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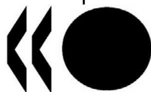

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LOBBYING: MODELS FOR REGULATION

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This paper provides a comparative overview of models and also outlines emerging principles for regulating lobbying. It was prepared by Professor A.P. Pross, Professor Emeritus, School of Public Administration, Dalhousie University, Halifax, Nova Scotia, Canada.

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LOBBYING: MODELS FOR REGULATION

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EXECUTIVE SUMMARY

This paper identifies, by looking at existing legislation and academic literature, a set of principles that might guide attempts to regulate lobbying. It considers the contexts which affect legislation, issues of regulation, and fundamental administrative principles.

Interest in lobby regulation reflects the globalisation of lobby practices, which has disrupted long-standing systems of relations between government and interests in a number of countries.

Exercises in lobby regulation have ranged from registering interests appearing before legislative committees to requiring extensive disclosure of lobby undertakings. Regulatory schemes vary, depending on the cultural and constitutional background of each state. These variations make it impractical to recommend a uniform pattern of regulation at this time.

Nevertheless, the globalisation of lobby practices and governments' endorsement of the principles of transparency and integrity are leading states to register lobbyists and to begin to formulate standards of disclosure. To date these elicit information that:

- Captures the intent of lobbying activity;
- Identifies its beneficiaries; and
- Points to those offices and institutions that are its targets.

Electronic filing has revolutionised lobby regulation, making it possible to collect and disseminate large quantities of information. But, there are limits to its application. Both compliance and timely and effective analysis are enhanced if disclosures are pertinent, but parsimonious. Conversely some information needs – such as criminal prosecution – demand documentation and extensive records. For such purposes, regulation may be best served if lobbyists are required to hold records for a given period, or must file them in a separate process.

Where transparency and integrity are the principal goals of regulation, effectiveness is best achieved if definitions are broad and inclusive, and the theatre of lobby activity is also defined broadly and inclusively, while compliance is best secured if definitions, and exemptions, are:

- Unambiguous and clearly understood by lobbyists and office holders;
- Practical in application;
- Robust enough to support legal challenges.

Furthermore, registry officials need the authority to require additional information and to carry out investigations. To secure compliance, however, extensive education programmes, can be as important as enforcing the rules with powerful sanctions.

Regulation of lobbyists' behaviour has focused on codes of conduct. These establish principles of behaviour – such as honesty, openness and professionalism – and rules to enforce them. Currently debate centres on whether codes should be voluntary or imposed by law; the paper suggests that legislative regulation is preferable. In considering the impact of codes, and other regulatory features of lobby legislation, it should be remembered that lobby regulation can not be free-standing. It is part of a regulatory regime consisting of laws, policies and practices that are interdependent and establish the principles of good governance across the public sector.

Finally, securing and maintaining the integrity of the regulations requires that officials have sufficient resources, powers and independence to enable them to carry out their functions.

INTRODUCTION: THE GLOBALISATION OF LOBBY REGULATION

Lobbying is a necessary adjunct to modern government. Complex regulations, labyrinthine bureaucracies, lengthy and diffused decision processes baffle individual citizens and tax the resources of most businesses. Few can afford to pursue their interests independently of experienced and informed advisors. These, acting as guides, intermediaries and interlocutors, have become indispensable.

Lobbying has not only become a reality, its legitimacy is widely recognised. In democracies citizens have the right to petition government, and it is legitimate for them to pay third parties in order to do so. However, just as the complexity of modern government necessitates lobbying, so the proliferation of lobbying activity introduces many new actors into policy processes, so that those processes become obscured and an environment is created where coercion and corruption can occur. Thus the regulation of lobbying becomes necessary.

The purpose of this paper is to identify, through examination of existing legislation and academic literature, a set of principles that might provide a framework for enhancing transparency and accountability insofar as lobbying is concerned. It will first consider the contexts which affect legislation and then turn to the more complex issues of regulation. In each, the paper will address broad themes, rather than the detailed provisions which frequently reflect idiosyncratic events. For example, the definition of who is a lobbyist, or what is lobbying, is clearly an important issue wherever regulation has been considered, but the exclusion of provincial or state officials is a provision that applies to federal systems. In addition to discussing the legislative provisions for monitoring and regulation, the paper will look at some fundamental administrative principles.

Convergence and disparity in the regulatory environment

For over a century the United States was the sole jurisdiction to regulate lobbyists, though many countries had legislated against bribery and other means of influencing government officials. In 1991 a Library of Congress survey found that only three other countries, Australia, Canada, and Germany had instituted lobbyist legislation.[1] In 2004 a similar survey, conducted by Margaret Mary Malone, of the Irish Institute of Public Administration, reported that 'countries with specific rules and regulations governing the activities of lobbyists and interest groups are more the exception than the rule'.[2] Even these, with the demise in 1995 of the Australian registry, had declined in number. Nevertheless, Malone concluded that:

> "In states where informal practices and conventions continue to prevail, the issue of more formal regulation of lobbyists is advancing up the political agenda. Typically, political scandals highlight undue influence on the part of certain interest groups *vis-à-vis* decision makers in the public domain. There is, consequently, greater public and political pressure for more formal regulation. Nor is there necessarily resistance to this pressure. There is evidence to suggest that some lobbyists would welcome greater regulation in order to set themselves apart from those who threaten to bring the profession into disrepute.

Throwing public light on the relationship between civil society and government (politicians and bureaucrats) is increasingly regarded as a desirable and necessary development in the interests of good government."[3]

This convergence is deceptive. Examination of the legislation adopted by different countries reveals a variety of reasons for and understandings about lobby regulation, even though the same terms – transparency, integrity, and, to a lesser extent, efficacy – inform the language of legislation and its supporting rhetoric. Broadly speaking regulation does address transparency, integrity and efficacy, but national perceptions of each differ and their regulations display quite different approaches to attaining them. These variations are systemic, reflecting constitutional arrangements and political cultures rooted in disparate national experience. To illustrate: In European and North American countries public philosophies deem it illegal for a public servant to seek or receive 'anything of value personally for or because of any official act performed or to be performed'.[4] Where Confucian philosophy has influenced political culture, however, gift-giving has long been an accepted part of the relationship between citizens and officials, a tradition that attenuates the impact of anti-bribery laws.[5] On another level, corporatist systems in Europe encourage organisational integration in policy-making processes. Sector associations participate, virtually by right, in consultative bodies. A body of law and convention has evolved over the last century to regulate their participation. In those systems lawmakers have demonstrated uncertainty about the appropriate methods for regulating newcomers, such as consultant lobbyists and public interest groups with broad international memberships, to their policy systems.[6] North American systems, on the other hand, first applied registration and regulation to consultant lobbyists, but have not been as successful as the European's in integrating associations in policy processes.[7]

Several strands of development are at work here. The global diffusion of democratic concepts and practices through the media and international interest groups may be persuasive, but not easily adapted to the practices, understandings and governmental arrangements that prevail in individual countries. These themselves may be undergoing radical change. Adoption effectively means adaptation. Poland's recent legislation illustrates this point. The first words of the Act on legislative and regulatory lobbying would be familiar to any North American lobbyist or official:

"This Act lays down the rules of openness governing legislative and regulatory lobbying and the rules governing professional lobbying, determines the forms in which control can be exercised over professional lobbying, and sets out the rules for the keeping of the Register of Professional Lobbyists and Lobbying Firms."[8]

However, as the 'rules of openness governing legislative lobbying' are enunciated, it is evident that the act has quite a different purpose from its counterparts in the United States and Canada. Rather than setting out a regime for disclosing contacts between officials and lobbyists and the methods used to influence decisions, the Polish act establishes a procedure whereby government declares its legislative intentions[9] and initiates procedures that allow interested parties to register their concerns and proposals for change *vis-à-vis* specific legislative and regulatory projects and to announce their intention to participate in public discussions of those proposals. Admission to these discussions is contingent on registration. In other words, while the Polish act does establish a register of lobbyists, its principal sections are more concerned with creating procedures for public consultation than with providing the type of lobby regulation familiar in North America.

The significance of the differences in policy processes between European and North American systems become apparent as we consider questions of definition. The free-wheeling environment of policy making in the United States, and to a lesser extent Canada, fosters an industry where entry is virtually uncontrolled and both consultant and in-house lobbyists can, as long as they are adequately supported financially, exploit access to a variety of decision points. Lobbyists thrive as nimble and versatile guides to

complex, diffuse and dynamic systems. On the other side of the coin, from the perspective of the general public and often of government itself, that very flexibility is a source of concern. It obscures policy processes and confuses issues. Hence calls for transparency, and attempts to bring some order to the lobbying scene by forcing lobbyists to disclose details of their undertakings. Because those undertakings, in one form or another, involve an element of compensation, North American legislators have felt that it is entirely logical that this process of regulation should begin by defining lobbyists in terms of their financial relationship to clients or employers.

In corporatist systems, on the other hand, a degree of order already exists. Historically, the approach to policy making has been more structured, particularly in economic realms. Formal industry and labour associations have had a recognised place in the deliberations that lead to government policy. It was not necessary to require them to register as lobbyists, because their participation was already known, the processes were defined, and the interests of the associations were familiar to the public as well as officials. Malone's description of Austrian practice illustrates these processes:

> "Large economic interest groups such as employers' organisations and trade unions do have a significant input into the making of law in the context of the 'social partnership'. When preparing a bill, the government must consult with the chambers or Kammern, which are statutory representatives of interest groups, under the 'appraisal procedure'. In general, the government consults not only the chambers but other interest groups also. At the parliamentary stage, the social partners exert influence through personal and political contacts. In the past, such informal contacts were greatly facilitated by the fact that more than 50% of MPs had close ties or were members of interest groups such as employers' associations or trade unions. This is no longer the case."[10]

Globalisation has brought two quite different challenges to these understandings in corporatist systems. In economic sectors, the rise of multinational corporations has meant that foreign concerns have sought entry not only to national markets, but also to the decision making processes that influence those markets. Inevitably local economic interests resisted entry at both levels, prompting intruder corporations to turn to lobbying firms that could offer both local knowledge and familiarity with North American lobbying techniques. International social movement groups have presented a somewhat different challenge to corporatist systems. They have encouraged public expectations for participation in social policy making, whilst raising issues that corporatist structures were not well organised to process.

The effect on corporatist systems has been to create two additional pressure patterns in policy systems. In the economic sphere consultant lobbying competes with the traditional weight of associations in policy deliberations, while in the fields of social policy the pressures from social movement groups are more public and overtly political. These new tensions, and new complexities, have contributed to a growing interest in adopting – but also adapting – North American-style lobby regulation in corporatist countries.

The lesson we have to learn from this is that we cannot assume that all lobby regulation is based on identical understandings of public need or even that clauses that appear to be comparable across jurisdictions, do in fact have the same purpose or the same effect. Hence, as we review the lobby legislation found in different jurisdictions, we must recognise that each political system values the objectives of regulation differently and varies legislative provisions accordingly. In addition to appreciating these cultural forces, we must remember that it is also fundamental that lobby regulation conform to the constitutional conventions of specific countries.[11] In Canada and the United States, for example, bills of rights set limits to lobby regulation. Care must be taken to distinguish the exercise of constitutional rights from the lobbying functions. Individuals seeking any kind of government benefit for themselves are generally within their rights when they seek meetings with officials and present arguments supporting their case. These individuals are certainly lobbying, but because they are exercising the right to

petition on their own behalf, are not 'lobbyists' as defined by most regulations. Similarly, volunteers who lobby to promote a cause also are exercising the right to petition, to associate with others of the same persuasion, and to exercise the freedom to speak in support of the cause.

It follows that regulation, to be effective, must respect the political culture and governmental system of the society in which it operates. It also follows that we should not confuse our attempt to identify principles for regulation with the creation of legislation that can be applied uniformly across jurisdictions. Each legislature has to review both the need for regulation and its precise form in the light not only of international experience, but of its own constitutional arrangements and its prevailing political culture.

But while lobby regulation must accommodate national and local variation, it must also recognise that globalisation has influenced government policy processes in similar ways around the world. A number of lobbying firms are themselves multinational organisations. Numerous interest groups are either international in structure, or co-operate through international coalitions. Many nationally-based non-governmental organisations operate globally. Although they generally conform to the practices of host governments, their lobbying techniques inevitably reflect the values and assumptions of their own political systems. Thus modes of lobbying have been transferred across nations, bringing with them common problems and raising similar issues in diverse societies. The effects are difficult to characterise and really require extensive research. It might be possible in some settings to describe modes of interaction between interests and government in terms of parallel systems; a corporatist track used by domestic interests and a lobby track used by multinational interests, with some larger enterprises engaged at both levels. Elsewhere there may be a confusing intrusion of newcomers into established patterns of representation. Lawmakers face a considerable challenge as they address the issues raised by the arrival of new actors and new patterns of behaviour while at the same time preserving traditional processes of local representation.

Transparency, integrity and efficacy

Examination of the history of campaigns to introduce existing legislation suggests that transparency, integrity and efficacy are the principal factors driving the adoption of legislation and its main objectives, though, as we have already emphasised, national and regional variations will occur,

Transparency promises to expose to public view the processes that are at work as government decisions are made. It is often promoted as enabling the public to know who is lobbying for what, in order to allow it to take suitable precautions to protect its interest. Transparency is also a means of reassuring the public that officials are working honestly and in the best interests of the community, and an incentive to those who seek public benefits to abide by prevailing norms of honesty.[12] Transparency sometimes precedes more extensive regulation.[13]

Transparency and integrity are closely related. In a democracy respect for governmental institutions depends in large part on citizens' confidence that the government is indeed their government, and is not the private preserve of those who can afford to pay for access. Consequently, there must be, amongst policy makers, a general concern to promote equal access to government; exemplary ethical standards in public life, and resistance to the exercise of undue influence.

Since they affect the political classes in general, such concerns cannot be addressed solely by regulation which specifically targets lobbyists. In fact, traditionally attempts to ensure the integrity of governmental decision making have targeted the officials who actually make those decisions.[14] Bribery and other forms of corruption were the first objects of regulation. However, as democratic government evolved financial controls were introduced; ethics issues were addressed; election finance became more strictly regulated, and, most recently, transparency in decision making has become a major objective, fostering access-to-information laws, whistleblower legislation and lobbyist regulation. Ultimately a cluster of

statutes, conventions and codes, taken together, constitute a regulatory regime that attempts to encompass governmental decision making.

Our concern here is with legislation that specifically addresses the regulation of those who lobby officials. We will assume that lobby regulation occurs as one of the more recent accretions of the ethics regime that has evolved in most countries and that laws targeting lobbyists are part of that more extensive regulatory regime.[15] Hence, we will note, but not explore, regulations that seek to govern officials as they interact with lobbyists. Since it is not always easy to distinguish between those who make governmental decisions and those who lobby for those decisions, we must note some instances where officials, legislators in particular, have to be regulated as lobbyists.[16]

When we look at legislation that regulates lobbyists, we find provisions directed at promoting integrity including those, such as disclosure rules, which illuminate activity. The most important recent moves toward securing integrity, however, have been the adoption of codes of conduct. Closely related to the ethics packages which have been adopted to regulate the behaviour of officials, these codes have been attached to registration statutes and their enforcement made the responsibility of registrars. Although their phrasing is broad, they do provide registry officials with some authority, albeit limited, to monitor compliance with the Act and to investigate lobbying behaviour and, through reports filed with the legislature, to draw public attention to breaches of the code. Taking this approach one step further, Canada has recently enacted legislation which connects the lobbyist registration requirements to regulations that govern the behaviour, including their post-employment behaviour, of senior officials.[17] In the final analysis, however, efforts to ensure integrity depend chiefly on clauses directed at securing compliance.

Lobby regulation is also affected by considerations of efficiency and effectiveness. Since communication is the essence of policy making, lobby regulation cannot be allowed to impede the flow of information from the public, and other official bodies, to lawmakers and their advisors. Consequently, legislators have been reluctant to define lobbying, and lobbying activities, so rigorously that informed members of the public hesitate to offer their views to government, and they generally take pains to exclude officials of other levels of government from the purview of the regulations.[18] For the general public, efficacy is a less obvious objective than are transparency and integrity, but for officials and party leaders it is a prominent concern, for they are themselves frequently overwhelmed by the variety and complexity of information showered on them by lobbyists. Laws like those of Germany and Poland can help policy makers by regulating the flow of information to them, while the disclosure rules common in North America facilitate officials' understanding of the sources of policy campaigns, and assist them to evaluate the pressures put upon them to take decisions. Although this information may not show them where the public interest lies, as decisions are made it can guide them away from options contrived and promoted to particularly favour special interests.[19]

We must also be concerned with the efficacy of lobby legislation itself. Early regulations were bedevilled by unrealistic disclosure requirements which undermined the legitimacy of the legislation. In recent years new information technologies have facilitated registration, permitting refinements in reporting requirements and greatly extending the capacity of both officials and the public to monitor the activities of lobbyists. With improved facilities to actually carry out their assignments, registry officials have sought, and sometimes obtained, the powers needed to carry out investigations and to see that violations are prosecuted. The most recent developments have seen some registrars given a degree of administrative autonomy of the government of the day.

