amounting to an offence, in which case no due diligence defence is

²¹⁹ *Honest Leadership and Open Government Act of 2007*, Pub L No 110-81, § 206, 121 STAT 735.

²²⁰ *Lobbying Disclosure Act*, Pub L No 104-65, § 6(2), 109 STAT 691.

²²¹ *Lobbying Disclosure Act*, Pub L No 104-65, § 6(7), 109 STAT 691.

²²² *Lobbying Disclosure Act*, Pub L No 104-65, § 6(8), 109 STAT 691.

²²³ *Honest Leadership and Open Government Act of 2007*, Pub L No 110-81, § 210, 121 STAT 735.

²²⁴ *Ibid*, Pub L No 110-81, § 211(a)(2), 121 STAT 735.

²²⁵ *Ibid*, Pub L No 110-81, § 211(b), 121 STAT 735.

²²⁶ *Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014* (UK), c. 4, s. 12(1) and (2).

²²⁷ *Ibid* at s. 12(3).

available.²²⁸ Civil penalties may not exceed £7500.²²⁹ TI UK has criticized this sanction as lacking in deterrent power.²³⁰

The three professional associations for lobbyists in the UK can investigate complaints and impose sanctions for member violations of their codes of conduct. Approximately four formal complaints and 20-30 informal complaints are received each year by the CIPR, with most resolved through confidential conciliation agreements.²³¹ If conciliation is unsuccessful, a Complaints Committee takes over, or a Disciplinary Committee for particularly egregious conduct. Committee members are drawn from outside the public relations industry and committees can request information and call witnesses. From 2007-2012, the CIPR's Complaints Committee dealt with only one lobbying-related hearing, and the Disciplinary Committee conducted only two hearings between 2002 and 2012.²³² Potential sanctions include reprimands, an order to repay fees for work involved in the complaint, an order to pay the CIPR's costs for the complaint process, or expulsion from the CIPR.²³³ The APPC's professional practices panel investigates complaints and can call witnesses and evidence and conduct disciplinary hearings. Investigations are rare and sanctions are similar to those available for breaches of the CIPR code of conduct. The scarcity of complaints and toothless nature of the available sanctions contributed to the finding that self-regulation in the UK was inadequate following the 2009 Public Administration Select Committee inquiry.²³⁴

7.7.1.3 Canada

The *LA* contains various penalties and sanctions. It is an offence to fail to file a required return or knowingly make a false or misleading statement in a return.²³⁵ Authorities may proceed summarily or by indictment. On summary conviction, contraventions may be subject to a fine not exceeding CAD\$50,000 or imprisonment for a term not exceeding six months.²³⁶ On proceedings by way of indictment, contraventions may be subject to a fine not exceeding CAD\$200,000 or imprisonment for a term not exceeding two years.²³⁷ Individuals

²²⁸ *Ibid* at s. 14.

²²⁹ *Ibid* at s. 16.

²³⁰ Transparency International UK, *Lifting the Lid on Lobbying: The Hidden Exercise of Power and Influence in the UK* (February 2015) at 32, online: <<http://www.transparency.org.uk/publications/liftheid/>>

²³¹ OECD (2012) at 44.

²³² *Ibid*.

²³³ Chartered Institute of Public Relations, "Complaints", online: <<http://www.cipr.co.uk/content/membership-groups/complaints>>.

²³⁴ Katy Budge & Marina Kaur-Channing, "United Kingdom: Developing lobbying regulation in an open government context" in OECD, *Lobbyists, Governments and Public Trust, Volume 3: Implementing the OECD Principles for Transparency and Integrity in Lobbying* (OECD, 2014) at 217, online: <<http://www.oecd.org/gov/lobbyists-governments-and-public-trust-volume-3-9789264214224-en.htm>>.

²³⁵ *Lobbying Act*, RSC 1985, c. 44 s. 14(1).

²³⁶ *Ibid* at s. 14(1)(a).

