

September 7, 2011

Bruce Wallace
Director, Electronic Commerce Policy
Electronic Commerce Branch, Department of Industry
Jean Edmonds Tower North, 18th Floor
Room 1891D, 300 Slater St.
Ottawa, Ontario K1A 0C8

Re: Comments of the Email Sender & Provider Coalition on the *Electronic Commerce Protection Regulations (Industry Canada)* and the *Electronic Commerce Protection Regulations (CRTC)*

Dear Mr. Wallace,

Please find enclosed comments submitted by the Email Sender & Provider Coalition (ESPC) respecting the draft *Electronic Commerce Protection Regulations (Industry Canada)*, published in the Canada Gazette on July 9, 2011, and the draft *Electronic Protection Regulations (CRTC)*, pursuant to Telecom Notice of Consultation CRTC 2011-400.

These regulations will have a significant impact on how Canada's Anti-Spam Legislation applies to our members and to the online marketing industry as a whole. The ESPC therefore appreciates the opportunity to comment on these regulations and looks forward to providing further input and support throughout the regulation-making process.

Respectfully submitted,



D. R. Freeman/sb

D. Reed Freeman, Jr. Esq.
Outside Counsel, Email Sender & Provider Coalition
Morrison & Foerster LLP
2000 Pennsylvania Avenue, NW, Suite 6000
Washington, DC 20006
202.887.6948
rfreeman@mofo.com

cc: ESPC Board of Directors
ESPC Members

Encl.

September 7, 2011

Comments of the Email Sender & Provider Coalition on the *Electronic Commerce Protection Regulations (Industry Canada)* and the *Electronic Commerce Protection Regulations (CRTC)*

1. This submission provides comments on the draft *Electronic Commerce Protection Regulations (Industry Canada)* (Draft Industry Canada Regulations) published in Part I of the Canada Gazette on July 9, 2011, as well as the draft *Electronic Protection Regulations (CRTC)* (Draft CRTC Regulations), pursuant to Telecom Notice of Consultation CRTC 2011-400.

I. Executive Summary

2. The regulations under Canada's Anti-Spam Legislation (CASL, or the "Act") are crucial for the online marketing industry and for consumers. As currently drafted, we are concerned that some of the draft regulations would result in unnecessary regulatory burden and potential confusion for consumers, with no corresponding benefit from an anti-spam perspective. In short, some of these regulations could undermine the primary objective of the Act, which is to promote the efficiency and adaptability of the Canadian economy.

3. In addition to recommending that some of the regulations be removed and/or amended, we also believe that Industry Canada's regulation-making powers should be exercised to clarify the meaning of a "sender" for the purposes of the legislation. As currently drafted, the lack of clarity of this concept creates uncertainty as to how the Act applies and to whom. Our recommendations are summarized as follows.

Industry Canada

- A. Amend the definition of a "personal relationship"
- B. Reduce restrictions on the use of consent obtained pursuant to subsection 10(2) of the Act
- C. Amend the definition of club, association or voluntary association
- D. Clarify the meaning of "a person who sends a commercial electronic message".

CRTC

- A. Remove the requirement to provide contact information for all parties in a CEM and in a request for consent
- B. Limit the number of electronic addresses required in CEM and a request for consent

- C. Remove the requirement for unsubscribe through multiple forms of contact information
 - D. Remove or amend conditions on the unsubscribe requirement
 - E. Remove the requirement for consent to be in writing
4. As a general comment, we would urge Industry Canada and CRTC to ensure that both sets of regulations are finalized at least 90 days before the Act comes into force so that businesses have sufficient time to make any necessary changes.