Finally, as a general principle, it is essential that lobby regulation be perceived by all concerned to serve a useful function. Perhaps this is the most important lesson to be learned from the Australian experience. There a lobbyist register was instituted in 1983, but abandoned in 1996 because, in the view of the Government, it was 'toothless and unenforceable', and in the view of others because its provisions

were ignored and access to the registered information was highly restricted; in other words, because it failed to serve a useful purpose.[20]

Summary: Underlying principles of lobby regulation

Experience to date suggests that the decision to regulate lobbyists and to introduce regulations that are effective is contingent upon the following underlying factors:

- Lobby regulation is perceived to address broadly accepted public policy objectives such as enhancing government transparency, openness and integrity.
- Regulation is compatible with the constitutional framework and political culture of the adopting jurisdiction.
- It is directed at achieving three principal objectives:
  - Promoting transparency in governmental decision making;
  - Supporting integrity in the policy process;
  - Enhancing the efficacy of policy processes.
- Regulation of lobbyists is conceived of as part of a body of regulation – a regime – that governs the ethical behaviour of public officials and those they deal with.
- The viability of the regulations depends on instituting rules of disclosure that can be realistically applied and on ensuring that officials have the powers and administrative autonomy sufficient to enable them to carry out their duties.

The paper will identify core issues in lobby regulation while recognising that specific countries will respond differently to them. The challenge for this writer, and for lawmakers, is to discover those principles in regulation that may be adhered to, if not universally, at least in a number of countries. Or, to express the point differently, the challenge is to set out a series of principles that might be considered as a point of reference for lawmakers developing a body of lobby regulation. The paper first identifies the principal features of lobby regulation as it currently exists. It then explores those features from the perspective of a series of questions that should define the regulatory arena.

STATE OF THE ART: CURRENT MODELS FOR REGULATING LOBBYING

Though only a few nations have enacted legislation to regulate lobbying, their experience – and that of sub-national levels of government – enables us to address the key question: what are the elements of strong lobby regulation? The answer to this overarching question is best considered by asking a series of subsidiary questions:

- Who is to be regulated?
- What should they be required to disclose?
- How can they be regulated?
- How can compliance be obtained?
- How can the integrity of lobby regulation be ensured?

We will find that effective regulation will depend on the presence of the following elements:

- There is a clear, unambiguous definition of the regulatory target;
- Disclosure requirements are meaningful and attainable;
- Procedures for securing compliance are effective and realistic;
- The integrity of the regulatory process is maintained by an appropriate administrative framework.

Since it is the purpose of this paper to identify ‘a set of principles that might provide a framework for enhancing transparency and accountability insofar as lobbying is concerned’, we can use these four elements – and the questions which led us to them – to organise a discussion of existing measures and proposals for measures. We will look first at issues of definition, then at the complexities of disclosure, the problems of securing compliance, and finally the steps that must be taken to secure the integrity of the regulatory process.

Who is to be regulated? Issues of definition

1. Introduction

Clarity is essential to effective lobby regulation. The early history of registration in Australia, Canada and the United States shows that where lobbyists are not clearly identified and demonstrably required to register, they will not do so. Equally, where disclosure requirements are not clearly laid out and unambiguously required, they will be ignored.[21]

The following paragraphs discuss some of the more significant issues that have arisen regarding definition. They conclude with an attempt to provide some general observations to assist in dealing with this critically important aspect of regulation.

2. Leading issues related to definition

As we have noted, two classes of policy actors are targeted by regulations governing lobbying. The first are government officials, including legislators, who are themselves lobbied; the second are lobbyists. Since the former are usually explicitly identified in both lobby legislation and in the body of regulations that apply to their conduct, it is not necessary to discuss their identification here. The definition of lobbyists, and lobbying activity, being much more troublesome, warrants examination.

In North America the obvious targets of lobbyist registration schemes are the fabled 'guns for hire' of fiction and investigative journalism, or, in the language of much legislation 'consultant lobbyists'. That this stereotype is simplistic soon came to be realised, and legislators extended registration to two breeds of 'in-house' lobbyists: full-time employees of corporations who were engaged in 'government relations' on behalf of their firms, and comparable employees of interest groups. This approach defines a lobbyist as a person who receives some form of remuneration for representing the interests of a third party to government officials. Thus, U.S. Public Law 104-65[22] and the Canadian Lobbyists Registration Act use compensation as the trigger for registration.[23] In Ottawa a consultant lobbyist is an individual who 'for payment, on behalf of any person or organisation' undertakes to communicate with public office holders concerning a specified set of public decisions or to arrange meetings with public office holders. Likewise, an in-house lobbyist is an employee whose duties include communicating with public office holders on behalf of the employer.[24]

Recognising that consultant and in-house lobbyists are the front-line actors in the lobbying business has not simplified the task of defining who should be regulated. In fact, defining 'lobbying' and determining who is a 'lobbyist' has proven particularly difficult in corporatist systems. Earlier we described how the intrusion of multinational corporations and international social movements have challenged corporatist policy-making systems, and encouraged authorities in those system to consider adopting North American-style lobby regulation. Such a project, however, must deal with the challenge of adapting regulatory frameworks that assume no prior privileged position for any group, to one that has for decades incorporated certain groups into policy deliberations. Justin Greenwood reports that for reform-minded members of the European Parliament, 'a major obstacle in getting [regulatory] legislation to a vote was the failure to provide a working definition of what constituted a lobbyist'.[25] The concept of lobbying was at odds with practice in a number of European states where corporatist structures made legitimate the participation of numerous groups in governmental decision-making processes. How, for example, could the representative of a trade organisation be characterised as a 'lobbyist' when he or she was participating, by invitation or by time-honoured tradition, in official advisory committees?

The European Parliament circumvented this problem by providing a set of conditions which, if met, would lead a consultant or organisation employee to register as a lobbyist.[26] Greenwood:

> "...the regulatory approach proposed by [MEP, Glynn] Ford was politically masterful in that it did not attempt to define a lobbyist, but relied upon self-definition through the incentive of applying for a pass. All those lobbyists wishing to visit the Parliament would find it much easier to obtain a regular pass, available in return for signing a code of conduct, than to stand in line for a day pass."[27]

Self-definition may have resolved this particular impasse, but it is inherently flawed. It captures only those lobbyists who actually work within the purviews of the European Parliament. Perhaps this is satisfactory, as far as the members of the Parliament are concerned. A similar level of coverage has, until recently, been the norm in the United States. But in other jurisdictions it is considered inadequate. Lobbyists, after all, do not have to pace the halls of legislatures if they want to meet with Parliamentarians. Many lobbyists, in fact, feel that they can easily dispense with meeting with Parliamentarians altogether. As far as they are concerned real power is exercised through the executive and is best approached either at

that level or via administrative offices. Conceivably, self-definition could be used to identify lobbyists 'creatively loitering' – as one lobbyist put it – in these offices, but, given the size and extent of most public services, it is much less amenable to control.

Germany, which is frequently considered the quintessential corporatist state, has, since 1972, required that associations wishing to be heard as the legislature debates changes in policy must register beforehand, disclosing their specific interests and the names and addresses of their representatives. Registration is published and secures a pass to the legislature. By 1985 Clarke reported that the register included the names of 1,226 associations and other organisations, but noted that the system had 'a far narrower scope than its closest counterparts in Canada and [at that time] Australia and there are no penal sanctions for failing to comply with its provisions'.[28]

This system has been carried over into the reunified Germany, extending to the Bundestag and the Federal Government with additional disclosure requirements relating to the number of members and the composition of the board of directors and board of management. According to Malone, the register continues to lack legal force. Its aim....

> "...is to identify clearly lobbyists and interest groups which supply information to the Bundestag and its committees. Registration confers no special status or privileges such as an automatic right to be consulted at parliamentary hearings."[29]

The Bundestag can refuse to hear registered representatives or can consult with unregistered representatives, so there is no strong incentive to register. Furthermore, in an allusion to Germany's corporatist consultation process, Malone notes that 'as a substantial number of Members of the Bundestag are or were members of trade unions or employers' associations, there is inevitably a good deal of political personal contact between such groups and individual Members'.[30] In 1996 the annual register contained the names of 1,614 organisations.[31]

According to a 1998 article by Ronit and Schneider these provisions, and similar arrangements in the German states, have emphasised the representational legitimacy of 'peak' associations not only before legislators but at ministry levels where contacts are 'most intensive'. They maintain that as a result lobbying firms have been discouraged, and that 'there is no strong political demand for regulation amongst the political and administrative elites'.[32] A somewhat different impression emerges from a discussion of lobbying in Denmark, which also has a corporatist tradition. Rene Rechtman and Larsen-Ledet report that the corporatist system that prevailed there between the 1940s and 1980s was 'sufficiently inclusive and widely understood' that lobby regulation was unnecessary, but that in recent years the intrusion of new players with pluralistic assumptions and the increased use of lobbyists – which had previously not been effective – has suggested the need for oversight and regulation.[33]

If oversight and regulation is needed, then it may be desirable to meld some of the provisions of North American regulation with those that prevail in corporatist countries. In particular, this would involve a broad definition of who is required to register as a lobbyist. A registry that simply records the names of individuals or organisations who wish to communicate with Parliamentary and Ministry committees does not adequately inform anyone of who is working elsewhere in the government to influence government decisions on behalf of third parties. A registry that includes those lobbyists would not undermine corporatist practices, but could supplement the present system of registering and authorising organisations to participate in formal policy discussions.

These considerations draw attention to the fact that, where the inclusiveness of the registry is concerned, much depends on the legislature's understanding of where lobbying takes place and what activities constitute lobbying. In the United States, for example, federal and state legislation often assumes

that lobbying begins and ends at the legislative branch, or, if it takes place elsewhere, with members of the executive who are 'covered' in the legislation.[34] Canadian legislation, on the other hand, takes a broader view of how lobbyists target government, extending to nearly all public officials, though contacts with cabinet ministers and senior officials are the subject of more extensive reporting. In today's world, where much government policy is at least shaped, if not resolved upon, at administrative levels, it seems to be essential to employ a broad definition of where lobbying is carried out.

Similarly, it is important to specify what activities constitute lobbying. The popular image of the lobbyist bearding a government official is only partially accurate. When the first Lobbyists Registration Act was debated in Canada, lobbyists argued strenuously that it should cover actual representation, and not the setting up of meetings between clients and officials, or the development for clients of 'maps' which traced the development of policy decisions and provided strategies to assist clients to achieve their objectives. At first blush these appeared to be reasonable limitations on the registration scheme, but experience soon demonstrated that such activities do in fact provide lobbyists with important opportunities to interact with officials and to present arguments that forward their clients' interests.[35] Similarly, it has been necessary to define very narrowly the nature of exchanges between officials and lobbyists over requests for information and apparent administrative issues.

Legal precision is also essential for successful enforcement of regulations. For example, legislation commonly describes lobbyists as communicating with public office holders 'in an attempt to influence'[36] decisions. Canadian officials were disappointed to discover that proposed prosecutions had to be abandoned because the Crown Prosecutor concluded that:

> "…in light of the insufficiency of evidence establishing that an attempt to influence had taken place and given there was no probability of obtaining a condemnation, no criminal accusation would be filed...
>
> The focus on the expression 'attempt to influence' entails that in order to successfully obtain a prosecution under sections 5,6 and 7 one must demonstrate beyond a reasonable doubt that an individual has attempted to influence a public office holder. The criminal nature of the offence requires a very high standard of proof, which is analogous to the standard required to prove the more serious offence of influence peddling under the Criminal Code thereby making it very difficult to secure a conviction under the LRA."[37]

As a consequence of this determination the references to attempts to influence were later deleted from the Canadian Act and lobbying was described in terms of communications 'in respect of' legislation, policies and so on.

At the local government level different problems arise. Neighbourhood organisations, comprised almost always of volunteers, are significant actors. Local officials have sought to have the leaders and official representatives of these groups register, but have encountered powerful objections on the grounds that as private citizens acting voluntarily these individuals are exercising constitutional rights that should be not limited by registration. In many cases local activists can point to provisions in the lobby regulations of senior governments that specifically exclude voluntary lobbyists from registration. Quebec addresses this issue through regulation, requiring registration by individuals who perform executive functions for certain interest groups, whether or not they receive compensation.[38]

This brings us to the matter of exclusions. Regardless of how specific laws define lobbyists or the act of lobbying, lawmakers have attempted to achieve greater certainty by setting out exclusions. The most common exclusions refer to the representatives of other governments – local, regional and international – who are acting in their official capacities. In addition, it is common to find exclusions that reflect the social

and political experience of the jurisdiction. For example, in North America the representatives of formally recognised aboriginal councils are often excluded from the obligation to register.[39] Certain activities are also excluded, particularly activities of a public nature, such as appearing before legislative committees or other inquiries. The principle in both instances has to do with the public role of the official or nature of the activity involved. If either is transparently a performance of a public function, then further publicity, or exposure, is considered to be unnecessary. At the same time, care has to be taken that exclusions are not so broadly stated as to encourage non-compliance. For example, in 1996 the Canadian Lobbyists Registration Act was amended to exclude communications made by lobbyists 'in direct response to a written request from a public office holder, for advice or comment' relating to matters before the government.[40] It soon became clear that lobbyists could use – or even solicit – requests for comment in such a way that special pleading for their clients could go unreported. Following the next quinquennial review of the Act the clause was amended so that only communications 'restricted to a request for information' could be excluded.[41] Finally, it has to be remembered that the scope of lobby legislation may create exclusions. That is, what is not specifically covered may be excluded. The U.S. Lobbying Disclosure Act of 1995, for example, focuses on contacts between lobbyists and officials and on the expenditures incurred in order to support those contacts. Section 3(7) defines 'lobbying activities' as...

> "...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."

'Lobbying contacts' are defined in terms of 'oral or written communications' to executive or legislative branch officials.[42] No mention is made of grassroots activities in support of communication with officials, yet this aspect of lobbying is highly developed in the United States and has been recognised in Canada as so much a part of lobbying activity that it must be included in lobbyists' registration filings.[43]

3. Summary: The challenge of definitions

Wording, as always in legislation, determines its effectiveness. Experience has shown that vague or partial definitions of who is to be covered by legislation, or what activities are encompassed, leads to non-compliance or inadequate compliance. Therefore:

- The descriptions of lobbyists and of lobbying activity must be clear and unambiguous;
- Equally, exclusions must be precise;
- Definitions must be clearly understood by lobbyists, office holders and members of the public and robust enough to support legal challenges.

For some European countries where globalisation has brought North American lobbying practices into uneasy tension with corporatist processes, it might be advisable to establish parallel systems of registration: One dedicated to supporting existing corporatist practices, the other meeting new needs for transparency. Whatever decisions individual legislatures arrive at, it is important to remember that....

> Definitions reflect the broad constitutional and political realities of the country for which they are devised. Therefore, they cannot be transferred from one political system to another without careful consideration and modification.

Where a decision is made to build a registry and regulations around the goal of transparency, effectiveness is most likely to be achieved if there is broad and inclusive definition of:

- Lobbyists and lobbying activities;
- The theatre of lobby activity.

In conclusion, targets for registration are commonly defined in legislation by the fact that they receive compensation for carrying out lobbying activities. Where a definition has eluded lawmakers, lobbyists may be invited to identify themselves by virtue of carrying out specified lobbying activities, though such a procedure can encourage non-compliance. Generally, definitions are refined by specifying that certain classes of actors are excluded from the obligation to register. These exclusions may reflect constitutional conventions, the political history of the jurisdiction and the practical realities of conducting business between governments.

Disclosure: How much is enough?

1. Introduction

A central challenge for this paper is to identify and articulate those aspects of lobbying activity whose disclosure will, in general, provide officials and the public with sufficient information to satisfy them that lobbyists' activity is compatible with the public interest, and allows parliamentarians to weigh the appeals of lobbyists against advocacy on behalf of ordinary members of the public.[44]

The challenge in disclosure has to do with the quantity and detail of the information submitted. To achieve transparency there must be meaningful disclosure. Both compliance and timely and effective analysis are enhanced if disclosures are pertinent, but parsimonious. Members of the first Canadian parliamentary committee to investigate a proposal to regulate lobbyists confessed that 'we have come to realise how difficult it is to achieve transparency while at the same time ensuring that the information desired to accomplish this goal is relevant and produced in a manner which makes it easily understood by the general public, the media and Members of Parliament'.[45] Howard Wilson, speaking from experience, described the challenge this way:

> "This is the heart of a lobbyist registration system and where the widest range of alternatives is found among different jurisdictions. Where to draw the line can be a matter of considerable difficulty and controversy. Some of the debates in Canada and elsewhere have been driven by the notion that if some disclosed information is good, then more is better. It can, at times, be difficult to keep the debate focused on why lobbyist registration is being considered in the first place, i.e. what is the 'evil' that is being addressed."[46]

Disclosure is the aspect of lobby regulation most susceptible to elaboration, wise and unwise. Initially, Canada's Lobbyists Registration Act, reflecting the Committee concerns previously quoted, made modest demands of registrants. So much so, in fact, that the first version of the Act was derisively called 'the business card bill'. Subsequent revisions threaten to encumber the registration process, with the most recent requiring lobbyists to make monthly reports of contacts with senior public office holders. Elaboration may flow from experience with lobbying processes and be designed to elicit information that best exposes how governments are influenced; identification of grass-roots and coalition campaigns, for example. However, goaded by evidence of corruption and scandal, lawmakers sometimes impose ever more exhaustive requirements for disclosure. Forgetting that the ingenuity of the unscrupulous is inexhaustible, they create thickets of regulation that intimidate all but those they are meant to discourage.[47] For example, financial information is a popular target, yet the true costs of a lobbying campaign are extremely difficult to assess. The data demanded is difficult to obtain and what is provided is often incomplete and therefore virtually meaningless.