²³⁷ *Ibid* at s. 14(1)(b).

convicted of an offence under the *LA* may be prohibited from lobbying for up to two years.²³⁸ The first conviction under the *LA* was in 2013-14.²³⁹ In total, the Commissioner of Lobbying has referred 14 cases to police for investigation and as of March 31, 2016 three court cases were pending.²⁴⁰ As discussed, the *LCC* allows broad discretion for the Commissioner to investigate unscrupulous activity. This investigative authority extends beyond individuals who have registered and applies to all parties who undertake lobbying activity. Violations are subsequently reported to Parliament, encouraging compliance through the specter of ‘naming and shaming’ unscrupulous lobbyists.

7.7.2 Education Programs

Education programs are less expensive than monitoring, investigating and prosecuting misconduct, and the OECD suggests that they may also be more effective.²⁴¹ These initiatives promote the legitimate role of lobbying in government decision making and alert public officials and lobbyists to registration requirements and codes of conduct. Professional and industry associations may mandate ethics training as a condition of membership.

7.7.2.1 US

As in the UK, professional associations like the Public Relations Society of America provide ethical training to lobbyist members. At the state level, lobbyists in Louisiana are required under statute to complete yearly training on the Louisiana Code of Governmental Ethics.²⁴²

7.7.2.2 UK

In the UK, there is no mandatory ethics or integrity training for lobbyists or public officials. Resistance to such training exists among public officials, partly due to potential exposure to ridicule for spending public money on the development of ethical behaviour.²⁴³ However, TI UK recommends the institution of mandatory training.²⁴⁴ The UK’s three professional associations provide training and education for lobbyists. The CIPR holds voluntary education events and classes and also runs industry-recognized certificate and diploma

²³⁸ *Ibid* at s. 14.01.

²³⁹ Office of the Commissioner of Lobbying, Annual Report 2013-14, (Office of the Commissioner of Lobbying, 2014), online: <https://lobbycanada.gc.ca/eic/site/012.nsf/eng/h_00918.html>.

²⁴⁰ Office of the Commissioner of Lobbying, Annual Report 2015-16 (Office of the Commissioner of Lobbying, 2016), online: <<https://lobbycanada.gc.ca/eic/site/012.nsf/vwapj/OCL-AR15-16.pdf/%24FILE/OCL-AR15-16.pdf>>.

²⁴¹ “Management Representation Statement”, Report on Plans and Priorities (Office of the Registrar of Lobbyists, 2007).

²⁴² R.S. 42:1170(4)(a) and (b).

²⁴³ Transparency International UK, *Lifting the Lid on Lobbying: The Hidden Exercise of Power and Influence in the UK* (February 2015) at 22, online: <<http://www.transparency.org.uk/publications/liftthelid/>>.

²⁴⁴ *Ibid* at 7.

programs that incorporate ethical training. The APPC conducts three voluntary training sessions per year focused on the code of conduct.²⁴⁵

7.7.2.3 Canada

In Canada, the Office of the Commissioner of Lobbying provides training sessions to help lobbyists understand the requirements and functioning of the reporting system. Each registrant in Canada is also assigned a Registration Advisor who provides guidance and individual support to lobbyists. As a matter of policy, the Office contacts every new registrant to introduce them to their Registration Advisor and inform them of their obligations. The Office also meets regularly with federal public officials and management teams in federal departments and agencies.

7.7.3 Revolving Door

The ‘revolving door’ between the political world and the lobbying world threatens the integrity of lobbyists and public confidence in government.²⁴⁶ Revolving door provisions are intended to limit pre- and post-employment conflicts of interest.²⁴⁷ The OECD defines conflict of interest as “a conflict between the public duty and private interests of a public official, in which the public official has private interests which could improperly influence the performance of their official duties and responsibilities.”²⁴⁸ If former lobbyists are free to assume public sector roles, there is a risk of regulatory and institutional capture. If former public officials are free to assume positions as lobbyists, they may gain preferential access to current decision makers. To prevent potential conflicts of interest, revolving door provisions must prescribe adequate “cooling-off” periods. These periods prohibit public officials from negotiating future lobbying jobs while in office or undertaking roles in the influence industry and lobbyists from assuming public sector roles until the proscribed duration has expired.

