

February 4, 2013

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Re: *Canada Gazette, Part I, January 5, 2013* – CWTA response to Industry Canada’s proposed Electronic Commerce Protection Regulations

1. The Canadian Wireless Telecommunications Association (CWTA) is the authority on wireless issues, developments and trends in Canada. It represents cellular, PCS, messaging, mobile radio, fixed wireless and mobile satellite carriers as well as companies that develop and produce products and services for the industry.
2. CWTA is pleased to file comments with respect to Industry Canada’s proposed regulatory text for the Electronic Commerce Protection Regulations (the “Regulations”). CWTA members are responsible Canadian companies that use electronic means to communicate with large numbers of customers and potential customers. As such, CWTA members are provided significant incentive to employ current best practices as well as to comply with the Act¹ and regulations made thereunder.
3. CWTA supports the objective of encouraging the growth of electronic commerce in Canada and the prohibition of spam, spyware, malicious code, botnets, and other related network threats. As with other network operators, there are significant incentives for wireless carriers to protect their customers from spam. CWTA also fully supports the underlying principles of the Act; disclosure, consent, and providing the opportunity to withdraw consent. CWTA has been actively involved in promoting these industry best practices, particularly with respect to mobile marketing.

¹ *An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act.*

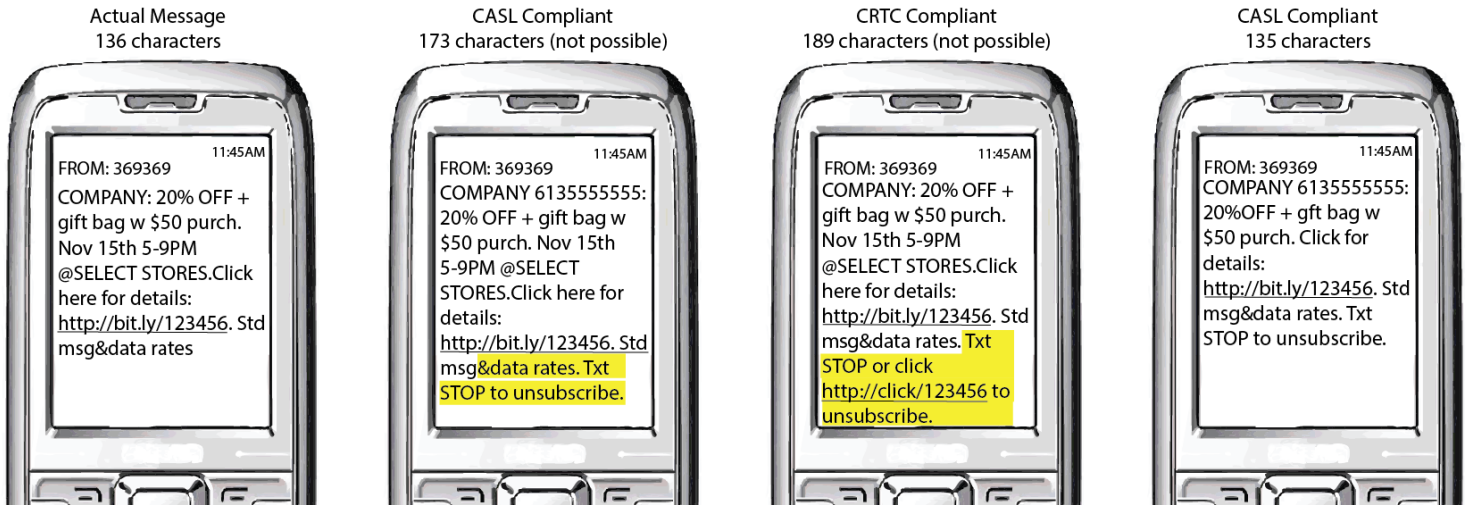
4. However, aspects of the Regulations and the Act, may unnecessarily limit the scope and effectiveness of the legitimate practices of well-meaning businesses, to the detriment of both businesses and consumers. CWTA contributed to, signed, and fully supports, the Coalition of Business and Technology Associations comments submitted as a part of this consultation, which address a broad range of concerns with the proposed regulations. As such, CWTA limits its comments in this submission to its specific concerns with the potential identification and unsubscribe compliance requirements (as yet unpublished) of SMS-based Commercial Electronic Messages (CEMs).