Core disclosure requirements ask lobbyists to identify:

- The interest being represented;
- Object of lobbying;
- The government institutions being lobbied.

Each of these categories is susceptible to expansion. Where regulation has been in place for some years, additional disclosure requirements have included spending details, lobbying techniques, organisational membership and, where they are permitted, arrangements for contingency funding. Their usefulness often depends on how legislators intend to apply the information that is collected. If the purpose is primarily to obtain, and to give the public, a broad understanding of what interests will be affected by changes in policy, then general statements may suffice. If, on the other hand, legislators expect that the information might be used in criminal prosecutions, detailed knowledge of lobbyists' activities could be valuable. In the aftermath of the Abramoff scandal, for example, Senator John McCain advocated extending disclosure requirements, arguing that the FBI could have identified Abramoff's activities earlier if more information had been available.[48]

2. The elaboration of core requirements

In the following paragraphs we will examine the principal disclosure requirements in current legislation. As we shall see, experience has led to the addition of further categories, and we will consider some of these before attempting to draw some general conclusions about their utility and applicability. Before leaving the topic we will also glance at the disclosure requirements for 'dual mandate' lobbyists and at the issues surrounding the timing of reports and the form in which reports are made.

2.1.1. The interest being represented: Cui bono?

While registration identifies lobbyists themselves, it does not shed much light on those who benefit. As this became apparent, regulations were introduced that compelled consultant lobbyists to identify the names of their clients, and 'any person or organisation that controls or directs the activities of the client or has a direct interest in the outcome of the lobbyist's undertaking'.[49] In the case of corporations, this would include the names of holding companies or subsidiaries, particularly subsidiaries that, in the language of the US regulations, will benefit from the lobbyists' work. Similar disclosure was required of corporate lobbyists. Some American states go further. New York, for example, demands a copy of the retainer or employment agreement and the names of affiliates. Texas requires associations to describe their methods of decision making, to estimate the number of their members and to name those members who are influential in decision making. Texas also requires lobbyists representing private companies to report the number of shareholders, the officers and/or members of the board of directors and the names of any individuals holding more than 10% of the shares.[50]

Lobbying by interest groups has posed more of a challenge. It is not always clear whether interest group members are the direct beneficiaries of group representations. The benefits to members may be clear when businesses participate in a trade organisation that lobbies for tariff protection or subsidies, but when organisations representing health professionals lobby for improvements in health care systems the connections are by no means as obvious. They are even more difficult to discern in the lobbying of such public interest groups as Amnesty International. Nevertheless, there is broad support for the contention that however altruistic the origins of lobbying activity, the public interest demands that it should be transparent. In line with this view, the *Green Paper on the European Transparency Initiative* prepared for the European Commission has suggested that groups be asked to explain who they represent, what their mission is and how they are funded.[51]

Legislators have adopted several disclosure mechanisms designed to determine who is behind lobbying activity. The United States' federal legislation requires registrants to identify organisations that, in a six month period, contributed more than USD10,000 to the lobbying activity, or 'in whole or in major part plans, supervises or controls' the undertaking.[52] The Ontario Lobbyists Registration Act, 1998 has a similar requirement for disclosure of the names of those persons or organisations that have contributed more than USD 750 to a lobbying undertaking.[53] While not all Canadian jurisdictions establish a financial

threshold for reporting participation in a lobbying undertaking, it is usual to require lobbyists to identify coalition partners and/or to identify entities that have a direct interest in the outcome of the lobby undertaking.

How meaningful is this information? There is no doubt that identification of corporations expecting to benefit from the outcome of lobby undertakings is helpful to officials as they assess the pressures for specific outcomes, and it also alerts other interests, including the public, to efforts to obtain public benefits. Similarly, since it is by no means difficult to hide a specific interest behind a real or dummy interest group, it is helpful to require registrants to identify beneficiaries or those who are directing activity. Whether detailed information about private companies or about the decision-making structures of interest groups is truly helpful to policy makers and the public is another matter, and the need for it may in part depend on the availability of such information elsewhere. For example, in many jurisdictions associations are required to file information about their constitutional bylaws, financial structure and leadership in separate registries. It seems counterproductive to burden lobbying databases with information that is available through such sources.

2.1.2. Financial information

Hardened observers of lobbying claim that to understand who benefits from lobby campaigns, one has to ‘follow the money’. It is understandable, therefore, that reporters, politicians and members of the public should attach importance to obtaining information about the costs of lobbying. Intuitively, most observers correlate the level of expenditure on lobbying with the prize to be won, and while this may not be an infallible guide, it is, in general a reasonable assumption. It is also reasonable for the public to question politicians when they appear to be selling public goods too cheaply. An ordinary member of the public can be forgiven for feeling that industries that are prepared to spend very large sums of money in order to secure favourable public policies may well be expecting to recoup their expenditures at the expense of the taxpayer and consumer. Knowing something of the cost of those campaigns not only alerts the public to the stakes involved,[54] but suggests that some effort should be expended, by the public service and relevant advocacy groups, in giving comparable weight to alternatives to those put forward through well-financed lobbying campaigns.[55]

Unfortunately, lobbying campaigns are frequently multi-faceted and expenses will be deployed to a wide range of firms and organisations. Payments will be made not only to lobbyists themselves, but to polling firms, advertising agencies, lawyers, accountants, non-profit organisations and even to charities that espouse the same cause. Forensic accountants have the skills and information needed to look at the overall effort involved in a campaign, and to arrive at a shrewd guess as to what it all costs, but such assessments are extremely expensive, and usually available to the public, and to policy decision makers, only long after key decisions have been made. Nevertheless, the lobbying that engulfs any important public decision is so extensive that its cost is in itself a matter of public concern. Consequently regulators frequently consider various stratagems for obtaining this information.

American lobby laws have been particularly concerned with extracting financial information from lobbyists. The 1946 Federal Regulation of Lobbying Act, for example, required detailed financial information, including:

- The lobbyist’s salary and duration of employment;
- How much the lobbyist was paid for expenses and the nature of those expenses.

Quarterly updating reports were required, specifying:

- A ‘detailed report under oath’ of funds received or spent during the preceding quarter;
- To whom and for what purpose these funds were paid.[56]

More detailed reports had to be filed, identifying:

- Each person making a contribution to the lobbyist or his organisation of USD 500 or more;
- The total sum of all contributions made for the year to date;
- Each person who had been the subject of expenditure USD 10 or more, and the amount, date and purpose of the expenditure;
- The total sum of expenditure made by or on behalf of any person during the calendar year.[57]

Failure to report this information could bring a fine of up to USD 5,000 or imprisonment for up to a year; conviction of violating the Act might incur larger fines, longer imprisonment and prohibition from lobbying for up to three years.

Despite these penalties, by 1991 Milton J. Socolar, Special Assistant to the Comptroller General, summed up the view of many when he reported to the Senate Subcommittee on Oversight of Government Management that the Act 'has been largely ineffective'.[58] Examination of the 6,000 registrations filed in 1989 found that...

> Information required of registered lobbyists was often submitted late and incomplete. The 6,000 lobbyists reported total receipts of USD 234 million and expenses of USD 76 million for 1989. Some 62 percent of required reports were filed late in varying degrees and over 90 percent were incomplete. We could not determine the extent to which required filings were not made, but interviews we conducted suggest that there may be a significant number of non-filers.

The Comptroller's Office reviewed 1,107 reports, finding that while 6,000 lobbyists considered themselves active in the period, 375 (34.9%) appeared to have received no income nor made any disbursements. Nine hundred and five (90.5%) seem neither to have paid nor received any wages, fees, salaries or commissions. A similar number apparently managed without offices or utilities. Slightly fewer (84.6%) did without telephones, and, 75.1% lobbied without travel, fine dining or entertainment.[59]

Inadequate reporting was not entirely attributed to problems with the specific requirements to file financial information. Imprecise definitions, inadequate guidance and forms that were 'models of confusion' contributed to the shortfall, but requirements that left much to the discretion of lobbyists themselves and the lack of effective monitoring clearly played their part. The General Accounting Office recommended that lobbyists be required to file their contracts and that random audits should be routine.[60]

These recommendations were not implemented. Instead after many years of debate and, of course, lobbying, the 1946 Act was replaced by The Lobbying Disclosure Act of 1995[61] which attempted to secure meaningful financial information by establishing earnings thresholds to trigger registration and requiring 'good faith' estimates of income and expenditures. Lobbying firms were required to register if an undertaking would realise an income, adjusted for inflation, of USD 5,000 or more in a six-month period. Organisations were subject to an expenditure threshold of USD 20,000 for the same period. All registrants had to file semi-annual reports which would include either 'good faith' estimates of income and expenditure or a copy of the firm or organisation's filing under the Internal Revenue Code.[62]

This attempt to come to grips with the financial aspects of lobbying has also encountered difficulties, leading Loree G. Bykerk to conclude that 'many who lobby for organised interests, foreign governments, and corporations do not register even their identity let alone their specific interest or their lobbying expenditures as required by law'.[63] This assessment appeared to be confirmed by a General Accounting Office comparison of 'good faith' and Internal Revenue Code filings, which found not only that the two definitions, having different purposes and therefore different coverage, elicit quite different information,

lobbyists can 'switch between ... definition(s) from one year to another, and ... can choose the definition that enables (them) to disclose the least information'.[64]

It is hard to escape the conclusion that the complexities of analysing and monitoring financial disclosure are such that the cost of the effort involved far outweighs the benefits. True, the information so obtained may prove valuable in prosecutions, but it should be possible to obtain much the same information, at far less cost, by requiring lobbyists and their clients to retain all records of lobbying undertakings for a period of years. Perhaps the most that can be realistically expected from requiring financial disclosure is some indication of the importance that lobbyists' clients attach to a specific undertaking. Other jurisdictions have employed less ambitious methods to elicit this type of information. The Quebec Lobbying Transparency and Ethics Act, for example, requires that consultant lobbyists identify which of four compensation zones each specific undertaking will realise.[65] According to the Commissioner of Lobbyists, Andre Cote, this information is used as an indication of the significance that a client attaches to a specific lobbying campaign.[66]

2.2. Objects of lobbying

Unquestionably the public and officials need to know what it is that lobbying campaigns are intended to achieve. In many cases protagonists are only too eager to identify their causes, but in others they have strong reasons for obscuring their objectives. Their motives are not necessarily illicit; probably most reflect competitive pressures in business. It is said that the Canadian data on lobby registration is followed most avidly not by politicians, officials or journalists, but by lobbyists themselves, because they find in it useful indications of the work that their competitors are doing and the opportunities that businesses are pursuing.[67]

This poses a dilemma for registry officials: How precise should the demand be for information concerning the objects of lobbying? Too precise, and the unintended effect is to damage enterprise. Too vague, and the public interest is violated. The U.S. Lobbying Disclosure Act of 1995 captures the sense of this dilemma when it prescribes that the registrant must provide a statement of 'the general issue areas in which the registrant expects to engage' and...

> ...to the extent practicable, specific issues that have (as of the date of the registration) already been addressed or are likely to be addressed in lobbying activities.[68]

The Canadian legislation is less sympathetic. It requires '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,' and goes on to demand 'particulars to identify any relevant legislative proposal, Bill, resolution, regulation, policy or programme, grant, contribution, financial benefit or contract'.[69] In its advice to lobbyists the Registration Branch indicates that in addition to specifying the object of lobbying by precise name and number, registrants should also give 'a brief description... as to why you are lobbying with reference to the above-mentioned Act, Legislation, Bills, etc. (e.g. with respect to its implementation and/or review of...)'.[70]

The information thus elicited varies widely. Consider, for example, recent registrations by Queen's University and the University of Calgary, two academic institutions with comparable interests. The President of Queen's University, the signing officer for the registration, reported that the University expected to lobby in relation to 'public policy, Canada research chairs, student assistance and financial support for higher education, immigration policy, commercialisation, indirect funds for research, copyright reform, intellectual property, tax reform, charitable donations, land acquisition, health sciences initiatives'. One can imagine senior members of the university administration brain-storming to come up with this list, which by no means covers the full gamut of policies that Canadian universities are concerned with. The

University of Calgary opted for a more succinct statement, proposing to lobby in relation to 'post-secondary education, funding, research and development, climate change technology, sustainable development and innovation'. It is unlikely that the University of Calgary is any less interested than Queen's University in immigration policy (as it relates to students and the hiring of staff) or that Queen's, which for a number of years has been working to develop a solar-powered automobile, would neglect policy issues related to 'climate change technology and sustainable development and innovation'.

All of which illustrates the difficulty of providing meaningful responses to disclosure requirements, and suggests that it would be more sensible to assume as some European practices appear to do, that simply stating the lobbyist's sphere of interests is sufficient to alert observers to the ramifications of a lobby undertaking.[71] That is, until one begins to analyse some of the responses provided by lobbyists acting for more specialised organisations. Here two strategies may be adopted. On the hand, the registrant may present a long list of legislation, or programmes, that are the object of lobbying activity, hoping thereby to hide the central purpose of the campaign in a mass of detail. On the other, a terse description – such as the recent filing on behalf of a technology group, which stated only that the group would be lobbying on 'Canada's innovation strategy' and 'meetings' – is no more revealing.[72] It may be that the difficulty of communicating a complex assignment on a short electronic form, rather than obfuscation, explains why these entries are vague and meaningless. At any rate, it justifies the authority given to officials to require registrants to provide more complete information.

As a general conclusion, lawmakers have a choice between accepting broad descriptions of lobbyists' objectives or requiring them to provide more precise details about the specific legislation, programme, policy or other government activity that they are concerned with. If the former, legislators must expect that interests will state their objectives in very broad terms, often with the result that it is virtually impossible to discern the real purpose of a lobby campaign. American and Canadian law attempts to force more meaningful disclosure by first asking for a general statement on the issue area, and then requiring information about the specific legislation, policy or benefit that the undertaking addresses. As we have seen, the information thus provided may not be illuminating. American laws are more likely to require the filing of contracts and other documents. It may be that truly meaningful disclosure can only be obtained through a combination of these requirements. That is, the current succinct reports that are filed on forms, if coupled with a requirement to file certain documents, and with the authority on the part of registry officials to demand clarification and/or to conduct investigations, may ensure that meaningful information will ultimately be provided.

We have to remember that disclosure in and of itself cannot fully inform either officials or the general public of the purpose or processes of a lobbying campaign. The key to effective disclosure lies in the lawmakers' understanding of what information is needed to shed light on the policy ramifications of a lobbying campaign, and to alert officials to illicit lobbying activities. To secure the latter objective, registry officials must have the authority to demand that registrants clarify their filings and to pursue investigations further, if necessary, to the point of setting in motion full-fledged criminal enquiries. To achieve the former objective two conditions are necessary: Registry officials need the authority to demand clarification of filings, and there must be in place both an informed bureaucracy, and a segment of the public – amongst journalists, advocacy groups and rival interests – equipped to understand the implications of the information provided, and to lead a public debate on the issues that it raises.

2.3. The targets of lobbying

Lobby registration requirements will seek to identify the points in decision-making processes where lobbyists have attempted to exert influence. However, there is a good deal of variation in the amount of information required and in the coverage of governmental institutions. European registries appear to most frequently require lists of interests seeking to appear before specific parliamentary and administrative

committees. The United States *Lobbying Disclosure Act* describes reportable 'lobbying contacts' as 'any oral or written communication ... to a covered executive branch official or a covered legislative branch official' made on behalf of a client. However, in their semi-annual reports lobbyists must provide lists of the Houses of Congress and the federal agencies contacted on behalf of clients.[73] Canada's *Lobbyists Registration Act* treats almost the entire public service as susceptible to lobbying influence,[74] and requires lobbyists to identify on first registration 'any department or other governmental institution' with which they communicate or intend to communicate.[75]

In the past Canada's federal legislation has not required lobbyists to name the officials that they contact. Even when lobbyists made contact with officials at social events, they have not had to name the officials, but to report 'informal communications' with unnamed officials of specified agencies. However, the new *Federal Accountability Act* will require lobbyists in Ottawa to identify any senior public office holders (designated public office holders) with whom they communicate. Senior public office holders are ministers of the Crown, deputy ministers, associate and assistant deputy ministers and similar designated officials. This information must be filed monthly and must include the date of communications and 'any particulars .... to identify the subject matter of the communication'.[76] This is by far the most searching disclosure requirement of any lobby regulation currently in effect, and it will be interesting to see whether it does indeed provide meaningful information to policy makers, the media, and the parliamentary opposition on the one hand or the general public on the other. One can envisage the public obtaining a very clear understanding of the frequency with which lobbyists interact with senior officials and when interaction occurs. Doubtless, too, this information, if properly reported, could assist in prosecutions in lobbying cases. By the same token interactions between officials and lobbyists may become increasingly formal, as both strive to avoid any appearance of undue influence. On the other hand, administration of the reporting process will be onerous. *The Lobby Monitor* predicts that...