7.7.3.1 US

The *LDA* contains limited revolving door provisions. Under the *LDA*, individuals who have aided a foreign entity in any trade negotiation or dispute with the US are ineligible for appointment as United States Trade Representative or Deputy United States Trade Representative.²⁴⁹ As amended by the *HLOGA*, the *United States Code (USC)* provides

²⁴⁵ OECD (2012) at 44.

²⁴⁶ Transparency International UK, (February 2015) at 48-52.

²⁴⁷ In the OECD’s report *Government at a Glance 2015* (2015), the under-regulation of pre-public employment in most member countries is criticized. Only 7 OECD countries impose restrictions on public officials who have worked in the private sector, worked for suppliers to government, lobbied government or negotiated public contracts on behalf of private companies prior to public employment. By contrast, 22 OECD countries impose rules or procedures for post-public employment.

²⁴⁸ OECD, *Guidelines for Managing Conflicts of Interest in the Public Service* (OECD, 2003) at 10.

²⁴⁹ *Lobbying Disclosure Act*, Pub L No 104-65, § 21(b)(3), 109 STAT 691.

extensive post-employment restrictions for past public officials. Generally, the *USC* prohibits any person who is a former officer or employee of the executive branch of the US from communicating or appearing before a current public official, with intent to influence that public official on matters in which the former public official participated substantially and personally, for a period of two years.²⁵⁰ Notably, the *USC*, as amended by the *HLOGA*, allows former lawmakers to assume lobbying activities provided they do not personally contact current legislators. The *USC* prohibitions were reinforced by a 2009 Presidential Executive Order that requires all executive agency appointees to sign an ethics pledge.²⁵¹ This pledge contains four revolving door prohibitions:

- **All Appointees Entering Government.** I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts.
- **Lobbyists Entering Government.** If I was a registered lobbyist within the 2 years before the date of my appointment, in addition to abiding by the limitations of paragraph 2, I will not for a period of 2 years after the date of my appointment:
 - (a) participate in any particular matter on which I lobbied within the 2 years before the date of my appointment;
 - (b) participate in the specific issue area in which that particular matter falls; or
 - (c) seek or accept employment with any executive agency that I lobbied within the 2 years before the date of my appointment.
- **Appointees Leaving Government.** If, upon my departure from the Government, I am covered by the post-employment restrictions on communicating with employees of my former executive agency set forth in section 207(c) of title 18, United States Code, I agree that I will abide by those restrictions for a period of 2 years following the end of my appointment.
- **Appointees Leaving Government to Lobby.** In addition to abiding by the limitations of paragraph 4, I also agree, upon leaving Government service, not to lobby any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration.

The Executive Order is remarkable for two reasons. First, former public officials are prohibited from lobbying not only their former department or agencies, but the entire Executive Branch of government. Second, ‘reverse’ revolving door provisions restrict, for the first time, the ability of lobbyists entering the public service from helping former clients. Legislation in neither Canada nor the EU contains similar ‘reverse’ revolving door provisions.

²⁵⁰ *Honest Leadership and Open Government Act of 2007*, Pub L No 110-81, § 101, 121 STAT 735.

²⁵¹ Executive orders have no jurisdiction over the legislative branch. They remain effective only as long as the issuing President remains in office. The 2009 Executive Order will expire with the end of the Obama Administration.

