We need universal lobbying rules in Ottawa

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With a three-week consultation on new regulations just ended, we still don’t know the impact of arguably the most significant, recent change to federal lobbying law — namely, the monthly reporting requirement imposed on lobbyists by the *Federal Accountability Act*, the Conservative government’s omnibus accountability law.

Rumours and speculation abound. Will the monthly returns cover all their communication with designated public office holders, as some lobbyists fear? Or will it cover only “arranged communications,” the ones lobbyists and officials worry least about coming to light? We won’t know, but the consultation’s abbreviated, terse nature suggests that Treasury Board (the federal department responsible for drafting the new regulations) already knows the answer.

My position is that the rules should be as uniform and universal as possible. (It is a stance unpopular among lobbyists: so unpopular, in fact, that the Government Relations Institute of Canada, the official voice of the lobbying industry, refused to run this the original version of this column in its newsletter. My contribution was solicited, and then rejected because I am too strong an advocate of transparency and disclosure.) Lobbying is no different than any other regulated activity, in that when lawmakers pick and choose, their distinctions usually have unintended consequences: they create winners and losers, skew behaviour, and encourage avoidance.*

For example, I oppose — to put it mildly — the suggestion that social or casual communication (described in the government’s consultation as “spontaneous” communication) might be exempt from monthly reporting. The debate is no longer whether to shine a light on communication with key government officials — Parliament has decided that already. The issue is where the light needs to be shone and, logically, it is the dimmest recesses that are most in need of illumination. If reporting is to be required of the arranged meeting, e.g., when a lobbyist visits a government office tower during ordinary business hours, checks in with the commissionaire, is issued a visitor’s pass and makes no secret of his or her presence, then is the private discussion at a cocktail reception any less worthy of scrutiny? At least in theory, all Canadians have an equal opportunity to schedule a meeting and enter through the federal department’s front door;

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* I refer to “avoidance” in its technical sense, which is to structure one’s affairs to avoid being subject to the law. Avoidance is legal, while evasion is not. Nevertheless, it is poor public policy to design a legal system that creates incentives for avoidance.
decidedly unequal is everyone’s access to social events and other networking opportunities for “spontaneous” communication.

I am not quite sure whether BlackBerry PIN messages would be considered “spontaneous” communication or “written” communication (or both). Yet the federal Treasury Board has raised the prospect of exemptions for spontaneous and written communication. Is it seriously thinking of exempting PINs? Talk about an uneven playing field. Such a rule would clearly advantage the lobbyist lucky enough to possess the magic, ministerial hexadecimal code. The inconsistency is untenable. Should the Federal Accountability Act be less concerned with lobbying by BlackBerry PIN than with the tedious regurgitation of some slide deck in a departmental boardroom?

No one denies that to require monthly reporting of some types of communication but not of others would create an incentive to lobby via non-reportable communication. Similarly, it may make designated public office holders more receptive to receiving non-reportable communication.

Of course, this would not be the first example of differential treatment under the Federal Accountability Act. Exempting MPs and Senators from the enhanced post-service restriction on lobbying, commonly called the “cooling-off” period, is among the most notable examples. The fact that MPs are not subject to the current cooling-off period under the Conflict of Interest and Post-employment Code for Public Office Holders is an unsatisfactory answer, because the Federal Accountability Act is supposed to improve on the Code. Further, another category of government officials (assistant deputy ministers) is not subject to the current post-service restriction but nonetheless was made subject to the new five-year post-service restriction under the Federal Accountability Act.

The five-year cooling-off period also distinguishes between former government officials who go to work for private-sector corporations and former officials who go to work for non-government organizations (NGOs). Simply put, for five years a former designated public office holder who goes to work in-house for an “organization” (as defined in the Act) cannot engage in any lobbying activity whatsoever, but a former designated public office holder who goes to work in-house for a corporation can engage in lobbying activity provided that it does not meet or exceed 20 per cent of duties.

Again, the purpose for the differential treatment was not adequately explained. It has been suggested that NGOs exist primarily for the purpose of advocacy, while in the case of most corporations lobbying is ancillary to their core business. This bald statement is not, however, true of all NGOs, many of which deliver services or whose primary activities are other than lobbying. Moreover, the Act also imposes different rules on employees of business corporations and employees of business partnerships; nothing adequately explains differential treatment of lobbyists for commercial operations based on the business structure adopted by their employers.
On balance, the *Federal Accountability Act* makes changes that were overdue and required to restore Canadians’ faith in their federal institutions. That said, uniform, universal rules would be preferable to uneven regulation that covers only some people and some activities.

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