> "...if it is like many of the other 'sunshine laws', it is quite likely that it will succumb to one of two problems – relevant information (purposefully) buried amidst a sea of useless and irrelevant information, or, information so truncated as to barely meet the letter, but not the spirit, of the law..."[77]

Other possible outcomes include engaging in 'non-reportable contact by pushing the point of contact below the required reporting levels in departmental hierarchies' or to rely on 'serendipitous' meetings with targeted officials. Alternatively, the Monitor wonders whether senior officials will be inundated with communications from lobbyists whose clients insist that they leave no public office holder in the dark about their needs. In the final analysis, the Monitor expects the reporting requirements to be expressed so vaguely that they allow 'for as much ambiguity and anonymity as possible', so that 'after much money, time and effort, when all is in place, the public is likely to be left slightly poorer but none the wiser'. This could well be the case. On the other hand, the Federal Accountability Act also provides that the Commissioner of Lobbyists shall have greater independence than earlier officials were given. Consequently, lobbyists may discover that it is not as easy as it has been to secure loosely-worded regulations.

Before leaving this subject we should note that lobby regulations generally exempt certain types of communication from reporting. All the North American legislation examined for this study, exempts formal presentations to legislative and other hearings that are on the public record. Communications asking for information or related to specific issues of enforcement or interpretation are also exempt. Lawyers advising their clients 'on the construction, meaning, or legislative or administrative action', to quote Hawaii's lobbying manual, are usually exempt, unless the communication is deemed to be an attempt to lobby.[78] Some jurisdictions exempt communications responding to requests for information from public servants. Draft legislation recently introduced in Alberta does this, but Parliamentarians in Ottawa have concluded that such requests are susceptible to connivance between officials and lobbyists and treat them as lobbying communications.[79] Most of these exemptions are meant to cover communications that are on

the public record, relate to the specific application of regulations, emanate from lawyer-client relations or involve requests for information. However, depending on the precision with which the exemption is worded, it is sometimes possible for skilled lobbyists to use these communications to, in effect, lobby. An apparently innocuous request for information, for example, may encourage a public official to purse a course action favoured by the lobbyist.

2.4. Other disclosure requirements

Understanding of the policy implications of lobbying undertakings can be significantly enhanced when the names of clients and other potential beneficiaries are known. Identification of the institutions being lobbied is equally important, since it allows tracking of decision processes, and alerts officials and others to the need to ensure that all issues and considerations are taken into account. However, other information is sometimes required, the salience of which is not always clear. Although these requirements may have been injected into the regulatory process as a result of particular situations, they can acquire a life of their own, becoming virtually permanent fixtures, regardless of their true utility or the fact that they may unnecessarily encumber both regulation and analysis.

Broadly speaking, these additions have two purposes. First, they are believed to shed light on the impact lobbying has on decision making. Second, they may reinforce other regulations. A few serve both purposes.

In the first category we find, in American legislation, the requirement that foreign interests should be identified. This requirement has its origins in the Foreign Agents Registration Act of 1938 which required individuals, other than diplomatic representatives, who were acting for foreign governments, political parties, corporations or other organisations by spreading propaganda or otherwise engaging in political activities. The Act was later amended to shift its focus to the gathering of information on lobbyists representing foreign corporations, and, in 1995, incorporated into the Lobbying Disclosure Act, a step that possibly reflects the declining utility of such information in an age when most domestic economic policy has to take account of global economic conditions.[80] Canada's Lobbyists Registration Act imposes a very different requirement when it calls for disclosure of...

> "... particulars to identify any communication technique that the individual uses or expects to use in connection with the 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."[81]

By identifying grass-roots campaigns that have been fomented by lobbyists, legislators presumably hoped that policy makers would be able to distinguish the 'genuine article'. Given that the sophistication of modern lobbying makes it unlikely that any significant campaign will lack either professional lobbyists or grass-roots campaigning, this hope has probably proven unrealistic, and the information the provision generates may be of greater interest to students of lobbying than to policy makers. Nevertheless, the clause does provide other benefits, notably, the fact that it enables officials to elicit reports of 'unofficial' communications at, for example, social occasions, conferences and so on.

Disclosure requirements that reinforce or compliment other regulations would include those that call for details of previous government employment and public office holding, contingency contracts and government funding. The first reinforces moratoria on lobbying by former office holders. The second may alert finance officials to infringements of regulations governing the awarding of contracts when contingency fees are involved, and the last reflects regulations that prohibit government agencies from attempting to lobby for preferred policies.

3. Disclosure of lobbying from within

3.1. Lobbying by legislators

The term 'dual-mandate lobbying' may have originated in Sweden where, according to the European Parliament's report on Rules on lobbying and inter-groups in the national parliaments of the member states, there is some discussion about the dangers of a 'dual mandate' for MPs involved in interest groups or state authorities.[82] This is an issue that has been touched on earlier, in comparing the status of interest groups in corporatist countries with their counterparts in pluralist states. Although in Sweden this debate appears not to have altered the status quo, in some other countries it has brought about changes in the way legislators disclose their relations with groups.

The central issue is whether a legislator who represents a constituency is subject to a conflict of interest when he or she also acts as a representative of a collective body, such as a union or an employers association. In France, deputies in the National Assembly are expressly required to use their positions exclusively to carry out their public duties, and are forbidden to belong to 'any association or group which defends private, local or professional interests' or to make 'any commitments to such groups regarding their parliamentary activities, if such membership or commitments involve accepting mandatory instructions.[83] As we have seen, other European countries have taken an entirely different approach. Germany, Sweden and Denmark have not only considered the representation of collective bodies to be compatible with election to the legislature, they treat it as being in the public interest, since it contributes to the development of consensus on major policies. This understanding probably accounts for the fact that there appear to be no rules governing disclosure of member's interests.

The debate on the issue in the United Kingdom illustrates its complexities. It waxed and waned for many years, and, according to Grant Jordan, came close, in the 1990s, to ushering in full-fledged lobby legislation. Lobbyists themselves were reported to be in favour of such a step, but 'unexpectedly' the push for legislation gave way to 'regulation of legislators, rather than lobbyists.'[84] Members of Parliament had represented special interests for generations, and there was resistance to attempts to limit their activities. However, the debate over consultancies was fuelled by a series of scandals involving lobbying, and gradually controls were imposed. These took the form of resolutions on the conduct of members, the setting up of committees on standards, and the establishment of a register of Members interests which would record 'all outside sources of remuneration which involved "the provision of services in their capacity as Members of Parliament"'.[85] On 6 November 1995 the House passed a resolution relating to 'conduct of Members' and prohibiting paid advocacy relating to certain situations. As with earlier resolutions, the general prohibition it enunciated was tempered by subsequent elaboration:

> "...in particular no Members of the House shall, in consideration of any remuneration, fee, payment, or 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 of 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 a bill."

In other words, while the Members were constrained against engaging in debate on behalf of outside interests, they were not forbidden to lobby informally for those interests. Consequently, the rules on members disclosure continued to be enforced and were strengthened, providing for declaration of interest in respect of matters coming before the House; the deposit with the Commissioner for Standards of agreements involving the provision of services by Members in their Parliamentary capacity and prohibiting Members from initiating, participating in, or attending delegations to Ministers or public officials where issues would be addressed that relate exclusively to the organisation with which the Member has a paid

interest. They also required Members to report directorships and consultancies and other professional undertakings where they might receive remuneration in return for offering guidance concerning the lobbying of Members, ministers and officials.[86]

According to the *Sixth Report of the Committee on Standards in Public Life*, these measures have 'dramatically changed the perception of lobbying among MPs'.

> "Our witnesses were overwhelmingly of the opinion that the regulation of MPs through the ban on paid advocacy and the new rules on registration of interests had changed the approach in Westminster for the better. The assessment of the former Parliamentary Commissioner for Standards was reassuring:
>
> 'To the best of my knowledge the financial links with lobbyists have now been broken. Some non-financial links are proving embarrassing but at least the spectre of cash for influence through this route has fallen away.'"[87]

To summarise: in addition to prohibiting the direct and formal advocacy by Members and their participation in certain types of meetings, the British House of Commons requires Members to register and deposit agreements whereby they provide services arising out of their Parliamentary capacity, including advisory undertakings, and to declare their interest in matters coming before the House.

3.2. Lobbying by family members, legislative staff and journalists

The United Kingdom has also dealt with the issue of lobbying by Members' support staff, who, because they hold full passes to the Palace of Westminster, have relatively free access to Members and could be in a position to exert influence. Registers were established for staff members and journalists, requiring the latter to report 'both the employment for which they received the pass and any other paid occupation or employment where their privileged access to Parliament may be relevant', and staff members to register 'any relevant gainful occupation' – that is occupations that 'might reasonably be thought to be advantaged in any way by access to the parliamentary buildings and their services and facilities'. Staff members must also report the receipt of gifts.[88]

In recent years lobbying by family members has become an issue. In Washington, where marriages between lawmakers and lobbyists is not uncommon, the Senate recently adopted an ethics package that, *inter alia*, will prevent spouses from taking advantage of their family status to lobby members of Congress.[89]

3.3. Disclosure requirements for 'All-Party Groups'

The growth of executive power and the consequent decline of influence on the part of back-bench members of legislatures have led to the evolution of Members' groups to informally examine broadly-defined issue areas. The composition and concerns of these groups vary according to the public agenda and that of Members. They may be referred to as 'All-Party Groups', Parliamentary Groups, Parliamentary Caucus Groups or as Inter-groups, and their organisation and proceedings are not highly institutionalised.

Where these groups are composed entirely of legislators who are independent of any interest, and where they receive staff support from officials of the legislature itself, their presence and activities must be treated as part of the normal functioning of the legislature. However, when these groups admit members who are not legislators or when they receive staff support from outside interests, questions arise about their susceptibility to influence.

The British Parliament appears to be the only legislature that has articulated rules to deal with this issue. Westminster requires groups whose members are drawn from more than one party to register the names of the officers of the group and the source and extent of any benefits that they receive, including 'the provision of staff help by outside organisations or individuals' and relevant occupational information relating to outside staff.[90] The groups must also adhere to Parliamentary rules governing their organisation, membership and influence by outside interests.

4. Summary: Emergent principles in disclosure

Disclosure is the soft under-belly of lobby regulation. Sometimes it is also a swollen under-belly. Effective disclosure requirements elicit that information which most succinctly and accurately:

- Captures the intent of lobbying activity;
- Identifies its beneficiaries; and
- Points to those offices and institutions that are its targets.

Even when regulation succeeds in securing this core information, it will by no means ensure that decision processes are transparent or satisfy the legitimate information needs of key players in the legislative process. Depending on those needs, supplementary disclosure will be required. Legislators and ministers, for example, will want to know where lobbying pressure is coming from, and whether it reflects broad public opinion. Consequently they have an interest in securing the disclosure of information about coalitions and about techniques of lobbying that generate grass-roots support. They also have an interest in ascertaining where information is coming from and whether it is credible, but for policy analysts that information is central to their concerns. Watchdogs for the public − and for other interests − insist on disclosure that reveals where lobbyists have been heard, and the relative attention paid to competing camps. Finally, the official guardians of public integrity will want records that assist them to track illicit lobbying undertakings. Attempts to satisfy even these users of disclosed information − and they are by no means the only ones asking for expanded disclosure − can create a reporting system that collapses of its own weight.

Given this inclination toward over-indulgence, regulators have to remember that while much is feasible, it is important to apply a few basic rules. Namely:

- Information sought and collected has to be relevant to the core goals of ensuring transparency, integrity and efficacy;
- The demand for information is realistic in practical and legal terms;
- Information can be disseminated efficiently to the public, to legislators and to officials.

There are, of course, information needs that do require a less frugal approach. Where prosecution is contemplated, for example, documentation and extensive records are essential. However, lobby regulation may be best served if lobbyists are simply required to hold records for a given period, or are required to file them in a separate process.

To reinforce all disclosure requirements registry officials must have authority to call for clarification of filings; to carry out further investigations, and to hand off enquiries to the police.

Finally, it should be noted that disclosure on the part of legislators who are permitted to lobby has to observe somewhat different rules than those imposed on others. A member of a legislature has privileges and opportunities denied to others. Therefore, he or she has a particular obligation to reveal any

undertakings with outside interests that stem specifically from the member's role as a legislator. Similar obligations apply to legislative staff and to parliamentary journalists.

Reporting processes and technologies

Lobby regulation has engaged the interest of legislatures in much of Europe and North America, but, as we have seen, the adoption of regulatory measures has occurred sporadically. The measures themselves are by no means uniform, and their administration frequently reflects the idiosyncrasies of the adopting legislatures. For example, separate registries may exist for each legislative chamber. Some registries are accessible through the internet, and filing itself can be conducted electronically. Others seem to rely on the provision of documents that are not amenable to website reporting.

Nevertheless, the current interest in lobby regulation has been accompanied by a growing appreciation of the utility of electronic filing and reporting. Electronic filing has made possible the collection or dissemination of far more information than the early regulators of lobbying could have imagined. Essentially, electronic filing has made modern regulation feasible. Its benefits are numerous:

- Registrants can file efficiently from their offices;[91]
- Forms can elicit quantifiable information, thereby facilitating analysis;
- Information can be easily stored and archival and documentation storage costs are greatly reduced;
- Internet access to filings and reports eliminates the physical centralisation of information and makes that information readily available to members of the public as well as officials, thereby facilitating transparency.

At the same time, electronic management of lobby records may impede transparency. As we have seen, this is especially true of forms calling for disclosure of information concerning the objects of lobbying undertakings. Clearly registry officials have had to acquire experience in developing forms that elicit truly informative responses, and where such information is not forthcoming officials need the authority to investigate.

As well, electronic filing cannot meet all the information needs of lobby regulation. Although it is relatively easy to file contracts, agreements and other business document electronically, legislators have to consider when it is lawful or in the public interest to make that information publicly available. It may be more appropriate to hold some information in confidence, or to require registrants and their clients to retain records against the demands of some future inquiry.

Information overload can also be a problem. As some lobbyists have discovered, providing too much information can obscure lobbying objectives just as effectively as providing too little. Well-intentioned data collection can be equally unhelpful. Detailed expense accounts, for example, may ultimately tell very little, and the filing of voluminous records of meetings, official and unofficial, between senior office holders and lobbyists may yield little useful information to all but the most persistent and experienced enquirers. Requiring registrants and their clients to deposit or retain this kind of information may facilitate the policing of the lobby activity, and perhaps, therefore, is necessary. However, its inclusion on registry websites may simply inhibit the public from enquiring into lobbying activities that should be transparent. If legislators decide to add appreciably more disclosure requirements to registries, they may find it helpful to establish two-tier sites so that summary information can be supplemented by more extensive reporting.

In short, electronic filing has greatly facilitated lobby registration and regulation. However, there are limits to its application. Although the technology can handle incredible amounts of data, the human

capacity to access it still has limits and the ingenuity of individuals who wish to obscure their undertakings is correspondingly extensive. Hence administrators of registry processes must be ingenious in developing forms that elicit genuinely useful information and legislators must avoid expanding demands for information to the point where it is difficult for the public to digest. Supplementary methods of holding and accessing information and documentation are essential, as are provisions in the regulations that allow registry officials to require further information and to carry out investigations.

Timeliness

Reporting deadlines are as important as disclosure itself. To serve the public interest, disclosure must be made and updated in a timely fashion. Canada's federal law requires initial reporting within ten days of entering into a lobbying undertaking,[92] and the American law, 45 days[93]. In Washington registrants must file reports semi-annually updating the information initially provided, but in Ottawa the new Federal Accountability Act will soon require monthly reporting on certain activities, such as communication with senior public office holders.[94]

Codes of conduct

Codes of conduct have increasingly become a part of modern lobby regulation. Three types of conduct now affect the operations of lobbyists in a number of countries.

The least coercive are the professional codes adopted in several jurisdictions by associations that have been organised by lobbyists themselves. These associations represent lobbyists to government and to other business sectors. They attempt in various ways to enhance the professional calibre of the lobbying community, conducting training sessions and developing codes of professional conduct which to some extent emulate the codes that govern the traditional professions. These efforts are constrained by the nature of the lobbying business itself. Unlike medicine, law, architecture or engineering, lobbying is a field of endeavour that can be entered relatively easily. It does not require a long period of formal study; there are no vetting bodies to confer credentials on new lobbyists. Furthermore, no legislature has conferred on these embryo professional bodies the same legal disciplinary powers held by the senior professions. There is, in effect, no compulsion to belong to a professional body in order to practice. The fact that many lobbyists belong to the legal profession also hampers efforts to create and impose on practitioners a single professional identity. Consequently, though some associations of lobbyists have attempted to discipline wayward practitioners[95], the open nature of the business and public ignorance of professional codes has rendered their efforts largely ineffective. The codes, therefore, state important ground rules for lobbyists in their relations with one another, with clients and with government officials, but because enforcement is extremely limited they do little to constrain those lobbyists who wish to break the rules.

