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Third Submission to the Commissioner of Lobbying's Consultation on Changes to the *Lobbyists' Code of Conduct*

(June 2022)

NOTE: Click here to download Democracy Watch's first submission made in December 2020. Click here to download its second submission made in February 2022.

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A. Summary: Loopholes and Commissioner's Weak Enforcement Causing Most Problems with *Lobbyists' Code*

As set out in Democracy Watch's first submission and second submission, most of the problems with the *Lobbyists' Code of Conduct* (the "*Code*")[1] that has been in place since December 1, 2015 exist because of huge loopholes in the *Lobbying Act*[2] that allow for secret, unregistered lobbying and, as a result, also unethical lobbying as the *Code* does not apply to unregistered lobbying, and key loopholes in the ethics rules for federal public office holders that create loopholes in the application of the gifts and conflict of interest sections of the *Code*.

The other problems with the *Code* have, very unfortunately, been created by negligent and legally incorrect enforcement by new Commissioner of Lobbying Nancy Bélanger, including especially a failure to enforce the enforceable Principles in the current *Code*, and a failure to enforce key ethics Rule 6 in the current *Code* which prohibits any action or proposed action by a lobbyist that places an office holder in even an apparent conflict of interest. Commissioner Bélanger's lack of enforcement very unfortunately continues the long history of negligently weak and secretive enforcement of the *Code* since it was enacted in 1997 by former Ethics Counsellor Howard Wilson, former Registrar of Lobbyists Michael Nelson, and former Registrar and Commissioner of Lobbying Karen Shepherd.

The current *Lobbyists' Code of Conduct* can be viewed by clicking here, and the latest draft of the Commissioner of Lobbying's proposed new *Lobbyists' Code* that was posted on her website in May 2022 can be viewed by clicking here. The Commissioner's initial December 2021 draft new Code can be viewed by clicking here, and the responses by stakeholders to that initial draft can be viewed by clicking here. The Commissioner's initial December 2020 consultation document, and responses by stakeholders to it, can be viewed by clicking here.[3]

The following is the list of changes needed to the latest draft of the Commissioner's proposed new *Code* because the latest draft:

- will delete much-needed rules from the current *Code* or narrow existing rules, and;
- will also create loopholes that will allow for even more unethical lobbying and corrupt favour-trading than is currently allowed, including lobbying right after a lobbyist fundraises or campaigns for politician or party up to nearly full-time during a campaign or other time period.

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[1] See the *Lobbyists' Code of Conduct* at: https://lobbycanada.gc.ca/en/rules/the-lobbyists-code-of-conduct/lobbyists-code-of-conduct/.
[2] *Lobbying Act* (R.S.C., 1985, c. 44 (4th Supp.)). See it at: https://laws-lois.justice.gc.ca/eng/acts/l-12.4/.
[3] All of these links will work only as long as the Commissioner's office maintains the webpages on its website.

B. Responses to the Commissioner's Proposed new *Lobbyists' Code*

1. Add anti-avoidance rule as Rule 1

As noted in its first and second submissions, an anti-avoidance rule exists in the current *Code*, as the current Principles are enforceable as the former Commissioner, Registrar and courts have ruled,[4] and the current "Professionalism" Principle requires lobbyists to "conform fully with the letter and the spirit of the *Lobbyists' Code of Conduct* as well as with all relevant laws, including the *Lobbying Act* and its regulations."

As in any law, an anti-avoidance rule is needed simply to prohibit anti-avoidance actions that are aimed at "legalizing" violations of the *Code*. As a result, a new Rule 1 should be added to the new *Code*, right at the top to remind lobbyists that there is no way to escape complying with the *Code*, and that there will be zero tolerance for violations of the *Code*. The new Rule 1 should be similarly worded as the current Professionalism Principle, or worded as a standard anti-avoidance clause is by prohibiting any action or arrangement that is designed to exploit technical or other gaps in the *Code*'s rules in order to violate the *Code*.