II. About the ESPC

5. Formed in November 2002, the Email Sender & Provider Coalition (ESPC) is comprised of many of the largest and most innovative technology providers in the email industry, including Email Service Providers (ESPs), Mail Transfer Agents, application and solution developers and deliverability solution providers. Members include Acxiom Digital, Constant Contact, Datran Media, e-Dialog, Eloqua, Epsilon, Responsys, Return Path, StrongMail, and SubscriberMail.¹
6. The ESPC is made up of 54 leading companies. While ESPs serve the marketing needs of their clients, our members also provide many other services. ESPs deliver transactional messages such as account statements, airline confirmations, purchase confirmations, email publications, affinity messages and messages required to manage and facilitate relationships between ESP clients and their customers. They also provide clients with the tools to integrate email with other online marketing efforts.
7. The ESP industry is robust and growing. The ESPC's members' clients represent the full breadth of the North American marketplace, from the largest multi-national corporations (including the vast majority of Fortune 500) to the smallest businesses (members of the ESPC serve hundreds of thousands of small businesses). Members of the ESPC also represent schools, not-for-profit groups, political campaigns, major publications with millions of subscribers, and small affinity-based newsletters. The use of ESPs by organizations large and small has become an industry standard.
8. The ESPC appreciates the opportunity to provide comments on these important regulations. We have been supportive of the Canadian government's efforts to address spam and related internet threats throughout the development of CASL. Overall it is our view that CASL is a positive development and we are hopeful that it will have a meaningful impact on reducing practices that continue to undermine the trustworthiness of the online marketing industry.

¹ For more information about the ESPC please visit www.espcalition.org.

9. The comments and recommendations in this submission are based on the collective knowledge of our members, which includes over a decade of experience in policy development in the United States. The ESPC and its members have been actively involved throughout the development and of the *Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003* (CAN-SPAM Act), and several rounds of rule-making by the Federal Trade Commission (FTC), in addition to state-level legislation, and therefore have a wealth of understanding of the types of issues that are likely to arise when legislating in this area. Despite the differences between CASL and the CAN-SPAM Act, many of the issues and challenges are the same.

III. Draft Industry Canada Regulations

A. Amend the definition of a personal relationship

10. Given the very broad manner in which a commercial electronic message (CEM) is defined, there are many instances where communications between individuals in a non-commercial context would be subject by the legislation, despite their being absolutely no risk of abuse. The exceptions under paragraph 6(5)(a) are therefore essential to preserving the value of email and other forms of electronic messaging as modes of personal communication.

11. The ESPC commends Industry Canada for including an exception for communications between individuals who have a "personal relationship". However, we are concerned that the proposed definition in paragraph 2(b) of the Draft Industry Canada Regulations is too restrictive and does not reflect the fact that many personal relationships develop and exist over the internet without an in-person meeting. Social networking sites such as Facebook, dating websites, chat rooms and online gaming platforms are just a few of the ways that individuals form lasting, personal relationships, many of which never involve an in-person meeting.

12. Furthermore, a two-year time limit on communications between individuals is an unnecessary restriction. Personal relationships can and often continue to exist even where communications have not taken place for two or more years.

13. The exception for communications between individuals who have personal or family relationships will be important for refer-a-friend (RAF) promotions. RAF promotions are a legitimate and commonplace marketing tool that allows an individual to easily share information about products and services that they find valuable. One of the primary advantages of RAF is that individuals are able to learn about products and services from a trusted source, which is beneficial both to the consumer and the advertiser.

14. An overly restrictive definition of personal relationship will limit the ability of individuals to communicate outside of a commercial context, simply because they communicate about matters that may have a commercial aspect. We therefore recommend that Industry Canada

remove the requirement for an in-person meeting, as well as the two-year time limit between communications.

15. The definition of a personal relationship would be sufficiently narrow to avoid abuse by spammers without these limitations, given that a message sent pursuant to this exception must be sent from one "individual" (not on behalf of that individual) to another, as opposed to between two "persons".

B. Reduce restrictions on the use of consent obtained pursuant to subsection 10(2) of the Act

16. Section 10(2) of the Act and section 3 of the Draft Industry Canada Regulations establish conditions on the ability of one person to seek express consent on behalf of another party whose identity is unknown, as well as the ability of another party to use that consent. Some of the conditions imposed in the regulations are untenable. In particular, we urge Industry Canada to remove the requirement for messages sent pursuant to this section to include unsubscribe mechanisms for other senders.

17. Paragraph 3(1)(b) of the Draft Industry Canada Regulations, and the corresponding conditions in subsection (2), require an authorized person to include an unsubscribe mechanism that not only allows a person to unsubscribe from receiving messages from that person, but from receiving messages from the person who obtained consent or any other authorized person. In practice, such a requirement is extremely complex and difficult to implement, and would significantly impact the ability of senders to work together in collaborative, permission-based marketing initiatives.

18. From a practical perspective, this would require multiple senders to work from the same suppression lists, or devise methods of sharing suppression lists in real time.² Not only is this technically challenging, but it creates significant security risks to personal information as organizations are required to constantly exchange lists of electronic addresses.

