

2011 12 06

To: Mr. Jean-Pierre Blais
Chairman
Canadian Radio-television and
Telecommunications Commission
Ottawa, Ontario
K1A 0N2

Subject: **Practical Concerns about the Impact of Commission's Electronic Commerce Guidelines on Consumers and Businesses**

Dear Mr. Blais,

1. We are a group of organizations representing a broad cross-section of Canadian businesses, ranging from small to large enterprises, and our members have participated actively in the development of Canada's Anti-Spam Legislation (CASL) and provided comments on the associated regulations. From the outset, Canada's business community has strongly supported the Federal Government's goal of protecting consumers from spam and malware.
2. CASL was intended to protect and promote e-commerce by preventing irresponsible, unethical and/or fraudulent activities that undermine consumer confidence in the online marketplace. At the same time, the legislation, as originally envisioned, recognized that a proper balance must be struck so as not to inconvenience consumers or unduly constrain legitimate businesses operating in the electronic marketplace.
3. Given that CASL will have a profound impact on how organizations communicate with customers and prospective customers it is important that the Commission seek input from consumers and businesses when making regulations and developing interpretative and enforcement guidelines. Consultation would provide the Commission with a thorough understanding of current methods and future trends; important insights in light of the highly prescriptive and restrictive nature of the guidelines; their impact on innovation should not be underestimated. We are very concerned that this type of consultation did not occur in the development of Compliance and Enforcement Information Bulletin CRTC 2012-548, *Guidelines on the interpretation of the Electronic Commerce Protection Regulations (CRTC)* and Compliance and Enforcement Information Bulletin CRTC 2012-549, *Guidelines on the use of toggling as a means of obtaining express consent under Canada's anti-spam legislation (the Guidelines)*. As a result, the Guidelines will have unnecessarily negative impacts on consumers and businesses. While not exhaustive, the following are some of our major concerns.

1) Oral Consent

4. The Guidelines provide that an organization may discharge its onus of proof if oral consent is verified by an independent third party or retained as an audio recording in its complete and unedited form. Small businesses have limited financial and staff resources, making the provisions unworkable and compliance challenging. Even for larger organizations, the requirement is burdensome, wasteful and only feasible if you are speaking with a customer on a telephone, in a call centre environment. The methods of proving oral consent, proposed in the Guidelines, were created in the 1990's to address specific competitive concerns in the nascent long distance competitive market (specifically, unauthorized customer transfers); these methods are out-dated and not appropriate in the context of CASL. It would be a significant undertaking to seek consent from the individual to record the conversation itself at the beginning of each call for the purpose of potentially recording CASL consent, then recording the conversations, then, manually edit each call to retain only the consent portion (to avoid violating the *Personal Information Protection and Electronic Documents Act* (PIPEDA) requirements), and then store the records in a searchable and retrievable manner. If the consent was subsequently withdrawn by the individual, the recorded call would have to be located and purged from the database. It is even more intrusive for consumers and less practical for businesses to obtain third party verification or record an oral consent in the context of a face-to-face discussion at a cash register.

5. The oral consent examples in the Guidelines appear to overlook 'business records practices' which have long been acceptable as evidence in Canadian law courts. A record created in the ordinary course of business, contemporaneously with the event and pursuant to invariable corporate policy, should be acceptable as evidence of oral consent. In other words, if at a point of sale, a customer service representative reads a short script asking for the individual's consent and their electronic address and then electronically records if the individual provides their consent and their electronic address, that should be acceptable consent for the purposes of CASL.

2) Requests for Written Consent

6. CASL's principal requirement for obtaining consent is to set out "clearly and simply ... the purpose or purposes for which consent is being sought", however the Guidelines restrict the use of common and appropriate business practices by being overly prescriptive. We also wish to note that while the Guidelines state that "following receipt of express consent, confirmation of this receipt should be sent to the person whose consent was being sought", confirmation of receipt of express consent is not a requirement in the legislation. For the past decade, responsible and ethical businesses have been obtaining consent for the use of email addresses with little or no complaint by using a range of mechanisms permitted under PIPEDA.

7. The Guidelines' strict requirement for a specific action by an individual (such as checking a box) is overly prescriptive and counter to consent practice which has evolved over the years in important areas such as privacy. We strongly believe that the acceptable mechanisms permitted for obtaining consent should be consistent with PIPEDA and that an informative, prominent opt-out opportunity should also be acceptable. A clear opt-out check-box, prominently situated within an agreement such as in close proximity to the signature line or "submit" button, has long been accepted as a reasonable means of obtaining consent for the use of non-sensitive personal information like contact coordinates.

8. It would be more consumer-friendly to be able to simply rely on a prominent opt-out opportunity to obtain express consent. Consumers can then easily change their preference by opting out during the course of any new interaction, and should they change their mind with

regard to continuing to receive Commercial Electronic Messages (CEMs) they can easily use the unsubscribe mechanism that must be contained in all CEMs.