2. Re: Proposed Rule 1.1: Require disclosure to officials of apparent conflicts of interest

In order to fulfill the Objectives and "Respect for Government Institutions" Expectation set out in the proposed new *Code* that say no lobbying should ever take place when there is even the appearance of a conflict of interest, and in order to help ensure officials comply with their ethics rules, Rule 1.1 of the proposed new *Code* should be changed to add at the end the following additional requirement:

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[4] Former Commissioner Shepherd, and the former Registrar of Lobbyists, concluded that the Principles were enforceable, and enforced them, and those rulings were upheld in the Federal Court (FC) and Federal Court of Appeal (FCA). A Principle in the Code was enforced in all four February 2007 rulings by the former Registrar on the activities of Neelam J. Makhija at: https://lobbycanada.gc.ca/en/investigations/reports-on-investigation/. Also see on that page the following rulings in which one or more Principles of the Code were enforced: *The lobbying activities of Bruce Rawson*; *The lobbying activities of Paul Ballard*; *The lobbying activities of Graham Bruce*; *The lobbying activities of Mark Jiles*; *The lobbying activities of GPG-Green Power Generation Corp. and Patrick Glémaud and Rahim Jaffer*; *The lobbying activities of Keith Beardsley*; *The lobbying activities of Julie Couillard*;*The lobbying activities of Trina Morissette*. See also *Makhija v. Canada (Attorney General)*, 2010 FC 141 (CanLII), <http://canlii.ca/t/28112>, at para. 45. Also seethe FC's ruling in *Democracy Watch v. Campbell*, 2009 FCA 79 (CanLII), [2010] 2 FCR 139, <http://canlii.ca/t/22vcj>, at para. 9, and the FCA's ruling in *Makhija v. Canada (Attorney General)*, 2010 FCA 342 (CanLII), <http://canlii.ca/t/2f3ql>.

"When you lobby, inform the official of your relationship with, or past political activities connected to, any other official who may be involved or may become involved in the decision-making process you are communicating in respect of, if the relationship and/or the political activities could reasonably be seen to create a sense of obligation or appearance of a conflict of interest on the part of the office holder."

3. Re: Proposed Rule 2.1: Ensure honesty prohibition applies to all communications by lobbyists

Add at the end of the Commissioner's proposed new "Integrity and honesty" Rule 2.2, add the words "including in any communication technique as defined in clause 5(2)(j) of the *Lobbying Act* or advertising related in any way to a lobby effort or lobbying an official" to ensure that all lobbyists are clearly aware that they are prohibited from communicating false claims in any way to an official or to the public.

4. Re: Proposed Rule 2.2: Require disclosure of confidential information obtained to authorities

While it is good that the Commissioner has added Rule 2.2 to the latest draft of the proposed new *Code*, which is similar to current *Code* Rule 5, it is not enough to trust a lobbyist not to use or share confidential information provided by an official. And Rule 2.2 as currently drafted fully trusts the lobbyist as it establishes an unrealistic standard that relies entirely on the lobbyist's honour not to act in a self-interested way after obtaining the secret information, especially given that no one will know that the lobbyist has the information except the official who provided it.

In order to ensure compliance with proposed Rule 2.2, and help ensure compliance with official's obligations in their ethics rules not to give preferential treatment to anyone or any entity and not to share confidential government information, the following built-in compliance measures should be added at the end of Rule 2.2:

"and the lobbyist shall not retain the information if it is in the form of a record, and shall return the record to the head of the institution that created the record and inform them, and the Information Commissioner of Canada and the Public Sector Integrity Commissioner, who provided the record or information to them."

5. Re: Proposed Rule 3: Only allow one low value gift to an official during a lobbying effort or, even better, ban all gifts

The simplest and most effective solution, given that testing of thousands of people around the world by psychologists has shown that even small gifts

and favours influence decisions,[5] is to ban all gifts from lobbyists to public office holders.

The other option is to set a very low limit for a gift that can be given by all the lobbyists involved in a lobbying effort to all the office holders involved in the decision that is targeted by the lobbying effort. Proposed Rule 3 of the new *Code* does not do this, as it still allows firms and organizations that employ dozens of lobbyists to give dozens of gifts annually (one gift worth $30 per lobbyist or employee per year) to each of the officials involved in a decision-making process.

To prevent this giving of multiple gifts that could amount to hundreds of dollars of gifts given to each official each year of a decision-making process, the following sentence must be added at the end of the Commissioner's new proposed Rule 3:

> "In total, only one thing of low value is permitted to be given during any 12-month period by all lobbyists at a lobbying firm, or by anyone involved in any lobbying effort, to all of the office holders (and their staff) involved in a decision targeted by the lobbying effort."

