Compliance Policy for the Register of Consultant Lobbyists

ICAEW welcomes the opportunity to comment on the *Consultation on Compliance Policy for the Register of Consultant Lobbyists* published by Office of the Registrar of Consultant Lobbyists (ORCL) on 26 May 2015, a copy of which is available from this link.

We recognise that the short consultation period allowed for responses to this consultation reflects the urgency of clarification of the requirements before the end of the first effective quarterly return period at the end of June. Nevertheless, we are concerned that the current lack of clarity over the extent of the disclosure required will be very challenging for all professional firms which may have a requirement to register and present returns to the ORCL, and hence may be challenging for the ORCL itself. The short consultation period has also made it difficult for us to conduct an appropriately wide consultation among our own membership, with the result that we may not have been able to identify all the issues with these requirements that our members may experience.

For this reason, and more generally, we would welcome further discussions with the ORCL, to try and ensure that our membership are in a position to comply with the expectations of the Registrar and the legislation, without the risk of over or under compliance, which currently we believe to be a significant risk.

This ICAEW response of 11 June 2015 reflects consultation with the Business Law Committee which includes representatives from public practice and the business community. The Committee is responsible for ICAEW policy on business law issues and related submissions to legislators, regulators and other external bodies.

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ICAEW members operate across a wide range of areas in business, practice and the public sector. They provide financial expertise and guidance based on the highest professional, technical and ethical standards. They are trained to provide clarity and apply rigour, and so help create long-term sustainable economic value.

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MAJOR POINTS

Summary

1. With the implementation of new legislation, there is inevitably a period of doubt over the extent of the new requirements. Some of our members, having seen the specific mention of lawyers and accountants as potential consultant lawyers and accountants, have raised with us the possibility that work that they carry out for marketing, reputational and public profile reasons, or purely in the public interest, may inadvertently be drawn within the scope of the disclosure requirements. Such work may indirectly benefit clients who contract with our members for professional services other than consultant lobbying, by reason of the improved public policy outcomes which may result, but which we do not believe should be considered as consultant lobbying activities carried out "in return for payment" for that activity. We would welcome the issue of clarification or Guidance from the Registrar, to confirm the policy position on this matter.

2. The rest of this response mainly covers the reasons for our members' concerns over this matter, specific instances where doubt may arise, and the potential for over-reporting in the event of the continuation of such doubt.

General Guidance for Professionals where Lobbying is not a core Service

3. ICAEW members typically provide a wide range of services to their clients, not just within the traditional sphere of accountancy, audit and taxation services, but across a wide range of business advice, consultancy and other professional services. This may, on occasion, include representations to policy makers on behalf of one or more of their clients. This could be either in a contractual form or as a matter of consequence without contract (for example through contact with Ministers at social functions).Members will also contribute to the formation of Government policy as a pro bono service through secondments into Government departments, or using their deep and extensive experience of business in general or a specific sector to provide information, produce thought leadership publications, or (usually by invitation) participate in consultative meetings or working parties within Government Departments. These would typically have no particular client or clients in mind. However, if the views of the members influence the outcome in any way, then by implication those clients whose affairs have contributed to the experience gained by the firm would be likely to benefit from the improved Government policy which could result. If those consultative meetings or working parties are also attended by a Government Minister or Permanent Secretary, or chaired by them, then these activities could be interpreted as coming within the scope of the legislative requirements.

4. Similarly, where members feel sufficiently strongly about the potential business or economic effects of some aspect of existing or developing Government policy, then they may write directly to a Government Minister. Again, in such cases, some of the firm's clients may ultimately benefit from any change in policy which resulted, but they would not expect this to be a part of the professional service for which they are contracted to the firm.

5. The published guidance issued by ORCL suggests that the correlation between the *consultant lobbying* and the *paying client(s)* does not need to be direct. Our concern is that some issues which members discuss with government representatives could be deemed to affect a high number of clients (and non-clients)– for example, discussions on corporation tax or employment rights could affect virtually all commercial clients, and discussions on income tax all personal clients. Without further clarification there is a risk that our firms will believe themselves obligated to disclose the names of very large numbers of clients in their quarterly returns, which would be both very onerous and unhelpful to those consulting the register. Indeed, in Question 7 of the consultation, the registrar raises the issue that this could even be considered as non-compliance in its own right, as "over-reporting".