Employment and post-employment codes and the rules governing the conduct of members of legislatures are in several ways more significant influences on the behaviour of lobbyists. A condition of obtaining access to the European Parliament, for example, is that lobbyists must 'comply strictly' with the rules that require Members to report remuneration or other benefits, including staff assistance, provided by third parties, and must satisfy themselves that the appropriate report has been registered.[96] They must also comply with staff regulations governing the employment of former officials and respect rules relating to the conduct of Members and of Members' assistants. A number of jurisdictions now have rules in place that purport to regulate the conduct of members of the legislature and public servants, and though lobbyists may not be specifically enjoined to respect them, the consequences of ignoring them, as far as public officials are concerned, will act as a constraint on their behaviour and thus on that of lobbyists.

A few jurisdictions impose codes of conduct on lobbyists, either as a condition of access to legislatures and government offices, or as in the case of Canada, as part of the legislation regulating lobbying. As we have seen, the European Parliament, under Rule 9(4) permits lobbyists to hold permanent

passes to the legislature on condition that they observe a code of conduct. Some aspects of the code have been noted. Others require lobbyists to disclose to the Members and other officials that they deal with the interests that they represent, and to refrain from certain activities.[97] Failure to comply with the code can lead to withdrawal of the lobbyist's pass, and thus to denial of access to Parliament.

Some American states also couple lobbyist registration with formal or de facto codes. Iowa, for example, does not have a code, but prohibits lobbyists from intentionally deceiving public officials with regard to facts pertinent to lobbying; sending unauthorised communications to public officials, accepting contingency fees, or acting as a conduit for campaign funds. Wilson notes that in California 'every person who registers as a lobbyist... must periodically attend a lobbyist ethics orientation course', which is conducted by the ethics committees of the state legislature. Certification as a lobbyist is contingent on taking the course. Wilson also notes that the state of Texas has adopted a code of conduct for lobbyists, but that it is primarily concerned with the lobbyist's relationship with clients.[98]

Canadian governments appear to be the only ones that legislate a code of conduct. Amendments to the Lobbyists Registration Act which came into effect in 1996 authorised the Ethics Counsellor to develop a code that would apply to all registrants and in-house lobbyists.[99] Quebec and Newfoundland subsequently introduced similar provisions.[100] The code, which came into effect in 1997, has two elements, a statement of principles and a set of rules which flow from those principles. There are three principles, calling on lobbyists to conduct themselves with openness, with integrity and honesty, and in a professional manner. These are, in Wilson's terms, 'goals and objectives to be obtained' while the rules set out the 'standards' that the principles enjoin. Thus, the principle of openness (or transparency) invokes three standards: an obligation to identify to officials the beneficiaries of the lobbying activity and the reasons for it; a commitment to convey information accurately, taking care not to mislead those being lobbied, and, thirdly, a requirement to remind office holders of the lobbyist's own obligation to adhere to the Act and the Code. The standards relating to integrity and honesty are confined to a commitment to respect the confidential nature of information obtained and not to use confidential information 'to the disadvantage of their client, employer or organisation'. The principle of professionalism is covered by rules relating to 'conflict of interest', requiring lobbyists to avoid representing conflicting or competing interests and to avoid placing office holders in positions of conflict of interest.

While these provisions are by no means extensive, they are susceptible to fairly broad interpretation, and can be amended and strengthened. Perhaps more important, the revised Lobbyists Registration Act, in authorising the Code, also conferred on the Registrar powers necessary to investigate suspected breaches of the code, a measure that considerably extended the Registrar's ability to enforce the Lobbyists Registration Act. In addition, the final report of any investigation carried out under the Act must be sent to Parliament. The Registrar has limited authority to take other action on findings that the Act, including the Code has been breached. Prosecution decisions rest with the Attorney General. However, in the lobbying business, where reputation is an important asset, the presentation to Parliament of an authoritative adverse report, and subsequent media interest, can be a significant consequence.[101]

As far as codes of conduct are concerned, the central issue that excites debate is not their actual content, but rather their status. Should they be voluntary? Or enforced with incentives? Or should they be full-fledged regulations? The European Commission has encouraged umbrella organisations of European public affairs practitioners to develop their own codes of conduct using three minimum criteria adopted by the Commission:

- Lobbyists should act in an honest manner and always declare the interest they represent;
- They should not disseminate misleading information;
- They should not offer any form of inducement in order to obtain information or to receive preferential treatment.

In its recent *Green Paper* on transparency the Commission notes with approval that various umbrella organisations have adopted voluntary codes based on these standards, and that some have also introduced sanctions such as reprimands and expulsions. Although it reports that only consultant lobbyists are obliged to observe the codes, the *Green Paper* suggests reluctance to embrace full-fledged imposition and regulation of codes by the European authorities. It invites the profession to develop a code that would cover all lobbyists and that would be part of a voluntary system run by the Commission and made effective through incentives and sanctions.[102] Whether such a system would secure adequate compliance is a moot point, which we can better consider after having examined current procedures for securing compliance.

Securing compliance

1. Strategies for securing compliance

The imposition of sanctions is often the first recourse of legislators attempting to address issues arising from improper lobbying. Sanctions are a necessary feature of lobby legislation, but are seldom sufficiently stringent to constitute a true deterrent. Even substantial fines or imprisonment, for example, may not intimidate lobbyists who anticipate very large profits from winning significant government contracts for their clients. Again, American experience is a case in point, with the Abramoff scandal being only the most recent example of some lobbyists' irrepressible conviction that it is possible to get away with behaviour that is either illegal or clearly outside the limits of professional conduct. In May 2006 Robert S. Mueller, Director of the FBI revealed that since 9/11 his agency, as part of its increased emphasis on counter-terrorism, had moved more than 200 agents to corruption investigations. By 2004 and 2005:

> "More than 1,060 government employees were convicted of corrupt activities, including 177 federal officials, 158 state officials, 360 local officials and 365 police officers, according to FBI statistics. The number of convictions rose 27 percent from 2004 to 2005."[103]

Nor is the United States unique. Canada has recently experienced its own 'sponsorship scandal' as a result of which a public servant and advertising executives were convicted of colluding over the awarding of contracts. A major public enquiry concluded that lax enforcement of regulations, including lobbying regulations, had led to 'a culture of entitlement' which permeated government decision making.[104] Tainted by the scandal, the governing Liberals were defeated in the election of January 2005 by the Conservatives, led by Stephen Harper, who made his government's first order of business the introduction of the Federal Accountability Act which has been referred to earlier as strengthening the role of registry officials and tightening disclosure regulations. The political history of many countries contains similar episodes, regardless of the severity of their laws punishing corruption. The United States is endowed with a legislative system in which power is highly diffused and the opportunities for lobbying – legal and illegal – correspondingly abundant. But it is worth remembering that the same openness that encourages lobbying also fosters a competitive advocacy environment and investigative journalism that not only reveals instances of wrong-doing, but creates the impression that America, in comparison to other countries, is riddled with corrupt lobbying practices. Perhaps the United States is more given to spectacular exercises in lobby wrong-doing, but that scarcely means that the rest of the world is free of similar, though less dramatic, activities. The lack of publicity may merely mean that they have not been investigated. As an FBI official wryly commented when the 2004 and 2005 records were revealed, 'I don't think anybody recognised the number and quality of cases we would generate'.

The lesson of American experience is that sanctions, while important, are only a small part of the regulatory regime that will confine illicit activity to tolerable limits.

One of the obvious concomitants of attempting to limit corrupt practices in lobbying is that sanctions – whether they be fines, imprisonment or denial of access to officials – cannot be imposed unless

registry officials are authorised to require expansions of the information filed by registrants and accorded the powers of investigation needed to access the tortuous and convoluted trail left by unscrupulous lobbyists. In Canada, for example, early iterations of the Lobbyists Registration Act neglected to give officials sufficient time to identify infractions and carry out investigations. The introduction of the Code of Conduct now enables officials to initiate investigations at any time. This, together with enlargement of powers of investigation has permitted a considerable increase in the number of investigations and, officials believe, greatly enhanced compliance.[105] Enhanced powers, however, do not always lead to successful prosecutions. Registry officials may be required to hand-off investigations once they reveal the possibility of criminal activity. In theory this is an appropriate demarcation line, one that ensures that eventual prosecution will rest on the findings of investigators experienced in criminal cases. But it may actually result in a failure on the part of the police – who frequently have more urgent priorities – to complete investigations.

These limitations have prompted registry officials to call on legislators to be more imaginative in developing sanctions that can be applied without criminal prosecutions. As we have noted, the Canadian practice of reporting to Parliament on investigations which have proven violations of the Act conjures up unwelcome publicity for lobbyists. In other jurisdictions, registration constitutes a license to lobby and offences against the regulations, including codes of conduct, can be punished through withdrawal of registration. This approach has been adopted in several European jurisdictions. In Canada, while neither British Columbia, Newfoundland and Quebec, nor the federal government in its new Federal Accountability Act,[106] establish a license system, they do provide for denial of registration. It is unclear whether or not denial would violate rights of Canadian citizens or whether the courts would consider such a sanction too significant for adjudication by an official or even an administrative tribunal.

What is clear, however, is that the effective use of access as an incentive to ethical lobbying conduct depends on more than simply issuing or denying passes. As we have noted, publicity is an important adjunct. So is a system for ensuring that lobbyists who have been denied access, do indeed find doors closed against them at the legislature, the executive and in administrative offices. This can only be achieved if officials and politicians fully understand the nature of the regulatory process and automatically look for evidence that those who lobby them are authorised to do so. It is not enough to enjoin lobbyists to declare their roles and affiliations, or even to insist that they carry authorisation. Those who are lobbied must be able to access registries to verify credentials and they must be expected to carry out verification as a matter of course. This means that there must be managerial directives requiring public servants to verify lobbyists' credentials and to report possible infractions. In turn, the effectiveness of such directives implies that public servants and politicians should be exposed to educational programmes that prepare them to recognise lobbying activity and familiarise them with reporting facilities and requirements.

Compared to the costs of monitoring, investigating and prosecuting lobby wrong-doing, education appears to be less expensive.[107] When adequately supported and imaginatively conducted, it can also be far more effective. Education strives to create a culture of compliance with the requirements of registration legislation and the ethical standards promulgated by governments. Education programmes address a number of targets. They prepare public officials and lobbyists to understand the role of lobbying in government decision making and to be aware of registration requirements and codes of conduct. The introduction of sessions on lobbying and its regulation can be considered a logical addition to the courses on government ethics that have become a regular part of the curriculum of in-house training programmes. When directed outside government, education can target lobbyists themselves – through their associations, their trade journals, and even, as in the California case, through requiring them to enrol in special training programmes. As for the general public, the academic study of lobbying issues at the university and senior secondary school levels, together with broad outreach to citizen's and business groups, as well as periodic media coverage, helps to create expectations about lobby regulation and public ethics that lobbyists, officials and politicians come to understand must be met. At the same time, they help the public to

appreciate the significance and utility of lobbying processes, including knowing how to participate in policy debates, rather than the blanket condemnation of lobbying that is encouraged by sensational coverage of scandals.

In conclusion, it seems evident that compliance is best addressed through a spectrum of strategies that start with clear requirements for inclusive and timely registration and disclosure and go on to include:

- Formal sanctions;
- Managerial directives requiring public servants to verify lobbyists' credentials and to report possible infractions;
- The endowment of registry officials with adequate powers of investigation and prosecution;
- Education.

Compliance also depends on the development of a culture of integrity throughout governmental institutions. Such a culture reinforces each element of a compliance regime; the lack of a culture of integrity cripples regulation, however carefully devised and expressed it may be. The influence of a regulatory regime and of a culture of integrity will be discussed in a later section.

2. Government or voluntary regulation?

Earlier reference was made to the suggestion in the European Commission's Green Paper on the European Transparency Initiative that the profession be invited to develop a code that would cover all lobbyists and that would be part of a voluntary system run by the Commission and made effective through incentives and sanctions.[108] Specifically the Commission has proposed:

- A voluntary registration system, run by the Commission, with clear incentives for lobbyists to register. The incentives would include automatic alerts of consultations on issues of known interest to the lobbyists.
- A common code of conduct for all lobbyists, or at least common minimum requirements. The code should be developed by the lobbying profession itself, possibly consolidating and improving the existing codes.
- A system of monitoring and sanctions to be applied in case of incorrect registration and/or breach of the code of conduct.

A start has been made to implement such a system. According to the Green Paper lobbyists' organisations have been encouraged to develop their own codes of conduct based on minima suggested by the Commission. As noted earlier, the resulting criteria are summarised in the paper as:

- Lobbyists should act in an honest manner and always declare the interest they represent;
- They should not disseminate misleading information;
- They should not offer any form of inducement in order to obtain information or receive preferential treatment.

However, as the Green Paper goes on to note, the organisations that have signed on to this process represent only a portion of those who lobby in Brussels. Interest group and think-tank employees as well as some members of professional groups, including lawyers, are not covered by these codes[109]. This illustrates the fact that the creation of a common code depends on securing a shared view of appropriate conduct in

this domain on the part of different professional bodies. Public relations specialists, journalists, lawyers, managers, accountants and even doctors and engineers can be found in the world of lobbying. Most of these fields are represented by professional bodies that have widely varying capacities to discipline their members and diverse views on what constitutes appropriate conduct.

Assuming that it will be possible to arrive at a Code that covers most of those who lobby in Brussels, the question arises as to whether the proposed incentives will be sufficient to encourage lobbyists to observe the Code. In the North American context the promise of 'automatic alerts of consultations on issues of known interest to the lobbyists' would be insufficient. Lobbyists, after all, are in the business of 'knowing what is going on'. A somewhat more stringent incentive that we have noted in some European jurisdictions is the practice of making registration a prerequisite to participation in consultations. This would be a more powerful incentive than simple notification, as long as formal participation were necessary to the lobbyists involved. It would not be an incentive for those lobbyists who use less formal means for influencing legislators and officials. On the other hand, if the theatre of lobbying activity were to be broadly defined, as suggested earlier, and if the privilege of access were to be dependent on strict observance of the Code, there might be sufficient incentive to bring the majority of lobbyists into compliance.

This brings us to the last of the Commissions proposals. Monitoring compliance is most likely to be achieved on a systematic and comprehensive basis if it is carried out by officials, and if those officials have authority to investigate non-compliance. And while some assistance in monitoring can be expected from members of the public, the media and lobbyists themselves, the most consistent source of information about lobbying activity has to be public officials. The people who are being lobbied are in the best position to require lobbyists to observe ethics codes and to report failures to do so. Their effectiveness, however, will depend on the extent to which they are familiar with the regulations regarding lobbying and with their own obligation to assist the monitoring process.

This last point suggests that while it may be possible to mount a lobby registration scheme on a voluntary basis, in the final analysis its success will depend on a level of enforcement that can only be achieved at the governmental level. Only government has the authority to require lobbyists to divulge information. Only government can require officials to report the failure of lobbyists to comply with the rules. Only government can investigate such failures and prosecute breaches of the rules. Only government can impose sanctions such as the denial of access.

Perhaps the achievement of a culture of integrity, such as was alluded to at the conclusion of our discussion of sanctions and compliance, would obviate the need for coercive measures and permit dependence on voluntary conformity with codes of conduct established by professional bodies. Canada's experience in the sponsorship scandal – which revealed that a number of lobbyists had not troubled to register – demonstrates that, in this country at least, no such culture exists, and some degree of coercion is necessary. It may be that a combination of governmental and voluntary arrangements, such as has been suggested for Brussels, can be made to work, but, again the Canadian experience suggests otherwise. In the several reviews that have been conducted of the lobby legislation, lobbyist organisations have argued against measures that would introduce greater transparency. The Canadian code was developed in consultation with lobbyists, and can be hardly considered rigorous; quite possibly a code that was entirely a product produced by lobbyists themselves would be even more permissive.

Several arguments have been put in favour of a voluntaristic approach. The Sixth Report of the British House of Commons Committee on Standards in Public Life concluded that 'the weight of evidence is against regulation by means of a compulsory register and code of conduct'. The evidence cited by the Committee warrants comment.

First, the Committee felt that 'the credibility of compulsory regulation schemes is often diminished by amendments to the rules. An elaborate, frequently changing system could produce unfairness, evasion and bureaucratic complexity.' The evidence supporting this view was 'the history in the United States, Canada and Australia in particular, of amendments to regulatory schemes to fill a succession of loopholes'. Whether the Australian registry was in existence long enough to experience elaborate and frequently changing rules, is questionable, but it is true that Canada and the United States have discussed a number of schemes to fill loopholes, and changes have been introduced. Doubtless these processes have created problems for lobbying firms,[110] but revisions of regulations are only to be expected when, as in the Canadian case, the state enters a new field. As we have seen, while the leaders of different governments may want to achieve similar objectives, such as transparency and integrity in public policy making, the political cultures and constitutional arrangements of their respective countries force each government that begins lobby regulation to invent its own approach. There is, as we have argued, no 'boiler-plate' legislation available. Even in the United States, where lobby regulation has been attempted for over a century, changes in public attitudes, in the scale of government activity, in the processes of party politics and public decision making, as well as in the technologies of political communication have all fostered a continuing debate over regulation. Both countries have been going through, and will continue to go through, a period of political learning in this field. It is doubtful that the adoption of a voluntaristic approach would have avoided this evolution.