6. Re: Proposed Rule 4: Only allow one instance of low-value hospitality to an official during a lobbying effort or, even better, ban all hospitality

For the same reasons as set out above re: proposed Rule 3, the simplest and most effective solution is to ban all hospitality.

If low-level hospitality is allowed, only one instance should be allowed each year in total by all lobbyists at a firm or all lobbyists involved in a lobbying effort. To prevent this multiple hospitality events that could amount to hundreds of dollars of wining and dining of each official each year of a decision-making process, the following sentence must be added at the end of the Commissioner's new proposed Rule 4:

> "In total, only one instance of hospitality of low value is permitted to be given during any 12-month period by all lobbyists at a lobbying firm, or by anyone involved in any lobbying effort, to all of the office holders (and their staff) involved in a decision targeted by the lobbying effort."

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[5] Link is to Alix Spiegel, "Give And Take: How The Rule Of Reciprocation Binds Us," NPR.org, November 26, 2012, online: <https://www.npr.org/sections/health-shots/2012/11/26/165570502/give-and-take-how-the-rule-of-reciprocation-binds-us>. See also Robert Cialdini and Noah Goldstein, "The Science and Practice of Persuasion," (2002) 43(2) *Cornell Hotel and Restaurant Administration Quarterly* 40 at 44; Robert Cialdini and Steve Martin, Science of Persuasion, online video: https://www.youtube.com/watch?v=cFdCzN7RYbw/; Robert Cialdini and Steve Martin, "The Power of Persuasion," (2006) Dec. *Training Journal* 40 at 41.

7. Re: Proposed Rule 5: Do not dilute the definition of "close relationship" any further

The current definition of "close relationship" in the Appendix should not be diluted any further than it has been in the latest draft of the *Code* compared to the initial draft of the proposed new *Code*.

8. Re: Proposed Rule 6: Add "a real apparent conflict of interest" to the Rule

As set out in the joint letter submitted to the Commissioner by Democracy Watch and 13 other organizations with total supporters of more than one million Canadians, proposed Rule 6 must be changed by adding the words "or a real or apparent conflict of interest" after the words "sense of obligation" to make Rule 6 consistent with the statements in the Objectives and the "Respect for Government Institutions" Expectation in the proposed new Code, both of which clearly prohibit lobbying when a real or apparent conflict of interest exists.

9. Re: Proposed Rule 6: Add "or their party" to the Rule

The words "or, if they are an elected official, their political party" should be added after the words "for the benefit of the official" to make it more clear that assisting a party creates an appearance of the conflict of interest and sense of obligation on the part of everyone elected under the party banner. Research clearly shows that assisting a party's central campaign is a major assistance to every candidate, and that few voters vote based on who the local candidate is.[6]

10. Re: Proposed Rule 6: Add "even before you registered as a lobbyist" to the Rule

The cooling-off periods should clearly apply to lobbyists who were not registered lobbyists under the *Lobbying Act* when they undertook the political activities. If this is not the case, it creates a huge loophole in the *Code* that will allow for unethical lobbying.

As a result, the words "even before you registered as a lobbyist" must be added to proposed Rule 6 after the words "you have done for the benefit of the official".

[6] Allen Stevens, B., Islam, M., De Geus, R., Goldberg, J., McAndrews, J., Mierke-Zatwarnicki, A., . . . Rubenson, D., "Local Candidate Effects in Canadian Elections," (2019) 52(1) *Canadian Journal of Political Science* 83.

This clarification is needed because Commissioner Bélanger ruled incorrectly in her Bergen and O'Born rulings[7] that some of their political activities were not covered by current Rule 9 because they did those activities before they registered as lobbyists. Even though all of their activities were still taken into account under current Rule 6, it makes no sense to have a gap between the application of Rule 6 and the application of Rule 9 to a lobbyist's activities. **See** subsection B.3(e) in Democracy Watch's second submission for more details about this loophole.

11. Re: Proposed Rule 6: Do not allow reductions in the cooling-off periods

As set out in the joint letter submitted to the Commissioner by Democracy Watch and 12 other organizations with total supporters of more than one million Canadians, proposed Rule 6 must be changed to remove the power of the Commissioner to grant exemptions to the cooling-off periods.