19. Subsection 3(2) requires the person who obtained consent to ensure that a person authorized to use that consent provides notice of a request to unsubscribe from (a) the person who obtained consent; (b) the authorized person; or, (c) any other authorized person. Again, this is an unworkable requirement, as the same practical difficulties arise. Furthermore, the obligation is imposed on the person who obtained consent to ensure that any other person provides notice. This is an unfair requirement, as it imposes legal liability on one person for the actions of another.

² A suppression list is a list of individuals who have opted-out of receiving messages.

20. The challenges in coordinating multiple suppression lists between senders formed part of the basis for the FTC's decision to allow senders of multi-marketer messages to designate a single sender.³ The FTC recognized that it would be difficult if not impossible for senders to coordinate multiple unsubscribe mechanisms in a single message. While the issue in this case is not necessarily about multi-marketer messages, the underlying challenge in sharing unsubscribe responsibilities between parties is the same.

21. The requirements established by section 3 are onerous to the point that it will be virtually impossible for one person to obtain consent on behalf of another, and for that consent to be used in compliance with the Act. As such, we recommend that Industry Canada remove the requirement for an authorized person to include an unsubscribe mechanism that applies to the person who obtained consent and any other authorized person. Similarly, once a person who has obtained consent authorizes another person to use that consent, the person who obtained consent should not be required to manage or respond to requests to unsubscribe from messages sent by any authorized person.

C. Amend the definition of club, association or voluntary association

22. The definition of a club, association or voluntary association under subsection 4(2) of the Draft Industry Canada Regulations is too restrictive. In particular, the explicit exclusion of any club, association or voluntary organization that is for-profit, or results in the personal benefit of a proprietor is too limited. Not all clubs or associations are non-profit, and this definition fails to recognize that the types of non-business relationships described in paragraph 10(13)(c) of the Act can exist regardless of whether the club, association or voluntary association generates profit or a personal benefit of a proprietor. As such, we recommend that the condition of non-profit or no personal benefit of a proprietor be removed.

D. Clarify the meaning of a sender

23. The Act refers in many instances to "a person who sends a commercial electronic message", and "the person — if different — on whose behalf the message is sent". Because the Act does not specify what it means to "send" a message for the purposes of the legislation, it is difficult to understand how the Act applies to the various parties who may be involved in the process of sending a CEM (e.g., advertisers, ESPs, advertising agencies, etc.). We urge Industry Canada to clarify the meaning of a "sender"⁴ using its regulation-making powers under paragraph 64(1)(m) of the Act.

³ See Definitions and Implementation Under the CAN-SPAM Act, 73, Fed. Reg. 29657-29660 (May 21, 2008).

⁴ Though the term "sender" does not appear in the Act, for the purposes of brevity it is used throughout this submission to refer to "a person who sends a commercial electronic message".

i. Problems with failing to provide clarification

24. Without a legal clarification of a sender it is difficult to know how the Act applies and to whom. For example, it is unclear how the Act was intended to apply to ESPs and other service providers who assist advertisers in developing and delivering email and other forms of electronic advertising.

25. The fact that the Act refers both to a sender and a person on whose behalf a message is sent does little to clarify this issue, as there are at least two possible interpretations as to why this additional reference was included. For example, it could mean that in many cases the ESP is the person who "sends", and the advertiser is the person on whose behalf the message is sent.⁵ Alternatively, the Act may refer to a person on whose behalf the message is sent in order to deal with more sophisticated scenarios, such as a list rental situation (the latter being the preferable interpretation, for reasons discussed below).

26. The difference between these two interpretations has significant implications for whether ESPs and other parties are compliant with the Act. If an ESP were to fail to identify itself, or to implement an unsubscribe mechanism when it was required to do so, it could be subject to millions of dollars in penalties or class action lawsuits.

ii. Industry Canada should draw on the experiences under the CAN-SPAM Act

27. In order to address the legal uncertainty described above, Industry Canada should consider the definition of a sender in the CAN-SPAM Act, and, more importantly, the reasons why such a definition was adopted.⁶ For the purposes of the CAN-SPAM Act, a sender is a person who "initiates" a message, and "and whose product, service, or Internet web site is advertised or promoted by the message." Thus, a sender is a person who both sends the message (i.e., clicks a "send" button), or procures someone to do this on their behalf, and is also the advertiser.