6. This is not just an issue for the very large firms of chartered accountants. Small firms who have (for example) a Government Minister as their constituency MP may also discuss matters of government policy with them, locally, including in the discussion their experience gained from their own clients. Government initiatives including deregulation in the Enterprise Bill, regional devolution in the Cities and Devolution Bill provide the locus to do this. All ideas and input from business leaders is being welcomed by Government. Such discussions could arise informally, for example at social engagements, where our members are also members of a local constituency party. Again, clients could benefit indirectly from any resulting improvements in Government policy, but it is very unlikely that lobbying would be a part of the services which clients would expect to pay for, or expect to be part of the service offering of their professional accountant. Nevertheless, in the absence of clarification, we are minded to draw the possibility of our members to the desirability of registering with the ORCL in such circumstances, to guard against the possibility that, with hindsight, such services could be considered to come under the registration requirements.

7. For this reason, we suggest that ORCL issues clarification of its views on when it considers that communications with Government ministers or senior officials from professional firms or their partners come within the definition of lobbying activity. For example, we suggest that it would be in accordance with the intentions of the legislation if communications were not considered to be lobbying for a client where:

   - The conversations and/or other communications are not being made on behalf of any specific client or client group, nor is it the intention to represent the views of a specific client or client group; or

   - The communications are made by the firm for the purposes of for general marketing, reputational or public profile reasons, or purely in the public interest, and not in the expectation of any direct reward.

Specific Issues where Guidance is needed

8. We are aware of the following specific areas of activity, where the requirements of the legislation could be particularly unhelpful for our members and for the formation of government policy, as well as potentially requiring the disclosure of a large number of clients. These could be avoided, with the issue of the Guidance suggested above.

   Activities carried out with or on behalf of ICAEW or other representative bodies: ICAEW and other membership, professional and representative bodies are excluded from the legislation. However, ORCL guidance is not clear on the position of ICAEW member firms' partners and staff who take part in meetings/consultations with Government representatives in their capacity as ICAEW members or voluntary office -holders. Our view is that when such individuals participate in ICAEW activities they are raising policy issues and not issues on behalf of their firms' clients but we fear that the Registrar may see a connection between the issues raised and the experience of those individuals and therefore the interests of one or more of the clients of the individual's employer firm. We would like clarification that the Registrar will not take this approach, otherwise, our firms' partners and staff may feel that they cannot raise any policy issues in their ICAEW roles, without having to make extensive disclosures of client names.

   Thought leadership activity: at the moment, the ORCL guidance does not exclude analytical or forward looking documents, surveys or similar publications which are prepared by firms for public relations, reputational or marketing purposes – or to contribute information and data which is valued by the Government - and which are widely distributed and publicly available. These may be sent directly to Government representatives, as part of the profile raising activities of the firm, and in that case could (arguably) meet the criteria for consultant lobbying ("communicated directly to a government representative, on behalf of one or more paying

clients, on an issue of government policy"). Again, the current guidance suggests that the correlation between the communication and the client does not need to be direct and we are concerned that without clarification from the Registrar, the thought-leadership of all of our members may be captured when it is communicated to Government representatives (as identified under the Act) and could require the disclosure of a high number of clients. For example, if a firm were to release a report on decentralisation which is communicated to Government representatives this may imply a need to disclose all the clients it could conceivably impact, directly or indirectly. These could include local authorities, transport providers, education boards and a wide range of businesses, even though there is no particular client or group of clients driving the views or information addressed in the report.

Audit independence: There are very strict ethical and professional requirements on the statutory auditors of companies to remain independent of their clients, and in particular not to provide services to them which may represent an "advocacy threat" that could undermine the auditor's independence. We are concerned that if our firms make a disclosure of lobbying activity in accordance with a strict interpretation of the requirements, to include some audit clients, then this could be wrongly interpreted as a breach of their audit independence obligations: these are obligations which our firms seek to manage with care, since audit is a core activity for all firms above a certain size, and where the possibility of misconduct can have a very significant effect on their reputation and hence their future business.

9. There is a significant danger that our firms may feel obliged to withdraw from activities such as these, thus removing significant relevant, experienced and objective input into governmental policy formation, whether or not it is specifically requested by the Government representative or Department concerned. By way of contrast, we are reassured that a parallel consultation by the Scottish Government on introducing a "Lobbying Register" specifically states that 'reforms should not restrict how stakeholders…engage in public policy issues.' We would like to see confirmation that then Registrar takes a similar view of the UK legislation.

RESPONSES TO SPECIFIC QUESTIONS

Q1: Is there any aspect of the proposed obligations which the Registrar has a duty to monitor, that are unclear?

10. Yes. We do not believe that the intended effect of the proposed obligations is sufficiently clear, in connection with professional firms carrying out representational, analytical or public policy work for marketing, reputational and public profile reasons, or purely in the public interest. Our suggestions for a way forward, to clarify these obligations, are set out above, under "Major Points".