12. Re: Proposed Rule 6 Appendix definitions: Increase the cooling-off period to 10 years, except for occasional canvassing or volunteering

As set out in the joint letter submitted to the Commissioner by Democracy Watch and 12 other organizations with total supporters of more than one million Canadians, the cooling-off periods for the activities listed in the definitions of "political work" and "other political work" in the Appendix of the latest draft of the proposed new *Code* should be extended to 10 years, not reduced (as the draft proposes) to no time or one or two years.

The definitions of "political work" and "cooling-off periods" set out in the "Political Work" in the Appendix essentially say that a person only has a two-year cooling-off period from lobbying after essentially being a senior campaign official and/or organizing fundraising efforts and/or developing or coordinating political research (including polling), data analysis, messaging or advertising and/or organizing campaign, candidate or party event.

The definition of "other political work" and "cooling-off periods" set out in the "Political Work" in the Appendix essentially say that a person only has a one-year cooling-off period from lobbying after essentially being less than a nearly full-time assistant campaign official, office manager, researcher, pollster or event organizer and/or campaigning through distributing campaign materials and/or fundraising through soliciting donations (known as a "bundler" in the U.S.) and/or canvassing up to nearly full time.

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[7] *Investigation Report: Benjamin Bergen, Council of Canadian Innovators*, https://lobbycanada.gc.ca/media/1857/investigation-report-benjamin-bergen-en.pdf, at pages 6-7. *Investigation Report: Dana O'Born, Council of Canadian Innovators*, https://lobbycanada.gc.ca/media/1850/investigation-report-dana-oborn-en.pdf, at pages 6-7.

The definition of “other political work” also essentially says, incredibly, that if a person does any of those activities anything less than nearly full-time, or without frequent contact with the candidate or party official, then they won’t have any cooling-off period from lobbying.

These proposed no time, one- and two-year cooling-off periods will allow for rampant unethical lobbying and corrupt favour-trading, as lobbyists fundraise and campaign for politicians and parties full-time or up to nearly full-time, and then cash in on their favours right after, or soon after, they have done these huge favours.

Another important point is that the federal *Conflict of Interest Act*[8] (which applies to Cabinet ministers, their staff, Cabinet appointees and top government officials) and the *Conflict of Interest Code for Members of the House of Commons*[9] (which applies to MPs) both prohibit taking part in a decision-making process if it will "improperly further the interests of another person or entity." This is a key, overriding ethics rule for Cabinet ministers, their staff and MPs. But if the cooling-off periods are gutted to allow lobbying right after, or 1-2 years after, a lobbyist fundraises or campaigns in a significant way for a politician or party, it will then make it "proper" for the politician (Cabinet minister or MP) and their staff to take part in decisions that affect the lobbyist and the lobbyist's clients or organization.

In other words, gutting key ethics rules for lobbyists will also gut key ethics rules for Cabinet ministers, their staff, and top government officials, and for MPs.

The *Guidance* document on current *Code* Rule 9 (re: Political Activities) that was issued by former Commissioner Karen Shepherd in summer 2016 (after the current *Code* came into force in December 2015)[10] is still available through the Internet Archive site at: https://web.archive.org/web/20160815213919/https://lobbycanada.gc.ca/eic/site/012.nsf/eng/01182.html/[11] states clearly that Commissioner Shepherd required a cooling-off period of five years after political activities like those listed in the proposed new Code’s definitions of “political work” and “other

[8] *Conflict of Interest Act* (S.C. 2006, c. 9, s. 2).
[9] See the MP *Code* at: https://www.ourcommons.ca/about/standingorders/appa1-e.htm.
[10] As noted in the “Guidance on the Lobbyists’ Code of Conduct” section of Commissioner Shepherd’s 2015-2016 Annual Report, online <https://lobbycanada.gc.ca/en/reports-and-publications/annual-report-2015-2016/#toc3-2-2>.
[11] If this link does not work, insert the old URL for the former Commissioner’s Guidance on Rule 9 https://lobbycanada.gc.ca/eic/site/012.nsf/eng/01182.html/ into the Internet Archive website’s WayBackMachine and check the Commissioner’s site update from August 15, 2016.

political work." As Commissioner Shepherd's *Guidance* document says under the heading "The risk diminishes over time":

> When a lobbyist has carried out political activities that pose a risk of creating a sense of obligation, the Commissioner is of the view that five years is a sufficient period of time to wait before lobbying the public office holder and/or his or her staff, in order to avoid creating a conflict of interest for that public office holder.[12] [emphasis added]

This is not to say that Commissioner Shepherd made a strong case for a five-year cooling-off period. Likely it was simply based on the five-year period set out in section 10.11 of the *Lobbying Act* during which, after they leave office, a former public office holder is prohibited from being a registered lobbyist.