28. This definition - which clarifies that ESPs are not senders under the legislation - is based on sound reasoning and policy. One of the key objectives of anti-spam legislation is to ensure that advertisers are accountable for messages sent on their behalf, as it is the advertisers who are

⁵ Under this interpretation an advertiser would be a "sender" if they actually send the message themselves.

⁶ A "sender" is defined under the CAN-SPAM Act as the following: Except as provided in subparagraph (B), the term "sender", when used with respect to a commercial electronic mail message, means a person who initiates such a message and whose product, service, or Internet web site is advertised or promoted by the message." Initiate means "to originate or transmit such message or to procure the origination or transmission of such message, but shall not include actions that constitute routine conveyance of such message. For purposes of this paragraph, more than one person may be considered to have initiated a message", 15.U.S.C.A. § 16(A).

ultimately responsible for the content of messages, and, most importantly, it is the advertisers who seek to develop relationships with recipients. Advertisers procure the services of ESPs to assist in the delivery of advertisements that appear as though they are sent from the advertiser in a clean and seamless manner.

29. An important problem that United States policy-makers sought to avoid by defining the concept of a sender is the possibility that ESPs would be responsible for certain obligations under the law that are more appropriately attributed to an advertiser; namely, identification and unsubscribe requirements.

30. ESPs should not be required to be identified in the body of a commercial electronic message. The goal of an email advertising campaign is to build brand recognition and a positive relationship between the consumer and the advertiser, and a recipient does not care which service provider may have assisted the advertiser in sending the message.⁷ It is potentially confusing to a recipient if an ESP is identified. The recipient wants to know who the advertiser is, and to whom they have provided permission. Including the name (and potentially contact information as a result of the CRTC regulations) of an ESP they have never heard of can confuse the recipient, and in no way assists in the prevention of spam.

31. A related purpose for this definition is to ensure that, when an individual unsubscribes from receiving messages, he or she unsubscribes from receiving messages from the advertiser, and not the ESP. The problems with unsubscribing from an ESP are obvious. A brand owner may use multiple ESPs; thus, an individual who unsubscribes from an ESP (expecting that they are unsubscribing from receiving messages from the brand) may still receive messages from that brand through another ESP. Furthermore, individuals do not provide consent to ESPs; they provide it to advertisers.

32. This is how the email ecosystem currently functions, and it functions very well. Individuals forge relationships with brand owners, not ESPs. The role of the ESP is to act merely as an agent to assist brand owners in developing and delivering effective email campaigns. A failure to clarify the meaning of a sender under CASL could turn this system on its head, much to the detriment of advertisers and consumers, with no corresponding benefit from an anti-spam perspective.

33. It is important to emphasize that with this recommendation we are not seeking to exempt service providers from accountability under CASL altogether. Notwithstanding our recommendations, in the rare instance that a service provider willingly and knowingly causes a client to violate the legislation, liability could arise as a result of section 9 of the legislation which states that "it is prohibited to aid, induce, procure or cause to be procured the doing of any

⁷ In practice ESPs are sometimes identified, though it is a mutual decision made by the ESP and the sender.

act contrary to any of sections 6 to 8." Thus, the goal of this recommendation is to ensure that online marketing continues to occur in the common sense manner that Canadian consumers have come to expect.

iii. Draft regulation

34. We offer a proposal for a draft regulation that would clarify the meaning of a sender for the purposes of the Act. Rather than define what a sender is, this proposed regulation would clarify that a CEM is not sent by or on behalf of a person merely because the person provides services that facilitate the transmission or creation of a CEM by another person. While this regulation differs significantly from the definition of a sender found in the CAN-SPAM Act, it is much simpler in design, and achieves similar objectives.

[x]. For the purposes of this Act, a commercial electronic message is not sent by or on behalf of a person merely because the person provides services facilitating the transmission or creation of a commercial electronic message by another person.