The second criticism is that defining lobbyists and lobbying, and distinguishing the latter 'from the simple provision of information would be difficult'; a point also made in the present discussion. Nevertheless, as the discussion also demonstrates, definitions have been achieved by North American governments, and probably as effectively as in more voluntaristic systems. Indeed, the assertion in the Sixth Report that 'the self-regulation schemes operated by lobbyists' organisations are already moving toward greater convergence', suggests that differences in approach and practice have been a problem. The fact that some of these groups have themselves recommended government take a lead in regulation suggests that harmonisation is more difficult to achieve than the Committee would have us believe.

An argument that may have carried more weight with the Committee than these stems from the very advice given by the professional lobby groups. Namely, that by creating a 'category of "registered" or "licensed" lobbyist' government would 'give the impression that access to government could only be gained through the employment of that kind of company'. In support of this view, the Committee quoted Justin Greenwood to the effect that:

> "Those schemes which are based on a declaration of clients by lobby firms tend to benefit lobby firms seeking intelligence on their competitors at the public expense. While lobbyists are no doubt concerned to improve standards, they tend to seek regulation to enhance their own status by controlling access to the profession and by seeking recognition."[111]

Some of the consequences of lobby registration may be pernicious in the manner Professor Greenwood suggests. Competition between firms, as a result of lobbyists' trolling for business, can complicate decision processes and increase the costs of public administration. But not all the lobbyists who watch the registers are business competitors; some are employees of public interest groups, such as Democracy Watch, in Canada, and Common Cause (and a host of others) in the United States. Their intervention, while irritating to many consultant lobbyists, is frequently in the public interest. Nor is it appropriate to dismiss the registers because only lobbyists and journalists follow them. The lobbying field is a specialised one in journalism as it is in business, and those journalists who regularly follow the registers play an important role in disseminating information about lobbying to their colleagues and to the public at large.[112] Finally, it has to be remembered that one of the objectives behind the creation of registers is efficacy. It is helpful to government officials to know who the lobbyists are, who they represent, what they are trying achieve and, if possible, how they are trying to achieve it. To some extent

use of the registries depends on education and familiarity with the data available. In 2005-6 the website for the Canadian federal registry recorded 82,230 visits (a 96 % annual increase in the number of hits), following a period of heightened public interest in lobbying issues, the beginnings of an education programme mounted by the Registry and stricter monitoring and verification by Registry officials.

Does a registration system create two-tier access to government as the British Committee suggests? The Committee cites a number of British charities, as well as Professor Greenwood, to this effect. On the other hand, it is doubtful that the creation of the lobbyist registration process in Canada, or its counterpart in the United States, has done anything more than reveal a situation that has existed for many years. A two-tiered system exists because of the growing complexity of government, and the need for guidance in understanding and approaching decision centres. The present author has interviewed a number of directors of Canadian charities about their activities in public policy development. These individuals referred to the Lobbyist Registration Act as adding to the paper burden that they have to carry, but none suggested that registration has made it more difficult for them to gain access to decision makers. Some commented that it has helped them to track the activities of lobbyists working for interests that they oppose.

This writer finds the case for formal regulation more compelling than the case against that is presented in the Sixth Report. As will be argued shortly, registration schemes address fundamental issues associated with applying the principles of open government and of working towards integrity in government. At a more mundane level, governments are in a better position than lobbyists' organisations to work towards standard rules for lobbying and to provide both lobbyists and the public with reliable data about them and their activities. Again, Canadian experience confirms one of the positive observations of the British Committee: that registration does encourage lobbyist organisations to deal with ethical issues and to improve the standing of practitioners in the eyes of the public. But most important, governments possess the authority to insist that lobbyists, on pain of losing either reputation, access, or, in the worst cases, freedom, conform to certain standards of behaviour. Professional organisations, even with government encouragement, find it difficult to effectively discipline their members. As Canadian and American experience attests, enforcement of standards has not been easy for government either, but over the long run, as regulatory systems develop, governments stand a better chance than professional organisations of securing compliance with regulations.

3. The place of lobby regulation in the regulatory regime

Where lobby legislation is in place it is one of a group of laws, policies and practices that define the quality of governance in the state. Taken together, they can be termed a regulatory regime. Even more than lobby regulation, these laws will reflect the national context in which they are developed, and so are far from being identical from one country to another. Nevertheless, we can find common elements. Among the more important of these, particularly from the perspective of lobby regulation, are laws, policies and practices which regulate the legislature and its members; govern the internal management, including the financial management, of the public service; provide for oversight of the executive by independent agencies appointed by the legislature; regulate elections; codify the criminal law, and define the relationships between citizens and the state.

The principal significance of this regulatory regime is that it establishes the culture of government. It is through this regime, that public aspirations for transparency, integrity and efficacy are authoritatively expressed. Interdependent, mutually reinforcing, the constituent elements of the regulatory regime create the environment that fosters – or discourages – the attainment of these aspirations.

Although all elements of the regime can influence lobby regulation, the influence of some is more important than that of others. Their significance, too, will vary from one country to another. In most jurisdictions, the regulation of the legislature itself and of the conduct of legislators and officials of

government are extremely important. We have observed how these rules vary from legislature to legislature, and how that variation affects the relationship between legislatures and the representatives of interests. In some legislatures 'dual mandates' are a matter of course; in others, they are a criminal offence. Even so, in many countries there is a growing concern to monitor, and often to regulate, the behaviour of legislators and officials both while they serve and for specific periods after service. It is increasingly realised that public officials have access to knowledge and to other office holders that is a commodity in the lobbyist's world; a commodity whose purchase provides an unfair advantage to the lobbyist's clients.[113]

Financial management policies are also significant factors in lobby regulation. Advertised calls for bids, competitive bidding, project evaluation, and bans on contingency fees all constitute a framework that is supposed to govern the behaviour of lobbyists when they represent clients seeking government contracts. Failure to conform with financial management legislation, regulations and policy guidelines may be detected through audits conducted by oversight authorities and can lead to prosecution under criminal law. Thus the lobbying framework created by financial management polices is reinforced by oversight legislation and the criminal law.

In most states, but particularly in North America, election law is closely tied to lobby regulation. Historically lobbyists and their clients have found that campaign finance is a sure route to the warm regard of legislators. As one Canadian businessman argued, you have to give money to politicians to get their help:

> "I prefer to do that [give to politician's election campaigns] than start running around after the election saying there was a misunderstanding. Then you risk being misunderstood for four years. The risk is big. In business we sometimes need the help of bureaucrats and MPs."[114]

Lobby regulation plays a modest role in this regime, but it can be a key strand in the web. In Canada, for example, it would be hard to identify the extent of the 'revolving door' problem, and so hard to know whether or not the Values and Ethics Code for the Public Service is accomplishing its purpose, were it not for the disclosure provisions of lobby legislation. Without it, as well, major contributors to, and important officials of political parties, would not be identified as lobbyists, so that it would be hard to establish a connection between the operations of political parties and the exercise of influence. The Lobbying Act, as the Lobbyists Registration Act is now called, and elections legislation thus work together to shed light on what has been a murky part of Canadian public life. Again, the provisions of the Act have helped to operationalise Treasury Board rules regarding the letting of contracts, identifying, for example, instances in which lobbyists may have received contingency fees for their assistance in obtaining contracts, contrary to Treasury Board rules.

The significance of the regulatory regime becomes strikingly apparent when we consider the goals that the European community has set for its institutions at Brussels. In the words of the 2006 *Green Paper*:

> "The Commission believes that high standards of transparency are part of the legitimacy of any modern administration. The European public is entitled to expect efficient, accountable and service-minded public institutions and that the power and resources entrusted to political and public bodies are handled with care and never abused for personal gain."[115]

The principles of transparency, integrity and efficacy are here laid out. The Green Paper goes on to demonstrate the role a regulatory regime plays in realising these principles. Access to documents legislation, the creation of publicly accessible data bases relating to public consultation, the enhancement of codes of conduct for legislators and officials and the establishment of policies and routines for evaluating and publicly reviewing policy proposals have all been part of the move toward transparency. The Green Paper:

> "With the European Transparency Initiative, the Commission has launched a review of its overall approach to transparency. The aim is to identify and stimulate a debate on areas for improvement. Consequently, the Initiative covers a broad spectrum of issues. These range from fuller information about management and use of Community funds to professional ethics in the European institutions and the framework in which lobby groups and civil society organisations are operating."[116]

We see here how the decision to accept specific principles of governance introduces a compelling logic into a variety of regulatory areas that changes every component as each is made compatible with the core principles and restructured to create an interdependent regime. In this transformation, lobby regulation is itself changed. To reflect for example, the Commission's commitment that 'relations between the Commission and interest representatives must be open to outside scrutiny'[117], lobby regulation is strengthened and acquires heightened significance. At the same time, however, the dependence of lobby regulation on the other elements of the regime becomes apparent, requiring, as the European developments illustrate, appropriate revisions of other statutes, policies and practices.

In sum, lobby regulation can neither be initiated nor reformed in isolation. As part of a complex regulatory regime, it must affect, and be affected by, other elements of the regime. Accordingly, its creation or modification must be synchronised with the revision of those other elements.

ESTABLISHING AND MAINTAINING THE INTEGRITY OF THE REGULATORY REGIME

The history of lobby regulation is one of periods of inaction interspersed with spasms of reform triggered by scandal. The periods of inaction are not devoid of development or without significance. On the contrary, the routine application – or, as in many cases, lack of application – of the regulations reveals their strengths and weaknesses. Occasions arise for public comment and discussion of suggestions for reform. These discussions prepare the way for the changes that seem to come so suddenly in the aftermath of scandal.

This has been the pattern of development for Canada's federal lobby regulations. It became clear before the first Lobbyists Registration Act was passed that it was a weak piece of legislation, and that the administration of the Act would be influenced by the wishes of the government of the day. This proved to be the case.

A central problem was that the Registrar of Lobbyists was a civil servant and that the Office was located in the executive part of government. The Registrar, who was not a senior official, was consequently ultimately subject to the pressures that ministers and other senior officials could bring to bear. It was absurd to expect this official to interview Ministers of the Crown in order to determine whether infringements of the Act, or the Code of Conduct, had taken place. Yet this was what the Act ordained. Furthermore, the Office was vulnerable to budgetary, staffing and organisational decisions that severely limited its effectiveness.

One of the saving graces of the early version of the Act was a clause that required a committee of Parliament to review its administration and operation on the third year after the Act's coming into force.[118] Several reviews have taken place, and each has led to significant improvements in the Act. Each also saw the raising of issues that were not addressed and that did not lead to change, but that did influence subsequent reviews.

Amongst the most contentious of these was the suggestion that the Lobbyists Registration Branch should be removed from its place in a line department and put under the supervision of Parliament itself. This proposal was put forward in 1993 at the first review, and repeated in subsequent reviews. The argument was straightforward: The Registrar and the Branch, located as they were in a line department, were exposed to improper influence. Such influence would be reduced if the Registrar were made an Officer of Parliament and his/her appointment protected.

The argument was dismissed by successive review committees, dominated as they were by members on the government side, but the status of the Registrar was enhanced and the powers of the office were strengthened. Eventually, however, in the aftermath of the sponsorship scandal, the proposal was endorsed by the Commission of Enquiry and found its way into the election platform of the Conservative Party, which, on coming to power, lost no time in introducing the Federal Accountability Act. Section 68 provides that the government of the day shall consult with the leaders of all other Parliamentary parties before appointing a Commissioner of Lobbyists, and that the appointment should be approved by

resolution of both Houses of Parliament. The Commissioner shall hold office for seven years, though subject to removal for cause through an address of both Houses.

It is too early to evaluate this reform, but in theory the Commissioner should be in a position to exercise his or responsibilities without fear or favour. Above all, the great advantage of appointment and regulation by Parliament lies in the fact that the legislature itself is an open forum. It is a centre of media attention and it has an authority that cannot be gainsayed at all easily by agencies in the executive branch. Notwithstanding any proclivity individual Members may have for secrecy or for protecting the perquisites of their party organisations, the competitive nature of the House and its underlying responsibility for the public interest, will in the long run support an agency that is charged with promoting transparency and genuinely enabling 'public office holders and the public... to know who is attempting to influence government'. Furthermore, even though the administration of the Registry is subject to the rules of the public service, the fact that the Commissioner can obtain the ear of Parliament suggests that in matters of staffing and management the Registry will have resources to match its responsibilities.

The rationale for these reforms is that the autonomy of the Commissioner of Lobbyists is essential to ensuring the continued integrity of lobby regulation. In the Canadian case this has certainly been true of Auditors General, who carry out their responsibilities in a similar way. In other jurisdictions comparable levels of autonomy have proven their worth. It is the case with the Quebec Commissioner of Lobbyists and at least two American states, New York and New Jersey, and it is noteworthy that Rep. Nancy Pelosi, the Speaker of the U.S. House of Representatives has proposed creating an Office of Public Integrity which would be overseen by the House Inspector General and would 'audit and investigate lobbyists filings' and refer problems to the Attorney General. If adopted, this measure would move administration of House lobbying regulations toward greater autonomy and effect a major improvement in the enforcement of disclosure rules.[119] However, a similar proposal has twice been defeated by the U.S. Senate.[120]

Even though experience suggests that autonomy holds considerable promise, it is not without risk. A great deal depends on the quality of the individuals recommended to lead the regulatory agency. Governments able to command a majority in the legislature could impose a weak candidate. Furthermore, legislators themselves have often proven unwilling to accept levels of regulation that they have promoted on the hustings. It is possible that their collective sense of self-preservation would at times constrain the gathering of information and the carrying out of investigations. Too, parliamentary bodies have shown themselves capable of limiting resources and clipping mandates. Nevertheless, the likelihood of these risks occurring under a parliamentary regime is far less than it would be were the regulatory programmes to be housed in line departments.

A concomitant necessity is that the goal of transparency should be paramount in the management and reporting arrangements of the registry. In the US and Canada the fact that the registries are publicly available has meant that the media, and interests themselves, have confirmed their utility, while the fact that reports into confirmed violations of the regulations are presented to Parliament and made public is a substantial incentive for compliance. No lobbyist who plans to remain in business wants to be known, like Jack Abramoff, as 'the disgraced lobbyist'.[121] The most important asset of any lobbyist is his or her capacity to access decision makers. Public officials, elected and unelected, are distinctly unwilling to consort with lobbyists with dubious reputations.

On balance, experience in the United States, Australia and Canada affirms that to be effective lobby regulation must be overseen by an official of high standing appointed by the legislature, independent of the government of the day for a fixed term and otherwise removable only through a formal legislative process.

CONCLUSION: EMERGENT PRINCIPLES IN LOBBY REGULATION

This paper has examined existing legislation and academic literature that deals with monitoring and regulating lobbying. It considered the contexts which affect legislation and then looked at the more complex issues of regulation, addressing broad themes, rather than detailed provisions. In addition to discussing legislative provisions for monitoring and regulation, the paper looked at some fundamental administrative principles.

The purpose of the paper is to identify a set of principles that might provide a framework to guide future attempts to enhance the transparency and accountability of lobbying activity. In the following paragraphs we will review our findings with that purpose in mind.

At the outset we established some context considerations. These included the fact that while there appears to be a trend, at least in North America and Europe, toward heightened lobby regulation, that trend has two opposing aspects. Globalisation has diffused modes of lobbying across nations, creating common problems and raising similar issues in diverse societies. But, at the same time each political system values the objectives of regulation differently and varies legislative provisions accordingly. Perhaps we cannot derive a principle from these observations, but we can suggest, as a rule of thumb, that:

> Lobby regulation has to respect and conform to the cultural forces at work in each jurisdiction, and to have regard for the constitutional conventions of that jurisdiction.

It is not wise, in other words, to propose legislation that can be copied from jurisdiction to another. Put more formally, an attempt to identify principles for regulation should not be confused with the creation of legislation that can be applied uniformly across jurisdictions. The best that one can hope to do is to identify a number of common situations that may be addressed in similar, but not identical, ways.

This caveat is particularly pertinent in Europe, where nations with corporatist traditions are experiencing the tension between these two forces: the forces of globalisation and respect for 'social partnerships' that have served them well. It follows that each legislature has to review both the need for regulation and its precise form in the light not only of international experience, but of its own constitutional arrangements and its prevailing political culture.