7.7.3.2 UK

In the UK, revolving door regulation applies to all Crown servants for two years after the last day of paid service. Senior officials are subject to an automatic cooling-off period of three months for all outside employment, which can be extended to two years or waived in certain situations. Senior officials are also prohibited from lobbying the government for two years after they leave their posts. In some situations, more junior officials will also require authorization to take new appointments in the two-year period after leaving their posts, including when potential employment involves lobbying the government. The Advisory Committee on Business Appointments implements the rules and provides advice.²⁵² TI UK argues that this regime is inadequate, stating:²⁵³

Senior civil servants and ministers are required to consult the Advisory Committee on Business Appointments (ACoBA) before taking up appointments. ACoBA can impose waiting periods on individuals, so that they cannot take up appointments until a certain period after leaving office, and can advise that appointments should only be taken on condition that the individual will not engage in lobbying former colleagues. However, the Committee is only an advisory body. There is nothing to stop individuals from ignoring its advice.

A series of high-profile scandals suggest that the ACoBA regime is not working. In March 2010, Channel 4's Dispatches documentary showed secret recordings of several MPs and former Ministers offering their influence and contacts to journalists posing as representatives of a potential corporate employer, interested in hiring them for lobbying work. One former Cabinet Minister, Stephen Byers, said "I'm a bit like a sort of cab for hire" and offered examples of how he had used his influence and contacts in the past. [endnotes omitted]

7.7.3.3 Canada

In Canada, DPOHs are subject to the *LA*'s five-year prohibition on lobbying after they leave office.²⁵⁴ This period begins when the DPOH ceases to carry out the functions of their employment. Anyone who violates the five-year cooling-off period commits an offence and is liable on summary conviction to a fine not exceeding CAD\$50,000.

²⁵² Alliance for Lobbying Transparency and Ethics Regulation, *Blocking the revolving door: Why we need to stop EU officials becoming lobbyists* (ALTER-EU, November 2011) at 27, online: <http://www.alter-eu.org/sites/default/files/AlterEU_revolving_doors_report.pdf>.

²⁵³ Transparency International UK, *Fixing the Revolving Door between Government and Business* (2012) at 3, online: <http://www.transparency.org/files/content/pressrelease/20110517_UK_Revolving_Door_EN.pdf>.

²⁵⁴ *Lobbying Act*, RSC 1985, c. 44 s. 10.1(1). Former public officials may apply to the Commissioner for an exemption from the five-year post-employment ban. The Commissioner will consider whether granting the exemption would be in keeping with the purpose of the *LA*.

8. COMPARISON WITH LOBBYING REGULATION IN EUROPEAN UNION INSTITUTIONS

Brussels boasts the second-highest density of lobbyists in the world, second only to Washington, DC.²⁵⁵ Lobbying regulation for EU institutions is distinct from that of the US, UK and Canada. The Transparency Register (TR) for lobbyist disclosures is a joint initiative of the European Parliament (EP) and European Commission (EC). It was launched in 2011 under Article 27 of the *Interinstitutional Agreement on the Transparency Register (IIA)*.²⁵⁶ Registrants must comply with the Code of Conduct for Interest Representatives (CCIR), which is codified in Annex III of the *IIA*. The European Council is not a party to the *IIA* and the TR does not extend to lobbying undertakings with the Council.

Unlike the registers in the US, UK and Canada, registration with the TR is voluntary but incentivized. The TR is an example of an institutional register, meaning it provides registrants with access to government institutions.²⁵⁷ Registrants gain access to EC and EP premises, as well as other advantages such as opportunities to participate as speakers in committee hearings.²⁵⁸ In order to be eligible to register, individuals and entities must meet the activity-based definition of lobbying in the *IIA*, which includes any “activities ... carried out with the objective of directly or indirectly influencing the formulation or implementation of policy and the decision-making processes of the EU institutions.”²⁵⁹ This definition of lobbying includes communications with a broader range of government officials than the US, UK and Canada. The *IIA* provides specific examples of lobbying activities, such as organizing events to which Members, officials or staff of EU institutions are invited. However, like the UK’s *TLA*, the TR has been criticized for under-inclusiveness, as registration can be avoided by conducting meetings away from EU premises and strategically not including lobbyists in expert groups.²⁶⁰ Also, just as formal meetings are emphasized in the *TLA*, the EU’s TR focuses on formal engagement with EU institutions, such as appearances before parliamentary and administrative committees, rather than informal communications.