The length of the time period should be based on an actual assessment of the depth of the sense of obligation someone would feel to someone who helps them obtain a very well-paying job (as the salaries of MPs are in the top five percent salaries of all jobs in Canada, and a Cabinet minister's salary is in the top one percent), as that is what people who help federal candidates win elections are doing. And when someone helps a party leader and the party win the election, they are also helping that person obtain an enormous amount of power.

Again, as with proposed new Rule 3 (gifts) and 4 (hospitality) discussed in above, this assessment must take into account the fact that testing of thousands of people around the world by psychologists has shown that even small gifts and favours influence decisions.[13] Helping someone win a very well-paying job is a huge favour that results in a lot of influence. Why would a politician's sense of obligation to someone who helps them win election ever disappear while they remain a politician? They arguably owe that person for their entire career, especially if they happen to be in a "safe" electoral district in which the party they represent has always won elections. In that situation, anyone who helped them win their first election helped them obtain a very well-paying job for the rest of their life.

Based on these factors, and others, former Commissioner Shepherd was at least heading in the correct direction by establishing a minimum five-year cooling-off period for all political activities. In contrast, Commissioner Bélanger's proposal to reduce the cooling-off periods to none, one to two years for the same political activities blatantly contradicts current Rule 6 in

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[12] Commissioner of Lobbying, *Commissioner's Guidance for lobbyists regarding the application of Rule 9 of the Lobbyists' Code of Conduct – Political Activities*.

[13] Link is to Alix Spiegel, "Give And Take: How The Rule Of Reciprocation Binds Us," NPR.org, November 26, 2012, online: <https://www.npr.org/sections/health-shots/2012/11/26/165570502/give-and-take-how-the-rule-of-reciprocation-binds-us>. See also the other sources re: gifts having influence in footnote 5 above.

the current *Code*, and the proposed new Objectives and Expectations sections, and proposed Rules 5, 7.1 and 7.2, in the proposed new *Code*, all of which strictly prohibit lobbying when there is even an appearance of a conflict of interest. New Rule 6 also blatantly contradicts proposed new Rules 3 and 4 that prohibit lobbyists giving gifts or hospitality to politicians, government officials and other office holders worth more than $30 annually. New Rule 6 also blatantly contradicts section 10.11 of the *Lobbying Act*, which prohibits Cabinet ministers, their staff, Cabinet appointees and MPs from lobbying the federal government for 5 years after they leave their position.

Instead, an even longer cooling-off period of 10 years should be established for anyone doing any of the activities listed in the definition of "political work" or "other political work" in the Appendix of the proposed new *Code*, even if the activity is done just with the knowledge of the candidate or official (frequent contact should not be required). Even better, a cooling-off period after these activities should be imposed lasting for the entire time period the politician or official is in office, as politicians continue to owe those who help them win an election for their entire political career.

13. Re: Proposed Rule 6 Appendix definitions: Create new cooling-off period of 5 years for lower-level political activities

As set out in the joint letter submitted to the Commissioner by Democracy Watch and 12 other organizations with total supporters of more than one million Canadians, and for all the reasons set out above in section 12, in the Appendix of the latest draft of the proposed new *Code* a new category of "low-level political work" should be created (i.e. part-time or occasional canvassing, campaigning, fundraising, research, data analysis, polling or event organizing) for which the cooling-off period is 5 years. To be clear, frequent contact with the candidate or party official should not be required in this category of political work for the cooling-off period to apply. If you do these activities, you should automatically be prohibited from lobbying for 5 years.

