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Richard Bilodeau  
Director General  
National and Cyber Security Branch  
Public Safety Canada  
269 Laurier Avenue West  
Ottawa ON K1A 0P8

Dear Mr. Bilodeau:

**Re: Enhancing Foreign Influence Transparency: Exploring Measures to Strengthen  
Canada's Approach**

We are writing on behalf of the Administrative Law and Competition Law and Foreign Investment Review Sections of the Canadian Bar Association (CBA Sections) to comment on the March 10, 2023 consultation paper on the proposed establishment of a foreign influence transparency registry (Consultation Paper).<sup>1</sup>

The CBA is a national association of over 37,000 members, including lawyers, notaries, academics and students across Canada, with a mandate to seek improvements in the law and the administration of justice. The Competition Law and Foreign Investment Review Section comprises lawyers who practise or are interested in law and policy related to the regulation of competition and foreign investment. The Administrative Law Section deals with legal practice concerning governmental decision-making and rule-making, administrative tribunals and lobbying.

We welcome a foreign influence transparency registry designed to assist in the detection of covert actions by foreign governments to advance their own strategic objectives to the detriment of Canada's national interests. A foreign influence transparency registry could complement the existing legislative tools intended to facilitate transparency, including the *Lobbying Act*, *Conflicts of*

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<sup>1</sup> Public Safety Canada, *Enhancing Foreign Influence Transparency: Exploring Measures to Strengthen Canada's Approach*, 10 March 2023, [online: Public Safety Consultation Paper](#).

*Interest Act, Canada Elections Act* and the national security review measures of the *Investment Canada Act*.

### **Legal advice and representation**

The Consultation Paper suggests a possible exemption for legal advice and representation. In our view, the provision of legal advice and representation to foreign governments and their related entities should be exempt from any registration requirement.

The exemption is particularly important for legal advice and representation to foreign governments in the administration and enforcement of federal, provincial and territorial legislation, including the *Investment Canada Act* and *Competition Act*.

For example, where a state-owned enterprise (SOE) investor acquires or establishes a Canadian business, it must make a filing with the Investment Review Division (IRD) under the *Investment Canada Act*. Legal counsel is typically engaged to assist the SOE investor in making these filings and responding to questions from the IRD during the review (e.g., net benefit assessments and national security reviews). In nearly all cases, legal counsel will directly communicate with the IRD on behalf of the SOE investor.

Legal advice to and representation of an SOE (or other entity owned or controlled by a foreign government) engaged in governmental reviews such as those in the *Investment Canada Act* or other proceedings before government agencies, tribunals and courts is certainly not the type of covert action intended to be captured by the registry.<sup>2</sup> In these situations there will already be transparency to the applicable agency, tribunal or court regarding the foreign government, its positions and activities in the proceedings.

The *Lobbying Act* contains a clear exemption for a communication that would otherwise constitute lobbying where the communication is made to a public office holder by an individual on behalf of any person or organization with respect to the enforcement, interpretation or application of any Act of Parliament or regulation by that public office holder with respect to that person or organization.<sup>3</sup> Similar exemptions exist in provincial lobbying legislative regimes.<sup>4</sup>

Clear exemption for legal advice and representation has been recognized in other jurisdictions with existing or proposed foreign influence registries:

- In the United States, the *Foreign Agents Registration Act* exempts from registration legal representation of a disclosed foreign principal before any court or law or agency of the United States government.<sup>5</sup>
- In Australia, the *Foreign Influence Transparency Scheme Act* exempts from registration an activity the person undertakes on behalf of a foreign principal if the activity is, or relates primarily to, or is incidental to, the provision of legal advice, legal representation in judicial,

<sup>2</sup> Communications undertaken by legal counsel on behalf of a client pursuant to the *Investment Canada Act* are subject to the confidentiality protections in section 36 of the *Investment Canada Act* and may involve investments or other matters not otherwise in the public domain.

<sup>3</sup> *Lobbying Act*, RSC 1985, c 44 (4th Supp), s. 4(2)(b).

<sup>4</sup> For example, *Lobbyists Registration Act*, SO 1998, c 27, s. 3(2)(b)(i); *Lobbyists Act*, SA 2007, c. L-20.5, s. 3(2)(b)(i); *Lobbyists Transparency Act*, SBC 2001, c 42, s. 2(2)(b)(i).

<sup>5</sup> 22 USC § 613 (1938); 28 C.F.R. §§ 5.300-5.307 (1938)

criminal or civil inquiries, investigations or proceedings or legal representation in relation to a government administrative process involving the foreign principal.<sup>6</sup>

- In the United Kingdom, proposed amendments to the *Official Secrets Act* would establish a new Foreign Influence Registration Scheme (FIRS) and exempt from registration lawyers offering legal services.<sup>7</sup> The FIRS also proposes to exempt from the disclosure requirements in the scheme itself *information that is subject to legal professional privilege*, not just information in the possession of lawyers.

In closing, we recommend that the provision of legal advice and representation to foreign governments and their related entities be exempt from registration requirements. We also recommend exempting from disclosure pursuant to the administration of the regime information that is subject to solicitor-client or contemplated litigation privilege, regardless of who is in possession of the information.

Thank you for the opportunity to comment on the Consultation Paper. We would welcome an opportunity to discuss our comments further.

Yours truly,

*(original letter signed by Marc-André O'Rourke for Sandy Walker and Pam Hrick)*

Sandy Walker, Chair, CBA Competition Law and Foreign Investment Review Section  
Pam Hrick, Chair, CBA Administrative Law Section

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<sup>6</sup> *Foreign Influence Transparency Scheme Act 2018* (Austl), 2018/63, s. 25.

<sup>7</sup> United Kingdom, Home Office, *Foreign Influence Registration Scheme factsheet*, 28 March 2023 policy paper, [online](#)