²⁵⁵ Transparency International (2015).

²⁵⁶ EC, *Agreement between the European Parliament and the European Commission on the transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation* [EC Agreement, (2014)] OJ, L277/11, online: <[http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014O0919\(01\)&from=en](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014O0919(01)&from=en)>.

²⁵⁷ Markus Krajewski, *Legal Framework for a Mandatory EU Lobby Register and Regulations* (Vienna Chamber of Labour, 2011), online: <http://www.foeeurope.org/sites/default/files/news/foee_legal_framework_mandatory_eu_lobby_register.pdf>.

²⁵⁸ EC Agreement, (2014), OJ, L277/11 at 15.

²⁵⁹ *Ibid* at 12.

²⁶⁰ OECD (2009).

After registration, registrants will be considered lobbyists and will be bound by the CCIR. Registrants are also required to self-identify as a certain type of lobbyist or entity, such as in-house lobbyists, think tanks or NGOs.

Registration imports mandatory annual disclosure requirements. Along with general contact and company information, lobbyists must disclose information on their lobbying activities and costs, including their lobbying objectives, fields of interest and targeted policies and legislative proposals. The Register also provides information on specific activities in which the registrant engages, such as the registrant's EU initiatives or participation in EU structures and platforms like expert groups. Unlike the registers in the US, UK and Canada, the clients of lobbying firms are not disclosed. The Register is available online in a searchable database.²⁶¹

Violations are punished by removal from the Register and resultant loss of incentives. Serious violations and noncompliance with the CCIR can be punished by removal for up to two years. Unlike the regimes in the US, UK and Canada, since registration is voluntary, failure to comply is not an offence and is not punishable by fines or incarceration.

9. CONCLUSION

Lobbying regulation is often enacted in the wake of political scandal. Public decision making and confidence in government stand to benefit from policy that is forward-looking and proactive, rather than reactionary.²⁶² The American approach sets a high standard for disclosure, and the Canadian regime is commendable. More stringent financial disclosure requirements would enhance the integrity of the Canadian regime. The UK's lobbying legislation would benefit from a broader definition of lobbying activity and more demanding and detailed disclosure requirements. Transparency in the EU would be greatly improved with the adoption of a mandatory registry; mandatory disclosure is the single most effective way to ensure standards of behaviour in lobbying, reduce corruption and promote confidence in public office. If a mandatory registry is adopted, the European Council should be a signatory.

The effectiveness of a lobbying regulatory regime demands that stakeholders are aware of responsibilities and obligations, and that enforcement mechanisms are objective and robust. American pluralism has produced a unique community of civil society watchdog groups that monitor lobby activity generally and in specific policy fields. These groups promote competency and understanding of lobbying regulations. Similar groups exist in Canada and the EU; however, in these jurisdictions the government has a greater responsibility to undertake education and awareness initiatives.

²⁶¹ Official Website of the European Union, "Transparency Register", (January 2017), online: <http://ec.europa.eu/transparencyregister/public/consultation/listlobbyists.do?locale=en&reset=>>.

²⁶² OECD (2014).

Lobbying remains an important component of democracy and will surely continue to operate as a mechanism for citizens to communicate with public officials and governments to acquire information from special interest groups. As jurisdictions such as Canada, the US, the UK and the EU continue to improve upon their regulatory regimes, globalization will cause expectations to develop amongst diplomatic and economic partners. While nations with fledgling lobbying policy can benefit from lessons learned in other regions, lawmakers must be mindful of domestic requirements and traditional relationships between government, commercial interests and the public at large. Nonetheless, in order for lobbying to maintain public legitimacy and promote principles of good governance, regulation must have clearly defined application and standards for information collection and disclosure that encourage compliance, and should integrate harmoniously within the broader regulatory and legal regime.