14. Re: Proposed Rule 6 Appendix definitions: Add canvassing or volunteering a couple of times to list of no cooling-off period activities

As set out in the joint letter submitted to the Commissioner by Democracy Watch and 12 other organizations with total supporters of more than one million Canadians, and for all the reasons set out above in section 12, and to allow lobbyists to participate in campaigns at a very low level, the words "canvassing or volunteering a couple of times during a campaign period" should be added to the list of political activities at the end of "Political work" section of the Appendix, as these are (like the other activities listed)

activities that many voters do and are, therefore, activities that can be done without having to sit out from lobbying for any time period.

15. Re: Rule 6 and definition of political work: Going to multiple events should require a cooling-off period of 5 years

In the Commissioner's proposed new list of exempt political work "simply attending a fundraising or campaign event" should be changed to "simply attending a fundraising or campaign event once or twice during any 12-month period." Frequently attending those events amounts to a favour for any politician or candidate, and offers an opportunity to lobby the candidate or politician and/or their assistants. As a result, attending multiple events during one year should require sitting out from lobbying the politician, their staff or party officials for 5 years.

16. Re: Proposed Rule 7.1: Ensure that creating even an apparent conflict of interest continues to be prohibited

As set out above in section 8, to stop the Commissioner from gutting the current Rule 6 in the current *Code* that prohibits lobbying anyone when there is any type of appearance of a conflict of interest, change the Commissioner's proposed new Rule 7.1 to read:

> "Never lobby an official when actions or decisions you have taken or propose to take create a real or apparent conflict of interest or sense of obligation for the official."

Even better, reject proposed new Rule 7.1 and just keep existing Rule 6 from the current *Code* in the new *Code*. The Commissioner's proposed new Rule 7.1 is an attempt to narrow the scope of the *Code*'s current conflict of interest rule (Rule 6), and escape from the binding unanimous 2009 ruling of the Federal Court of Appeal in the case *Democracy Watch v. Campbell*,[14] which defined the scope of former Rule 8 (now Rule 6) on the basis of its interpretation and application of the phrase "conflict of interest".

Proposed new Rule 7.1 also directly contradicts the Objectives and Expectations sections of the proposed new *Code*, both of which state that preventing lobbying when there is an "apparent conflict of interest" is key (neither include the phrase "sense of obligation").

Proposed Rule 7.1 is also an attempt by the Commissioner to escape the binding rulings on Rule 6 (and Rule 9) that will very likely be issued by the Federal Court in the ongoing consolidated judicial review applications

[14] *Democracy Watch v. Campbell*, 2009 FCA 79 (CanLII), [2010] 2 FCR 139, <https://canlii.ca/t/22vcj>.

Democracy Watch v. Canada (Attorney General)[15] concerning two rulings of the Commissioner issued in spring 2020 that interpreted and applied Rules 6 and 9.

If Rule 7.1 is approved in the form proposed by the Commissioner, these court rulings would not apply to it, and the Commissioner would be free once again to ignore or misapply the new rule in future situations that are investigated, until the courts rule (likely years from now) on the Commissioner's new interpretation of new Rule 7.1. This would set back effective enforcement of the conflict of interest rule in the *Code* for years (not that it has ever been effectively enforced in the past, as every official who has enforced the rule since the *Code* was enacted in 1997 has tried to ignore the rule). See subsections B.(c)(i) and C.5 of Democracy Watch's second submission for more details.

17. Re: Several Proposed New Rules: Ensure that lobbyists are prohibited from lobbying everyone who serves under any official with whom they have an apparent conflict of interest

The current wording of Rules 7 and 8, and several of the proposed rules in the *Code*, allow for gifts, hospitality to be given to the staff and Parliamentary Secretary of a Cabinet minister, and staff of MPs and Senators and top government officials, and lobbying of all these people even when the lobbyist has an apparent conflict of interest with the minister, MP, Senator or official.

This creates a charade that could be interpreted as allowing for unethical lobbying (although all the rules should be interpreted as encompassing any lobbying of anyone who works for an official). Proposed new Rule 6 does not allow this lobbying of staff and others who work under the authority of the official who has the conflict of interest, so to be consistent, and to close this huge loophole, add to existing Rule 7 in the current *Code* or, if the Commissioner's proposed new *Code* is enacted, add to proposed new Rules 3, 4, 5, 7.1 and 7.2, a second sentence that says:

> "The words "an official" in this rule means the official and any "associate" of the official as defined in the Appendix."