Having identified broad contextual influences on lobby regulation, the paper moved on to examine the 'state of the art' in the field, bearing in mind a series of questions that might logically guide the framing of lobby regulation. How does the legislator identify the target of regulation? Who is to be regulated? As we saw, this is a fundamentally difficult issue for some countries and in some situations. Next the question of disclosure was raised. What should they be required to disclose? This is the meat of lobby regulation, and the most difficult to formulate parsimoniously. Codes of conduct, in various forms, were addressed by asking how lobbyists can be regulated, and led on to the issue of securing compliance. Finally, points were made in response to the question: How can the integrity of lobby regulation be ensured?

In practice, targets for registration are commonly defined in legislation by the fact that they receive compensation for carrying out lobbying activities, but this definition is expressed in law principally in

North America. In Europe formal definition has eluded lawmakers, leading them to invite lobbyists to identify themselves by virtue of carrying out specified lobbying activities, a procedure that resolves a political difficulty but may encourage non-compliance, especially where lobbying activities can be undertaken through informal contacts with legislators and officials. It is also a procedure that depends on those same office holders to strictly require lobbyists to carry passes, badges or similar authorisation.

Definitions can be refined by specifying that certain classes of actors are excluded from the obligation to register. These exclusions may reflect constitutional conventions, the political history of the jurisdiction and the practical realities of conducting business between governments.

Whatever the specific requirements of the legislating jurisdiction concerning definition, the importance of clear definition has to be emphasised. Vague or partial definitions of who is to be covered by legislation, or what activities are encompassed, leads to non-compliance or inadequate compliance. Therefore it is important to ensure that:

- Descriptions of lobbyists and of lobbying activity are clear and unambiguous;
- Exclusions are equally precise;
- Definitions are robust enough to withstand legal challenges.

Some jurisdictions have embraced very broad aspirations. The European Commission has undertaken to embed the principles of transparency and integrity in its laws and practices. Such policies impose a compelling logic on those laws and practices. Where lobby regulation is concerned, making transparency and integrity the principal goals of regulation means that effectiveness is most likely to be achieved if

- Definitions are broad and inclusive;
- The theatre of lobby activity is also defined broadly and inclusively.

Turning to the issue of what lobbyists should be required to disclose, the paper stresses that both compliance and timely and effective analysis are enhanced if disclosures are pertinent, but parsimonious. Core disclosure requirements elicit information that...

- Captures the intent of lobbying activity;
- Identifies its beneficiaries; and
- Points to those offices and institutions that are its targets.

Furthermore, while much information can be gathered, it is important to apply a few basic rules. Namely:

- Information sought and collected has to be relevant to the core goals of ensuring transparency, integrity and efficacy;
- The demand for information is realistic in practical and legal terms;
- Information can be disseminated efficiently to the public, to legislators and to officials.

In this respect, electronic filing has revolutionised lobby regulation, making it possible to collect and disseminate large quantities of information. However, there are limits to its application. Most members of the public have difficulty analysing much of the information that can be made available. Hence, administrators of registry processes must be ingenious in developing forms that elicit genuinely useful information. There are, of course, information needs that require a less frugal approach. Where

prosecution is contemplated documentation and extensive records are essential. For this purpose, regulation may be best served if lobbyists are required to hold records for a given period, or must file them in a separate process.

Finally,

- To secure the objectives of lobby regulation, registry officials need the authority to demand that registrants clarify their filings and to pursue investigations further; if necessary, to the point of setting in motion full-fledged criminal enquiries.
- Reporting deadlines are as important as disclosure itself. To serve the public interest, disclosure must be made and updated in a timely fashion.

Apart from specific registration requirements and the rules associated with the broader regulatory regimes that address integrity issues across governments, the principal regulations that affect lobbyists are contained in codes of conduct. At present only Canada, at the federal and provincial levels, legislates codes of conduct. Elsewhere access to legislatures may be contingent on observing codes, or there may be purely voluntary observance of codes developed by professional bodies. The existing codes are not extensive, although in the Canadian case they do provide a platform for investigation and regulation by registry officials.

At present the central issue that excites debate about codes is not their actual content, but rather their status. Should they be voluntary? Or enforced with incentives? Or should they be full-fledged regulations? The paper reviews the current debate, and suggests that...

> "Realisation of the principles of transparency and integrity will be contingent on the implementation of mandatory codes."

A similar debate surrounds the issue of compliance. Lobby regulation, whether voluntary or legislated, is part of a regulatory regime which aims to achieve transparency and integrity in government. It may be possible, through the operation of others of these measures to create a culture of integrity and openness that obviates the need to legislate lobby regulation. However, experience to date indicates that the principles of transparency and integrity cannot be adopted half-heartedly. They have to be accepted by all the institutions and at all levels of a government. Furthermore:

> Competition for public goods is such that it may be impossible to attain observance of lobby regulations on a voluntary basis.

Consequently legislators may have to resort to legislated regulation. This is likely to be most difficult in European jurisdictions where nations with corporatist traditions are experiencing the tension between the forces of globalisation and respect for the 'social partnerships' that have served them well. It may be that where globalisation has brought North American lobbying practices into uneasy tension with corporatist processes, it might be advisable to establish parallel systems of registration: One dedicated to supporting existing corporatist practices, the other meeting new needs for transparency.

Finally, experience indicates that the integrity of lobby regulation is extremely difficult to ensure on a voluntary basis, or if it is entrusted to the administration of ministers or even to the legislature itself. Experience indicates that:

- The integrity of lobby regulation is best maintained if the principal official responsible for enforcing the regulations set out by the legislature is appointed by the legislature itself for a pre-determined period and is removable only under clearly defined conditions.

- Administrative support must be adequate to allow effective implementation of the regulatory requirements.

Lobby regulation has developed incrementally as part of a process of political learning. We are at an early stage in the process. One of the things that we have learned is that lobby regulation exists as part of a regulatory regime, and that if the implementation of the principles of transparency, integrity and efficacy is to be achieved, the refinement of lobby regulation must be seen as only a part of a process of enhancing an integrated and interdependent body of laws.

NOTES

1. Stephen F. Clarke 'Regulation of Lobbying in Foreign Countries' (Washington, D.C.: Law Library of Congress, mimeo. 1991).
2. *Regulation of Lobbyists in Developed Countries: Current Rules and Practices* (Dublin: Institute of Public Administration, 2004), p. 3.
3. *Regulation of Lobbyists in Developed Countries*, p. 23.
4. Dorothy Samuels, 'What, no tipping the people's servants?' *New York Times*, November 27, 2006.
5. Ronald J. Hrebenar, Akira Nakainura and Akio Nakamura 'Lobby Regulation in the Japanese Diet' *Parliamentary Affairs* 51 (1998) 4, 551-558, at 555-7.
6. Karsten Ronit and Volker Scheider, 'The Strange Case of Regulating Lobbying in Germany' *Parliamentary Affairs* 51 (1998) 4, 559-78.
7. Thomas, *Research Guide to U.S. and International Interest Groups*.
8. *Act of 7 July 2005 on legislative and regulatory lobbying.* Article 1. Lobbyists are also described in terms familiar in pluralist systems.
9. *Act of 7 July 2005* , Chapter 2, Art. 3.1.
10. *Regulation of Lobbyists in Developed Countries*, p.7.
11. For a useful discussion of the constitutional underpinnings of the Quebec *Lobbying, Transparency and Ethics Act* see Henri Brun and Guy Tremblay 'The public's right to know who is trying to influence the government: A fundamental right' translated from 'Le droit du public de savoir qui cherche a influencer le gouvernement: un droit fondamental' *ethique publique* 8 (2006) 1, 123-136.
12. New Jersey's *Legislative Activity Disclosure Act* illustrates: The Act requires lobbyists to report any benefits they had provided public officials. An amendment in 1994 directs lobbyists to inform the recipients of benefits, by February 1 of each year that such a report had been filed. The effect of this amendment has been to provide 'the recipient with an opportunity to correct any error that may exist before public reporting on February 15th and allows an opportunity for reimbursement.' While reimbursement will not prevent publication of the original benefit, it is publicly noted. Frederick M. Herrmann, *Lobbying in New Jersey, 2006* (Trenton, N.J.: New Jersey Election Law Enforcement Commission, 2006), p. 2.
13. The first US federal exercise in lobby regulation followed this pattern. In 1876 the US House of Representatives adopted a resolution requiring lobbyists to register with the Clerk of the House. The resolution had effect only for the duration of the 44th Congress. This was also the pattern at the Canadian federal level, where the first *Lobbyists Registration Act* emphasised transparency, through monitoring lobbying activity, On the other hand, several US state legislatures moved immediately to stringent regulation. Between 1873 and 1905 Alabama, Georgia, California and Wisconsin declared lobbying a felony. See Congressional Research Service. Library of Congress. *Congress and Pressure Groups: Lobbying in a Modern Democracy: A Report Prepared for the*

Subcommittee on Intergovernmental Relations of the Committee on Governmental Affairs, United States Senate (Washington, D.C.: US Government Printing Office, 1986.) p. 5.

14. For example, Hrebenar et. al. note that in Japan 'bribery laws have been promulgated for centuries' ('Lobby Regulation in the Japanese Diet', p. 556-7) and Jordan cites British Parliamentary rules dating from the seventeenth century that, in the words of a 1947 Resolution, state that 'the duty of a Member being to his constituency and to the country as a whole rather than to any particular section thereof.' ('Towards Regulation in the UK: From "General Good Sense" to "Formalised Rules"' p. 526.)

15. As lobbyists registration acts evolve they may explicitly affirm provisions that are to be found elsewhere. For example, Quebec's act invokes a two-year moratorium on cabinet members and senior municipals lobbying the governments or institutions with which they were previously associated and a one-year moratorium on former senior public office servants. R.S.Q. c. T 11.011, s. 29. and s. 30.

16. This is a continuing issue in Britain where convention has permitted Parliamentarians to accept consultancies, and in Germany where the 'Provisions for the Rules of Conduct for the Members of the Bundestag' (1972) recognise that Members often represent specific organisations. See Grant Jordan, 'Towards Regulation in the UK: From "General Good Sense" to "Formalised Rules"' *Parliamentary Affairs* 51 (1998) 4, 524-37 and Karsten Ronit and Volker Scheider, 'The Strange Case of Regulating Lobbying in Germany'.

17. Canada. House of Commons. Bill C-2 *An Act providing for conflict of interest rules, restrictions on election financing and measures respecting administrative transparency, oversight and accountability* 55 Eliz. II, 2006 (As passed by the Commons, June 21, 2006).At the time of writing the Act as been assented to but not brought into effect. It is consequently difficult to access on the web. The Royal Assent version can be found, at this time, at

    http://www.parl.gc.ca/LEGISINFO/index.asp?Language=E&Chamber=N&StartList=A&EndList=Z&Session=14&Type=0&Scope=I&query=4649&List=toc-1

    The *Act* illustrates the point being made here: It is omnibus legislation folding together measures relating to lobbying, ethics, election financing, whistleblowing and Parliamentary monitoring of government expenditure. Included in the Bill are extensive amendments to the *Lobbyists Registration Act* (renamed the Lobbying Act) which, in contrast to earlier lobby legislation, regulate the post-employment behaviour of senior officials. For example, section 75 of the Bill prohibits senior public office holders from engaging in paid lobbying activities. Earlier versions of the *Lobbyists Registration Act* simply required registrants to disclose whether the lobbyist had been a public office holder and which offices had been held. The actual post-employment prohibition on lobbying activity was to be found in the ethics codes for public office holders and civil servants. See Office of the Ethics Commissioner. *Conflict of Interest Code and Post-Employment Code for Public Office Holders*, section 28, and Treasury Board of Canada Secretariat, *Values and Ethics Code for the Public Service*, ch. 3. The new rules considerably extend the moratorium period for senior public office holders.

18. For somewhat different reasons - chiefly a desire to avoid administrative bottlenecks for both public and officials - routine administrative communications are not considered to be lobbying activities

19. Justin Greenwood, 'Regulation of interest representation in the European Union (EU)' in Clive S. Thomas, (ed.) *Research Guide to U.S. and International Interest Groups* (Westport, Conn.: Praeger, 2004), pp. 379- at p. 385. Greenwood suggests that decisions to regulate lobbyists are precipitated by one or other of these considerations, and most frequently by the need to address

issues arising from scandals. My own view is that all three factors may be at play. In Canada, for example, private members attempted on a number of occasions at the federal level to introduce legislation regulating lobbying, because, as they said, they were concerned in broad terms about public perceptions of government and access. Their efforts bore fruit in 1985 when the Mulroney government undertook to include lobby regulation in an ethics package that had been promised in the previous election and may have been brought forward by Prime Minister Mulroney following some early charges leveled against his administration. See A. Paul Pross, `The Rise of the Lobbying Issue in Canada: "The Business Card Bill"' in Grant Jordan *Commercial Lobbyists: Politics for Profit in Britain* (Aberdeen: University of Aberdeen Press, 1991).

20. John Warhurst, 'Locating the Target: Regulating Lobbying in Australia' *Parliamentary Affairs* 51 (1998) 4, 538-50. However, in late 2006 the State of Western Australia established a code of conduct for contract between lobbyists and officials and created a lobbyists register. The enabling legislation is the State's Public Sector Management Act of 1994. See http://www.lobbyregister.dpc.wa.gov.au.

21. During the public hearings of Canada's Commission of Inquiry into the Sponsorship Program and Advertising Activities, so many witnesses revealed that they had not registered, that the Commissioner commented wryly that he had 'the impression that nobody registers as a lobbyist. ...I haven't heard (of) one case so far.' (Commission of Inquiry into the Sponsorship Program and Advertising Activities *Public Hearing* (Translation) Vol. 110, p. 20193) One witness, Alain Renaud, explained that 'I didn't do it because it was standard practice. In the communications field, most people were not registered. So I was not alone.' (*Public Hearing* (Translation) Vol. 96. p.17136.)

22. *The Lobbying Disclosure Act of 1995* 109 *Stat*. 691.

23. *Lobbyists Registration Act* (2004) Section 5. The informal version of the current Act will be found at the website of the Office of the Registrar of Lobbyists (http://strategis.is.gc.ca/epic/internet/inlobbyist-lobbyiste.nsf/en/nx00101e.html). The present Act is a consolidation of the *Lobbyists Registration Act*, R.S. 1985, c. 44 (4th Supp.); *An Act to Amend the Lobbyists Registration Act and to make related amendments to other Acts*, S.C 1995, c. 12; July 25, 1995, January 31, 1996 and the remainder from Bill C-15 on June 11, 2003; and *An Act to amend the Parliament of Canada Act (Ethics Commissioner and Senate Ethics Officer) and other Acts in consequence*, Bill C-4, which came into force on May 17, 2004.

24. S.7.

25. 'The regulation of interest representation in the European Union (EU)' in Clive S. Thomas (ed.) *Research Guide to U.S. and International Interest Groups* (N.Y.: Praeger, 2004), pp. 379-381, at 380.

26. 'The regulation of interest representation in the European Union (EU)' p. 380.

27. 'The regulation of interest representation in the European Union (EU)', p. 380.

28. 'Regulation of Lobbying in Foreign Countries', p. 5.

29. *Regulation of Lobbyists in Developed Countries*, p.13.

30. *Regulation of Lobbyists in Developed Countries*, p. 13.

31. Marilia Crespo Allen, *Rules on Lobbying and Inter-groups in the National Parliaments of the Member States* (Brussels: European Parliament. Directorate General for Research. Working Document: National Parliaments Series. W5/rev. 1996), p.9.

32. Karsten Ronit and Volker Schneider, 'The strange case of regulating lobbying in Germany' *Parliamentary Affairs* 51 (1998), 4, pp. 559-78.

33. Rene Rechtmann and with Jasper Panum Larsen-Ledet, 'Regulation of lobbyists in Scandinavia: A Danish perspective' *Parliamentary Affairs* 51 (1998), 4, pp. 579-86.

34. *The Lobbying Disclosure Act of 1995*, Sections 3(8) (A) and 5 (b) (2) (B). A 'covered executive branch official' includes the President, the Vice-President and other officials specified by their civil service or military grade and 'serving in a position of a confidential, policy-determining, policy making, or policy-advocating character' described in section 7511 (b) (2) of Title 5 United States Code. A similar list of members of congress and employees in that branch describes 'covered legislative branch officials'.

35. See Pross, ` The Rise of the Lobbying Issue in Canada'. Other legislatures take a more permissive view. New Jersey, for example, considers scheduling meetings, requesting information and all contacts with lower level officials to be routine and not requiring registration. Hermann, *Lobbying in New Jersey 2006*, p. 13.

36. ss. 5,6 and 7 of the Act

37. Letter. Diane Champagne-Paul, Registrar, Lobbyists Registration, to Richard Dupuis, Clerk, House of Commons Standing Committee on Industry Science and Technology. April 30, 2001.

38. Telephone interview with Andre Cote, Commissioner of Lobbyists, Quebec, January 22, 2007.

39. For example, Ontario's *Lobbyists Registration Act* c. 27, Ontario Statutes, 1998, s. 3 (1) provides that the Act 'does not apply to the following persons when acting in their official capacity: (4) Members of the council of a band as defined in subsection 2 (1) of the *Indian Act* (Canada) or of the council of an Indian band established by an Act of the Parliament of Canada, persons on the staff of these members or employees of the council.'