SMS Messages

5. While the intent of the Act and the Regulations is for a technology-neutral application of the rules to all forms of electronic messaging, CWTA remains concerned that the rules will not fully consider and address the unique limitations of CEMs that do not resemble an email. Regulations that do not fully consider the limitations of SMS messages will cause considerable compliance challenges and will fully undermine the relevance and impact of mobile messaging as a marketing platform.
6. Canada's wireless industry has devoted significant resources to the development and growth of the legitimate commercial use of mobile messaging. In the absence of Government regulation, the industry has established a series of rules, guidelines, best practices and codes of conduct to direct the behavior of mobile marketers, simplify the activation process for application service providers, and provide a consistent user experience for end users. All of the rules are founded on three key ideals: end users must "opt-in" or volunteer to participate in a program; unsolicited messages are absolutely not tolerated; and end users are provided with a convenient process to "opt-out".
7. Since 2003, CWTA has administered Common Short Codes (CSCs) in Canada. Short codes deliver information services using text messaging technology supporting a maximum message length of 136 characters, and are the primary means through which legitimate commercial mobile marketing currently occurs. A short code is a special number used to route and address text messages that is significantly shorter than a standard telephone number. CSC programs are activated on all or most Canadian mobile phone networks for the same application or service. CSC programs may be: free to the end user; billed at the rate of a standard text message; or billed at a premium rate. Message frequency varies among programs; some programs are limited to one or two messages, while others may be an ongoing subscription.
8. CSC programs are strictly consumer opt-in closed message platforms, meaning consumers must actively agree to participate in the program(s) and do not receive text messages for which they have not subscribed. CWTA Canadian Common Short Code Application Guidelines explicitly require that the service costs and message frequency of subscription services be clearly identified before a consumer opts in. To end a subscription, all the customer must do is text "STOP" to the originating short code (this can be done as a reply to any message received from the program).

9. As mentioned, all messages associated with CSCs are sent with the express consent of the recipient. The Canadian CSC rules are very explicit that all programs are to be subscriber opt-in. Consumers generally become aware of CSC programs as a result of advertising that occurs through other mediums (for example, on-line, in-store material, etc.). During the advertised invitation to participate (the “Call-to-Action”), as well as during the opt-in process, a CSC content provider is required to clearly disclose the terms of the service (including the frequency and price of messages). In addition, the end-users are made aware of their options to text “STOP” at any time to unsubscribe from the program. CSC content providers are also required to support “INFO” and “HELP” as keywords that, once received from an end-user, prompt the content provider to supply information about the provider, how the program operates, and a customer service contact toll-free number and/or email address. While these disclosures do not have to be made in the text of each subsequent message, the “INFO”, “HELP” and STOP functions are industry standards, well known among people who use text messaging. Moreover all subscription services must deliver a monthly reminder notice repeating the terms of the service and “STOP” functionality.
10. CWTA notes that compliance requirements specific to CEMs in the form of SMS messages are not provided in the draft Electronic Commerce Protection Regulations. This creates difficulty for CWTA members as they attempt to ensure compliance with the Act, given that there remains considerable confusion over the scope of the Act. Indeed, Industry Canada has acknowledged this confusion, stating that it is “exploring the use of interpretational guidelines and other guidance material to provide clarity where appropriate.” In this connection, Industry Canada has indicated that it is aware of technology-specific concerns arising across a broad range of technologies. Its Regulatory Impact Analysis Statement notes:
- “Another example is the concern that it would be difficult to satisfy identification and unsubscribe requirements on popular social networking services or instant messaging services.”
11. CWTA can attest to those difficulties, as it has worked hard to find a balance that adequately informs consumers without eliminating the value of CSC messages. As such, CWTA submits that, Industry Canada exempt strictly opt-in/closed messaging platforms from the unsubscribe requirements of the Act, or, at a minimum, use existing CSC Application Guidelines as an example of best practices when developing interpretational guidelines or other compliance guidance.
12. The Act requires that all CEMs must Provide:
- The identity of the sender and/or “sent on behalf of”;
 - Contact Information of sender and/or “sent on behalf of”;
 - An unsubscribe mechanism.
13. In the absence of appropriate regulatory requirements or even practical interpretational guidelines, meeting the information and unsubscribe requirements of the Act in SMS messages will be difficult. CSC messages are restricted to 136 characters to accommodate the lowest character count across participating networks. As the amount of mandatory content increases, it becomes correspondingly more difficult to provide that content in a clear and meaningful way to the recipient.

14. As an example, the figure below attempts to reword an actual CSC message² to be compliant with the unsubscribe requirements of the Act. The figure also demonstrates attempts to reword the message based on the interpretive guidelines issued by the CRTC.³ CWTA submits the CRTC guidelines as an example of guidance that does not recognize the limitations of SMS, and greatly hinders the effectiveness of the messaging platform as a result.



15. As is clear from the example above, the content, clarity and overall value of the CSC message is greatly reduced by any attempt to comply with the generic identification and unsubscribe requirements of the Act. CWTA submits that the identification and unsubscribe requirements of the Act are fulfilled by current industry requirements to provide sender information and unsubscribe functionality to users that text 'INFO', 'Help' and 'STOP,' respectively. Indeed, the CWTA's CSC requirements (provided as an appendix) ensure CSC messages meet the requirements of the Act because every message is inherently accompanied by the identification and unsubscribe information – even if that information is not within the message itself.

Class and Circumstance Exemptions

16. Some classes of messaging platforms are designed and used in a manner such that the user is very unlikely to receive unsolicited messages, and if they do, the platform provides effective tools to deal with them. That is, users specifically invite contacts, or accept requests from contacts, before any messages can be sent between them. In such cases, the user is fully protected by opt-in rules and built-in message management tools.

² The actual company name and hyperlink has been altered.