As well, the definition of "associate" should be moved into the list of general definitions and changed to include:

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[15] The case is proceeding despite the Government of Canada's attempt to have the case thrown out. See the Federal Court ruling rejecting the Government's motion to strike at: *Democracy Watch v. Canada (Attorney General)*, 2021 FC 613 (CanLII), <https://canlii.ca/t/jggb8>. And see the ruling on the Commissioner's motion re: disclosure of the Certified Tribunal Record at: *Democracy Watch v. Canada (Attorney General)*, 2021 FC 1417 (CanLII), <https://canlii.ca/t/jlmrm>.

"for a Minister, anyone in any government institution or department when the lobbying is about any decision or action for which the Minister has decision-making authority, unless the Minister has recused themselves publicly and publicly delegated their decision-making authority entirely to someone who is fully independent of the Minister and not under their control in any way, directly or indirectly."

In addition, the following should be added to the definition of "associate":

"for any government appointee or employee, anyone who works for them when the lobbying is about any decision or action for which the official has decision-making authority, unless they have recused themselves publicly and publicly delegated their decision-making authority entirely to someone who is independent of them and not under their control in any way, directly or indirectly."

Finally, the following should also be added to the definition of "associate":

"In relation to members of the Senate of Canada, their staff but not their fellow Senators."

All of these changes are needed to prevent Rules 3, 4, 5, 6, 7.1 and 7.2 from being a charade that allows for unethical lobbying. First, the current definition of associate means these rules don't even apply to Senate staff, which is a negligent omission by the Commissioner. Secondly, as currently drafted, these rules would allow lobbyists to lobby department officials of every Cabinet minister, right up to the Deputy Minister and Assistant Deputy Minister, even when they have a relationship with the minister that causes a conflict of interest.

Given that department officials regularly communicate the concerns and proposals of lobbyists to their minister's office, every lobbyist would be legally allowed to lobby those officials even though they would, in effect, be lobbying the minister. This would essentially void the prohibition on lobbying a minister when the minister has a sense of obligation to you. In other words, it would gut Rules 3, 4, 5, 7.1 and 7.2 of the proposed *Code*.

C. Conclusion

As set out in section B of Democracy Watch's second submission, the wording of some parts of the *Lobbyists' Code* could be made stronger, in part by changing the wording back to the original version of the *Code* that was in effect from 1997 until the new *Code* was enacted in December 2015, and in part by adding more expansive terms or wording to some of the rules.

It is an option for the House of Commons Standing Committee on Access to Information, Privacy and Ethics to instead adopt the Commissioner's proposed new *Code*. However, if the new *Code* is adopted without the changes set out above in section B, key rules of the existing *Code* will be removed, and new loopholes will be created, and that will result in even more unethical lobbying and corrupt favour-trading being allowed than is currently allowed.

In any case, to make these wording changes to the existing *Code*, or the Commissioner's proposed new *Code*, actually effective, as set out above in section A, loopholes must be closed in the *Lobbying Act* so that the *Code* applies to all lobbying activities. The only exception to registering lobbying communications in the Registry should be when someone signs a mass email letter appeal that an individual or organization has set up (as the individual or organization will be required to register that lobbying effort). Loopholes must also be closed and in MP and Senator ethics codes to prohibit unethical lobbying tactics, most specifically gifts like sponsored travel. A summary of the key changes needed to the *MP Code* as proposed by Democracy Watch and the Government Ethics Coalition can be seen by clicking here.

As well, Commissioner of Lobbying Nancy Bélanger must stop enforcing the *Lobbyists' Code* in the usual negligent and secretive weak way it has been enforced since it was enacted in 1997. The Commissioner must take into account the *Code*'s purpose of ensuring ethical lobbying so public confidence in the integrity of government is enhanced, and must also take into account the *Code*'s strong Principles.

If Commissioner Bélanger does not strengthen her enforcement approach, even if the all of the loopholes in the proposed new *Code* were closed, illegal, secret, unethical and dishonest lobbying of Cabinet ministers, their staff and appointees, MPs and senators and their staff, and federal government employees will continue to be allowed, and will continue to undermine and corrupt many federal policy-making processes.