Q2: Is there any aspect of the proposed categories that are unclear or that you disagree with?

11. We broadly agree with ORCL's definitions of the categories of "administrative errors" and "non-compliance" in the context of the obligations of consultant lobbyists, though we are concerned that:

- With the best of intentions, it may be difficult to ensure that all small regional firms who conduct activities which come within the definitions of the Act, on a very occasional basis, are aware of their responsibilities with immediate effect, and cease further activities until they have been registered.

- Two weeks is a short period in which to prepare complete and accurate returns of clients, especially at this early stage, when firms may not yet have set up appropriate systems and procedures, and in the absence of clear guidance on the position of representational work which is not carried out under contract with clients.

We would hope that the Registrar will act in a flexible and proportionate way to any inadvertent non-compliance in the meantime.

Q3: Do you agree that matters of administrative error should be elevated to matters of non-compliance in the instances stated?

12. We agree with the substance of the proposal that administrative errors should only be elevated to a matter of non-compliance where an error remains uncorrected or is made repeatedly but, for the avoidance of doubt, these conditions should only apply after the error has been brought to the attention of the consultant lobbyist clearly and in writing.

4. Is there any part of this interpretation of who is liable for an offence under the Act that you find unclear or that you disagree with?

13. We agree that under the legislation, the directors of companies and the partners of partnerships who conduct the business of consultant lobbyists may be guilty of the offence of lobbying while unregistered, but not other employees of the business. The Registrar's policy in this area would be a little clearer, if "shadow directors" were included in the resulting Guidance, and the words "of the business" were omitted, since the words "director" and "partner" can be used in a variety of contexts, which may be suggested by the inclusion of additional and superfluous words not present in the underlying legislation.

5. & 6. Do you agree with the interpretation of these terms?

14. We broadly agree with the interpretation of the definitions of "material particulars", "administrative errors" and "non-compliance" in relation to both the register entries for consultant lobbyists and their quarterly returns.

7. Do you agree that over-declaration of clients should be considered non-compliance?

15. We agree that deliberate attempts to mask the identity of clients, including by the declaring of large numbers of clients not required to be declared under the legislation, should be considered to be non-compliance. But this should not apply where "consultant lobbyists" are genuinely unclear on the extent of their obligations, and are declaring clients who they consider may fall into a grey area.

8. Do you agree that an organisation should be given 15 working days to update their information from the point of it changing?

16. Large professional partnerships may have frequent changes to their list of partners – an obligation to update the records within 15 days of each change may be unnecessarily onerous for both the ORCL and the partnerships concerned. We suggest that updates on a Quarterly basis, as required by the legislation, should also be permitted.

9. Is my interpretation of historic inaccuracies clear, and if not, what further clarification would be helpful?
10. Should corrections be signposted on the Register for the sake of transparency?

17. We suggest that the significance of historical inaccuracies to the Register, and the usefulness of signposting their correction on the Register, should be judged on a case by case basis.

11. Is there any aspect of the situations in which a registrant may be served with an information notice that are unclear or that you disagree with?
12. Are there any other situations in which you feel it appropriate for an information notice to be served on a registrant?

18. The serving of information notices is a key power for the ORCL to ensure that the Register is as accurate and useful as possible. We therefore suggest that the Registrar should not limit the circumstances in which she serves a notice, for example by limiting the use of this power to circumstances where there is clear evidence of inaccuracies or potential inaccuracies. But neither should the Registrar imply that the serving of an information notice implies a duty on registrants which does not in fact exist – such as an implied duty to proactively provide an explanation of substantial increases or decreases in the volume of clients that they declare.

13. Do you agree that one or more of these criteria could be considered reasonable grounds for believing an organisation to be conducting the business of consultant lobbying?
14. Are there any other criteria which would suggest that an organisation is carrying out the business of consultant lobbying?

19. We agree that the criteria listed provide grounds for conducting further investigations into possible lobbying activities of an organisation or individual. We do not have any further suggestions to add at this time, but do not think that this should be considered to be a categorical and complete list of all such grounds.

OTHER MATTERS

20. Questions 15 to 22 of the consultation relate to the operation of the enforcement powers of the Registrar, including in relation to information provided in response to information notices, offences and the public disclosure of the Registrars conclusions of enforcement matters. We have briefly considered these questions, but have no comments that we wish to make, beyond our approbation of the Registrar's intention to apply her powers in these areas with proportionality, and taking into account the requirements of the Data Protection legislation.