9. On the other hand, the current Guidelines will mean that a consumer is likely to be asked to proactively reiterate their express consent in the course of every new transaction with a business. Where an email address and consent to send CEMs have already been obtained by the business, how is the business to interpret an existing customer's wishes in cases where they have failed to check the express opt-in box in subsequent interactions? Does failure to continually check the express opt-in box mean that a particular consumer no longer wishes to receive any communications from the business, even in cases where there is an "existing business relationship" with the consumer? Where failure to check the box is simply an oversight, it could result in an unintentional withdrawal of consent and missed communications over a lengthy period. Again, this is in sharp contrast to a situation where an individual may overlook the opportunity to opt-out or deny consent, and yet they can easily remedy their oversight by using the unsubscribe mechanism that is contained in the first and every subsequent CEM they receive.

10. It is very important to recognize that Canadian consumers are not being spammed by responsible Canadian businesses that obtain consent in compliance with PIPEDA. Yet, the Commission Guidelines shift away from existing consent requirements and will require that businesses make significant changes to processes, forms, training and databases that will do little to curb unwanted CEMs from current or future wrongdoers. These unnecessary changes will involve major costs that will ultimately be borne by consumers.

3) Recording Electronic Consent

11. The Guidelines also prescribe that acceptable written consent occurs where "a record of the date, time, purpose, and manner of that consent is stored in a database". While record storage may be feasible for consent obtained while an individual is connected to a network (e.g., Internet or Intranet), it may not be possible or appropriate in other instances. For example, consumers still purchase computer programs on shrink-wrapped CDs, and companies often require that the consumer expressly consent to the installation before the program is installed or service can be activated. It is reasonable to accept that the consumer's act of installing the software is sufficient indication of express consent for its installation. Any further recording or transmission of consent would not be necessary and may not even be possible if the consumer's computer is not connected in some fashion with the vendor's computer system.

12. The details required for acceptable written consent do not reflect the reality that many online order forms, 'contact us' web pages, online applications or online contest ballots record proof of consent in a "process-based" manner. 'Process-based' consent occurs when an individual is only able to proceed from the first webpage by passing through pages containing the terms and conditions and, with respect to CEMs, a prominent opt-out. Arrival at the final webpage and submission of the online form without having exercised the prominent opt-out opportunity for CEMs is evidence of agreement with all required terms and conditions and consent to receive CEMs. It would be overly onerous to require businesses re-engineer current online forms where agreement is recorded in a process-based manner, to collect and store in a database the details of written consent required by the Guidelines.

4) Consent Withdrawal Statement

13. The Guidelines suggest that a request for consent must contain a statement indicating that the person whose consent is sought can withdraw their consent. We consider this interpretation reasonable with respect to CEMs as it supplements the right to unsubscribe.

However, the Guidelines (and the underlying regulations) are once again overly restrictive as they suggest that a similar statement accompany a request for consent to install a program. It will be quite impracticable, and in some cases, impossible, for businesses and consumers to insist on a right to withdraw consent for software that has already been installed with consent. We note that section 11(5) of CASL requires a process to withdraw consent to install only in the exceptional situation in which the consent was obtained through misrepresentation. Again, we trust that the Commission will recognize the need to minimize unnecessary actions that may create confusion, cost and inconvenience for consumers.

5) Identification of CEM Sender – Affiliates Rule

14. The requirement that affiliates be identified in a CEM overlooks how related companies market to their customers today. Many corporate affiliates provide a variety of services bundled as a single consumer offering. Consumers see no obvious benefit in listing the individual affiliates responsible for specific components. In fact, many of our vertically integrated members say that their customers feel more comfortable and find it more meaningful to identify their services and products by brand rather than by the specific affiliated entities responsible for components of the offering. This requirement creates unnecessary complexity and confusion for consumers with no tangible benefit. We must note that the Commission, in another context, has put in place rules that permit the sharing of consumer information between affiliates within the telecommunications and broadcasting industries. We encourage the Commission to take the same practical approach and permit wholly owned affiliates with similar branding to be able to use a single identification on their CEMs.

6) Form of CEMs (unsubscribe mechanism)

15. The examples of unsubscribe mechanisms in the Guidelines show the user being taken “to a web page where he or she can unsubscribe from receiving all or some types of CEMs from the sender.” The Guidelines should specify that this only one example of an acceptable unsubscribe method and that an unsubscribe method relating solely to CEMs is equally acceptable. Section 11 of CASL requires every CEM to include an unsubscribe mechanism that allows the recipient to instruct the sender that no further CEMs, **or** any specified class of such messages, from the person who sent the message. The Guidelines imply that two alternative unsubscribe options must be presented to the user. This cannot be correct as a requirement to offer the ability to unsubscribe from all electronic messages would include unsubscribing from important, non-CEM services messages (such as public safety messages, warnings of suspected fraud and even messages that are mandated under other Federal and provincial statutes). Many consumers may not realize the significant negative impacts of unsubscribing from all messages from a particular sender.

16. Our group fully supports the goal of developing an effective enforcement regime to combat and significantly reduce unwanted spam and malicious online activities, but we strongly believe that stakeholders should be fully included in the process. We also feel that the policy objective of CASL can be achieved more effectively through more precise measures targeted at actual illegitimate activity, without unduly burdening all legitimate and well-meaning businesses with layers of costs and complexity which are not called for. We, therefore, urge that the Commission reconsider elements of the Guidelines, bearing in mind that CASL is intended to protect and promote legitimate electronic commerce. Representatives of our group will request a meeting with you at the earliest opportunity to discuss how we can contribute to that work and we will contact your office in that regard.

Yours truly,

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