³ *Guidelines on the Interpretation of the Electronic Commerce Protection Regulations*, October 10, 2012.

17. CWTA therefore reiterates the Coalition's recommendation for an exemption pursuant to s.6(5)(c) so that s.6 does not apply to a CEM sent to a recipient over a messaging network where (a) a commercial electronic message can only be sent from a sender to a recipient if the recipient has given prior consent to the receipt of messages from that sender, and (b) the messaging network allows the recipient to readily discontinue the receipt of messages from senders that are specified by the recipient
18. CWTA submits that CSC messages in particular should be exempt from the Regulations based on both 1) their class as a strictly opt-in/closed message platform, and 2) under the circumstances that they are already fully and effectively governed by legal terms of use that have protocols to address unsolicited messages.
19. CWTA additionally recommends a circumstantial exemption for CEMs that are subject to terms and conditions that already fully comply with the objectives of the Act. We recognize the challenge associated with exempting legitimate messages while not allowing illegitimate messages to shelter under such exemptions, but we believe that it is possible to identify characteristics with which they can be distinguished, with CSC text messages being an obvious example.
20. As mentioned above, the rules stipulated by the CWTA Canadian Common Short Code Application Guidelines are wholly consistent and with the purpose and intent of the Act, requiring express consent, and providing functionality to obtain sender information or to unsubscribe. While these disclosures do not have to be made in the text of each subsequent message, the functions are well known among people who use text messaging, and all subscription services must deliver a monthly reminder notice repeating the terms of the service and "STOP" functionality.

Best Practices for Interpretational Guidelines

21. In the case that Industry Canada does not provide additional class or circumstance exemptions, CWTA recommends that the concerns highlighted above be addressed through practical, best practices interpretational guidelines. Specifically, CWTA recommends the compliance guidelines for SMS CEMs be based on the opt-out and disclosure requirements in the CWTA Canadian Common Short Code Application Guidelines, which are provided as an appendix to this submission.
22. The CSC Application Guidelines are tested, proven to be practical and effective and are well known to consumers. Since the advent of CSC programs, the guidelines have been consistently reviewed and updated to respond to market changes and ensure the greatest protection for consumers. Most importantly, the guidelines completely achieve the intent of the Act. As such, they provide a ready-made solution that will not significantly alter or devalue ongoing, legitimate business practices, or result in substantial compliance costs.

Conclusion

23. Canada's wireless industry absolutely supports the objectives of encouraging the growth of electronic commerce in Canada and the prohibition of spam and other serious threats to their networks, services, and their customers. The industry is willing and prepared to work with government to achieve those objectives.

24. CWTA, its members and clients have consistently endeavoured and expended considerable resources to provide consumers with the information and options needed to avoid spam messages. The result is a comprehensive set of guidelines that are well known by consumers and proven effective in practice. It would be regrettable if, despite these efforts, they are faced with cumbersome enforcement actions for legitimate business practices that do not harm consumers.

25. CWTA appreciates the opportunity to provide these comments and looks forward to fruitful collaboration with the government to ensure that Canadians are indeed protected from spam and other electronic nuisances.

Jim Patrick
Senior Vice President

Appendix 1: CURRENT INDUSTRY SOLUTION TO OPT-OUT AND DISCLOSURE

CWTA requires CSC programs to program the use of five (5) key words to ensure that end users have a consistent user experience. These words are “INFO”, “STOP”, “ARRET”, “HELP”, and “AIDE”. This obligation includes the availability of both English and French key words regardless of the intended audience of the CSC program. CWTA also requires CSC programs to provide a response message when a CSC is active, but there is no programming or content available. These “Dormant Code” messages are intended to inform the end user that the CSC is not currently in use. The following are the specific requirements for each key word:

<INFO>:

Whenever INFO is sent as a keyword in an MO message, the content provider must send one (1) MT containing its client’s (or its own) company name and customer service contact information (i.e. email, URL and/or phone number). This information should be provided in a manner that is not language sensitive such that the MT message can be easily understood in both English and French.

<STOP>:

Whenever <STOP> is sent as a keyword in an MO message, the content provider must send one (1) message to the subscriber stating that he or she has unsubscribed from the program and will no longer receive messages from the program. It must also stop sending messages of any kind to that user until or unless the user follows the opt-in procedure to initiate the service again. STOP instructions must be disclosed during the mandatory double opt-in for premium rate subscriptions, the mandatory monthly subscription reminder message, and as part of response to <HELP>.

<ARRET>:

This keyword will return the same information as <STOP> but the one (1) MT response must be in French.

<HELP>:

Whenever HELP is sent as a keyword in an MO message, the content provider must send one (1) MT message containing its client’s (or its own) company name, customer service contact information (i.e. email, URL and/or phone number), cost and message frequency of the program and a short description of the program. This message can also include a short list of the most common keywords.

<AIDE>:

This keyword will return the same information as <HELP> but the one (1) MT response must be in French.

Canada was one of the first countries to require the use of STOP as an unsubscribe mechanism. It is now widely used internationally, including in the United States, United Kingdom, Ireland, Australia, France, Sweden, and Norway.