40. '*An Act to Amend the Lobbyists Registration Act....'* S.C. 1995, c. 12. s. 4.2.c.

41. '*An Act to Amend the Parliament of Canada Act (Ethics Commissioner and Senate Ethics Officer) and other Acts in consequence* Bill C-4. In effect May 17, 2004. s. 4.2.c.

42. *Lobbying Disclosure Act of 1995* Public Law 104-65, s. 8.

43. '*An Act to Amend the Parliament of Canada Act (Ethics Commissioner and Senate Ethics Officer) and other Acts in consequence* Bill C-4. In effect May 17, 2004. s. 5.2.f provides that the registrant must 'identify any communication techniques, including appeals to members of the public through the mass media or by direct communication that seek to persuade 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 (in this Act referred to as 'grass-roots communication'), that the individual has used or expects to use in an attempt to influence that matter.'

    An interesting feature of American regulation is that while the *Lobbying Disclosure Act* does not compel lobbyists to report grass-roots activities, the Internal Revenue Code (s. 4911) imposes a tax on expenditures exceeding certain amounts, and thereby forces organisations to report they have spent on grass-roots lobbying. See U.S. General Accounting Office. *Federal Lobbying: Differences in Lobbying Definitions and their Impact* (Washington. GAO/GGD-99-38).

44. *Sub-Committee on Bill C-43,* p. 20:18.

45. Canada. Parliament. House of Commons. Standing Committee on Elections, Privileges and Procedure. *Issue No. 2: First Report Respecting Lobbying and the Registration of Paid Lobbyists* January 25, 1987, pp. 2:3 and 2:6.

46. Howard Wilson, '*obbying: Key Policy Issues* OECD Public Governance Committee. 04-Jan.-2005. p. 12.

47. See Wilson, *Lobbying: Key Policy Issues* p. 12.

48. Matthew Continetti *The K Street Gang* (N.Y.: Doubleday, 2006) p. 243.

49. Quoting here from *A guide to the Lobbyists Registration Act* (Office of the Registrar. Government of British Columbia, July 2003), p. 7.

50. Wilson, 'Lobbying Key Policy Issues', p. 14.

51. At www.com2006_0194_en.pdf

52. U.S. Public Law 104-65, 109 *Stat*. 691, ss.4 (b)(3) and (4)

53. *The Integrity Commissioner and Lobbyists Statute Law Amendment Act, 1998*, Ontario Statutes 1998 c. 27. ss. 4(7), 5(8) and 6(6).

54. John Chenier, editor of *The Lobby Monitor* noted in testimony before the House of Commons Standing Committee on Industry, Science, and Technology that recent U.S. state legislation has begun to include 'a component to identify the expenditures involved in lobby campaigns in order to provide some measure of (the) intensity of the campaign, as well as who is involved.' (*Proceedings and Evidence*, April 24, 2005) The *Monitor* frequently cites U.S. data on lobbying activity. Its October, 2003, issue commented on a study by the Annenburg Public Policy Center at the University of Pennsylvania which looked at lobby advertising. It reported that in 2001 and 2002 lobbies spent USD 105 million in the Washington, D.C. area alone on advertising relating to issues before the President and Congress. Eleven organisations spent 40% of this amount. In addition to drawing attention to the big spenders, the study found a correlation between heavy spending on advertising and policy success. It warned that 'organisations that are spending large amounts regularly to influence public policy may be of greater concern than the occasional large spender because this could indicate that a small sector of the public is consistently having more influence on issues of public policy.' *The Lobby Monitor* 15 (October 29, 2003) 1, pp. 6-7.

55. This issue, like the argument that public interest groups are discriminated against by the *LRA*, impinges on a concern that has troubled supporters of public interest groups for a number of years. That is, that commercial enterprises can treat the costs of lobbying as legitimate business expenses. Since such expenses reduce corporate taxes, the public is, in effect, paying part of the costs of lobbying its own government. This is offensive to public interest groups on several grounds. First, such groups are themselves required to report such sums as they receive from government. Second, charities - which constitute a large proportion of Canada's active public interest groups - face strict regulations governing their expenditure on lobbying. However, worthy their cause, no one charity can spend more than 10% of its annual income on lobbying. Furthermore, there are even stricter regulations prohibiting politically partisan advocacy and some forms of policy advocacy. Third, corporations' capacity to raise funds for lobbying far exceeds that of public interest groups. Many such groups have registered as charities because the tax incentive for charitable donations does encourage donations. Those that have determined to remain as non-profit organisations in order to avoid the advocacy restrictions applied to charities find that public financial support is quite limited. In short, neither group has the resources, or in many cases is permitted, to challenge corporate lobbying on anything like equal terms.

56. Congressional Research Service. *Lobbying in a Modern Democracy*, p. 43.

57. Congressional Research Service. *Lobbying in a Modern Democracy*, p. 44.

58. United States General Accounting Office. 'Testimony. "Federal lobbying - *Federal Regulation of Lobbying Act* of 1946 is ineffective" Statement of Milton J. Socolar. Special Assistant to the Comptroller General before the Subcommittee on Oversight of Government Management. Committee on Governmental Affairs. United States Senate' (Washington, D.C.: GAO mimeo, July 16, 1991.) p. i.

59. US GAO 'Testimony ... Milton J. Socolar', Appendix V.

60. US GAO 'Testimony ... Milton J. Socolar', p. 12.

61. U.S. Public Law 104-65, 109 *Stat*. 691

62. U.S. Public Law 104-65, 109 *Stat*. 691, ss. 3 (a), 3 (b)(3) and (4); 5 (3) and (4).

63. 'Regulation of interest groups in the United States: Federal regulation' in Thomas, Thomas *Research Guide to U.S. and International Interest Groups*, pp. 374-377, at pp. 375-6.

64. U.S. GAO *Differences in Lobbying Definitions* ...(Washington, D.C.: Report to Congressional Committees. GAO/GGD-99-38), pp. 2-3. The GAO also noted that 'no data exists to determine (1) the number of organisations that met the threshold under LDA's definition but are not registered as a result of using an IRC definition or (2) whether any registered organisations that may have met the threshold under an IRC definition did not do so under the LDA definition.'

65. Section 9 (9). Corporations and other organisations are not required to report comparable information. The zones are: less than CAD 10,000; CAD 10-50,000; CAD 50,000 to CAD 100,000, and over CAD 100,000.

66. Telephone interview. December 7, 2006.

67. This point is frequently made by Canadian observers, particularly by the editor of the *Lobby Monitor* whose newsletter is widely read in the lobbying community. Professor Justin Greenwood, in his testimony to the United Kingdom House of Commons Committee on Standards argued that 'those schemes which are based on a declaration of clients by lobby firms tend to benefit lobby firms seeking intelligence on their competitors at the public expense.'*Sixth Report* , p. 87.

68. Sections 4 (b) (5) (A) and (B).

69. *Lobbyists Registration Act* (Consolidation of March 2005), s. 5 (2) (g) and (h).

70. Lobbyist Registration Branch. *A Guide to Registration* as of 26 August 2005 at strategis.ic.gc.ca/epic /internet/inlobbyist-lobbyiste.nsf/en/nx00112e.html .

71. As, for example, in Germany. See European Commission. *Green Paper on the European Transparency Initiative*, p. 7.

72. These examples have been drawn from a recent issue of *The Lobby Monitor.*

73. Sections 3(8) (A) and 5 (b) (2) (B). A 'covered executive branch official' includes the President, the Vice-President and other officials specified by their civil service or military grade and 'serving in a position of a confidential, policy-determining, policy making, or policy-advocating character' described in section 7511 (b) (2) of Title 5 United States Code. A similar list of members of congress and employees in that branch describes 'covered legislative branch officials'.

74. Section 2(1).

75. Section 5(2).

76. *The Federal Accountability Act* Statutes of Canada. 55 Eliz. II, 2006. Chapter 9, sections 67 (2) and 69 (4).

77. *The Lobby Monitor* 18 (December 18, 2006) 6, pp. 1-2.

78. 'Lobbying Restrictions and Reporting Manual for the *Lobbyists Law*, Chap. 97, Hawaii Revised Statutes', s. 3 (5).

79. Alberta Legislative Assembly 3rd Session 26th Legislature. 2007. Bill 1 '*Lobbyists Act'* s. 3 (2)[c] exempts communications to public office holders 'in response to a request initiated by a public office holder for advice or comment' on legislative proposals, development of regulations, etc. The Federal *Lobbyists Registration Act* on the other hand exempts similar communications only if the request initiated by the public office holder is 'restricted to a request for information'. (s. 4 (2) [c].

80. See U.S. General Accounting Office, *Foreign Agent Registration: Justice Needs to Improve Program Administration* (Washington. GAO Report to the Chairman, Subcommittee on Oversight of Government, Committee on Governmental Affairs, U.S. Senate. GAO?NSIAD-90-250. July, 1990.)

81. Sections 5 (2) (j) and 7 (3) (k).

82. P. 15.

83. Malone, *Regulation of Lobbyists in Developed Countries*, p. 12.

84. Jordan, 'Towards regulation in the U.K.', p. 524.

85. Allen, *Rules on Lobbying and Intergroups in the National Parliaments of the Member States*, p. 16, quoting the section of the report of the 1995 House of Commons Select Committee on Standards in Public Life which was incorporated in the Code of Conduct for Members of Parliament of July, 1996.

86. Allen, *Rules on Lobbying and Intergroups in the National Parliaments of the Member States*, pp. 16-17.

87. United Kingdom. House of Commons. *Sixth Report of the Committee on Standards*, p. 84, quoting the 'Appendix to the *Nineteenth Report of the House of Commons Select Committee on Standards and Privileges*' (HC 1147 [1997-98]), p. v.

88. Allen, *Rules on Lobbying...*, pp. 17-18.

89. David D. Kirkpatrick,'When lobbyists say 'I do', should they add 'I won't?' *New York Times* Feb. 19, 2006. Jonathan Weisman and Jeffrey H. Birnbaum, 'Senate passes ethics package' *Washington Post*, January 19, 2007.

90. Allen, *Rules on Lobbying and Intergroups in the National Parliaments of the Member States*, pp. 19.

91. According to the *Annual Reports* the Canadian Registrar, 99% of registrations are submitted over the internet.

92. *Lobbyists Registration Act* (2004) Section 5 (1.1).

93. *'The lobbying disclosure Act of 1995*', s. 4 a.1.

94. At this time, in Washington, they must give more detailed information about the issue areas they are lobbying in - listing specific areas, bill numbers and executive actions; the legislative

branches or executive agencies contact, and the income received or expenses incurred. *'The Lobbying Disclosure Act of 1995*', s. 5. Canadian laws, in addition to semi-annual updates, require immediate reporting of significant changes in lobby undertakings. See, for example, the *Guide to the Nova Scotia Registry of Lobbyists.*

95. The *Sixth Report* cites the case of two firms that were suspended from membership in the Association of Professional Political Consultants following an inquiry. The internal arrangements of the firms were investigated by third parties and the firms eventually reinstated. (p. 85)

96. *Rules of Procedure of the European Parliament.* Annex IX 'Provisions governing the application of Rule 9(2) - Lobbying in the European Parliament', Art. 3 'Code of Conduct', (f).

97. Such as obtaining information dishonestly, claiming any formal relationship with the Parliament in dealings with other, and circulating, for profit, copies of documents obtained from Parliament. Art. 3, sections (b) to (e).

98. Wilson, 'Lobbying: Key Policy Issues', pp. 18-20.

99. Section 10 (2) (1). The amendments that came into effect in May 2004 transferred responsibility for the Code to the Registrar.

100. Newfoundland, *Lobbyists Registration Act* SNL 2004 c. L 24.1, s. 25 and the Quebec *Lobbying Transparency and Ethics Act*, sections 36-38.

101. The filing before Parliament of an adverse report is clearly a more momentous event than the advertising of disciplinary action by a professional body, but to date there is very little concrete evidence of whether or not critical publicity in either venue actually results in a loss of business.

102. *Green Paper*, p. 10.

103. David Johnston 'F.B.I.'s focus on public corruption includes 2,000 investigations' NYT May 11, 2006. The Internal Revenue Service, which monitors charities, has also found, despite increasingly restrictive campaign finance laws,'a disturbing amount of political intervention in charities in the last election cycle', including 'a staggering increase in money flowing (illegally) into campaigns.' 'I.R.S. finds sharp increase in illegal political activity' NYT Feb. 25,2006.

104. Commission of Inquiry into the Sponsorship Program and Advertising Activities. *Reports* (Ottawa: 2005 and 2006). A review, by the present author, of 'The Lobbyists Registration Act, its Application and Effectiveness' will be found in the Commission's research studies: *Restoring Accountability: Research Studies* (Ottawa: 2006) vol. 2, pp. 163-231.

105. Between 2004 and 2006 the Canadian registry has been extensively reorganised and expanded. Additional staff has been hired, permitting closer monitoring of registrations and follow-up enquiries. More investigations have also been carried out. In 2005-6 6,994 registrations were processed. The previous year 1,638 registrations were processed. (See Office of the Registrar of Lobbyists.) Lobbyists Registration Act. *Annual Reports* for the respective years. Data will be found in the 'Statistical Review' section.

106. See British Columbia, Office of the Registrar *A Guide to the Lobbyists Registration Act*, (Victoria: The Office, July 2003), p. 5; Statutes of Newfoundland and Labrador 2004 c. L-24.1 *Lobbyists Registration Act*, s. 28 (1); Quebec Lobbying Transparency and Ethics Act, ss. 25 and 53., and the *Federal Accountability Act,* s. 80. 14.01

107. The 'Management Representation Statement' contained in the *2006-2007 Report on Plans and Priorities (RPP) for the Office of the Registrar of Lobbyists* states that the Office's education programme, through which the Office 'develops and implements educational and research programmes to foster awareness of the requirements of the *Lobbyists Registration Act* and the

Lobbyists' Code of Conduct' is scheduled to cost CAD 909,000 in each of the current and next budget year. Most of this programme will be directed to lobbyists, their clients and public office holders. Reviews and Investigations under the *Lobbyists Registration Act* and the *Lobbyists' Code of Conduct*. will cost CAD 1,050,000 in each of those two years. It will involve validating information provided by registered lobbyists to ensure accuracy; reviewing allegations of non-registration or misconduct by lobbyists, and carrying out formal investigations. Although this expenditure is similar to the budget for education and research, it must be remembered that it does not include any criminal investigations and prosecutions which may follow from the work carried out in the Office. Another approach to comparing the relative costs and benefits of education versus investigation, is to compare the number of individuals who can be reached through education with the number who would either immediately affected or aware of the consequences of investigations. Enforcement investigations can be time consuming and labour intensive, relatively few can be completed each year. On the other hand strategically targeted information sessions for senior officials, coupled with increased exposure to lobbying regulation during in-service education programmes, reaches a much larger group of public servants. Add special programmes for lobbyists and for the general public, and the level of exposure and awareness grows considerably. In the words Michael Nelson, Canada's Registrar of Lobbyists, 'while enforcement spending is necessary and may be effective in creating individual remedies, it does not provide the reach and leverage that education spending does, and is thus not as efficient as a way to spend the regulatory dollar.' (E-mail. M. Nelson to P. Pross, March 20, 2007.)

108. *Green Paper*, p. 10.

109. *Green Paper*, p. 9.

110. For example, the recent changes to Canada's lobbying rules introduced by the *Federal Accountability Act* which require lobbyists to provide monthly reports on certain communications with designated public office holders has caused consternation in Ottawa lobbying circles. During the summer of 2006 the *Lobby Monitor* reported that lobbyists were campaigning 'on the golf courses of the nation's capital' with 'talking points focused on the costs of compliance, the administrative nightmare that would ensue and the erosion of client... privacy.' ('Lobby Notes', September 25, 2006, p. 2) Those who hire Ottawa lobbyists should hope that they are more successful on their clients behalf, than were on their own. In Washington, firms that have specialised in taking advantage of the practice of 'earmarking' will doubtless find that recent changes to regulations which have the effect of limiting the use of this practice will force them to adopt other strategies. K-Street lobbyists are infinitely nimble and doubtless will overcome this difficulty.

111. *Sixth Report*, p. 87.

112. In Canada, for example, the *Hill Times* and *The Lobby Monitor* provide this service.

113. In recent years these concerns have been extended to the families of public officials. Currently in the United States, for example, there is debate over how to regulate lobbying by the spouses of legislators. See David D. Kirkpatrick,'When lobbyists say 'I do', should they add 'I won't?' *New York Times* February 19, 2006.

114. 'Giving money to politicians necessary: Fermco' Toronto *Globe and Mail*, Dec. 18, 1999. p. A4.

115. Green Paper, p. 2.

116. Green Paper, p. 3.

117. Green Paper, p. 4.

118. Section 14.

119. Jeffrey H. Birnbaum, ‘Lobbyists won’t like what Pelosi has in mind’ Washington Post, Oct. 30, 2006. D01.

120. Jonathan Weisman and Jeffrey H. Birnbaum, ‘Senate passes ethics package’ Washington Post, January 19, 2007.

121. For an account of the Abramoff affair, and one view of an appropriate reform agenda, see Continetti, The K Street Gang.