IV. Draft CRTC Regulations

A. Remove the requirement to provide contact information for all parties in a CEM and in a request for consent

35. CASL requires every CEM to include the identity of the person sending the CEM (e.g., business name), as well as any person on whose behalf the message is sent, if different. Where a message is sent by one person on behalf of another, both parties must be identified, but contact information for only one of those parties must be included in the message.⁸

36. According to the proposed CRTC regulations, every CEM and request for consent must:

- include the name of the sender, and the person on whose behalf the message is sent (if different);
- describe who is sending, and on whose behalf the message is sent (if applicable);
- the names by which the sender and the person on whose behalf the message is sent (if applicable) carry on business;
- the physical and mailing address, a telephone number providing access to an agent or voice messaging system, an email address and web address for the person sending the

⁸ CASL, paragraph 6(2)(b).

message, and on whose behalf the message is sent (if applicable).⁹

37. As a result, where a person sends a CEM that includes content on behalf on another person, contact information for each person must be included. A CEM that contains content from ten advertisers would be required to include the various contact information for all ten advertisers (in addition to the sender).

38. Providing contact information for each party will make messages cluttered and potentially confusing to recipients. For example, a recipient with a complaint or question about the message may not know which party to contact, and may be referred from one party to another. In a list rental or newsletter-type message, each advertiser may need to provide contact information and ensure that it is prepared to respond to inquiries about the message. The Act contemplates that, where a message is sent by one person on behalf of another, only one person should be required to provide contact information. Section 2 of the Proposed Regulations (CRTC) specifically contradicts this intention. Furthermore, there is no corresponding benefit from the perspective of preventing spam.

39. Similarly, there is no benefit to providing such contact information for multiple parties in a request for consent.

40. We therefore recommend that the CRTC remove these requirements from sections 2 and 4 of the Draft Regulations. More specifically, the "and" before "if different" in paragraphs 2(d) and 4(d) should be replaced with "or".

B. Limit the number of electronic addresses required in CEM and a request for consent

41. Sections 2 (information to be included in CEMs) and 4 (information to be included in a request for consent) of the Draft CRTC Regulations require, in addition to "the physical and mailing address, a telephone number providing access to an agent or a voice messaging system, an email address and a web address", that a person include "any other electronic address used by those persons."

42. First, it is not clear why there is a need to include a telephone number and web address in every CEM/request for consent. The Draft CRTC Regulations effectively stipulate that a telephone system (with a live agent or voice messaging system), as well as a website, are conditions of using email or other forms of electronic communications for marketing purposes. This is a significant and costly burden to impose on businesses that may not already use a telephone or website to communicate with consumers.

⁹ Draft CRTC Regulations, s. 2, 4.

43. Furthermore, the requirement to include "any other electronic address used by those persons" is problematic for obvious reasons. A person could use dozens or even hundreds of electronic addresses for various business purposes, and a literal interpretation of paragraphs 2(d) and 4(d) would require a person to list each of those electronic addresses.

44. A more reasonable requirement would be, in addition to a physical and mailing address, to require at least one functioning electronic address that is of the same type of electronic address to which the CEM is sent. Thus, if the CEM is sent to an email account, then the sender should include an email address.

45. The following is a recommended draft paragraph that could be included in both sections 2 and 4:

(d) the physical and mailing address, and an electronic address that is of the same type of electronic address to which the commercial electronic message is [or will be, in the case of section 4] sent, of the person sending the message or, if different, the person on whose behalf the message is sent.

C. Remove the requirement for unsubscribe through multiple forms of contact information

46. A request for consent must include all of the contact information described above under subheading 1, while paragraph 4(e) requires a person seeking consent to indicate that the person can withdraw their consent by using any of the contact information provided.

47. CASL requires every CEM to include a functioning unsubscribe mechanism, and provides senders with some flexibility in terms of how the unsubscribe request can be indicated; e.g., by sending a message to an electronic address, or through a web link. By requiring senders to indicate that a recipient can unsubscribe through contact information provided in a request for consent, senders are effectively required to establish multiple avenues to unsubscribe. This is very onerous from a practical perspective, and creates potential legal liability if all of those forms of communication are not continuously monitored for unsubscribe requests. For example, if a recipient leaves a voice message at a telephone number, the sender could be liable if a CEM is sent after the voice mail message has been left. In short, it is simply not feasible for a sender to police multiple forms of unsubscribe mechanisms.

48. This requirement would be costly for business, with no corresponding benefit from an anti-spam perspective, as there is no reason why recipients require multiple options to unsubscribe. In addition, this regulation appears to be beyond the CRTC's regulation-making powers under subsection 64(2) of the Act. Though the Act enables the CRTC to make regulations respecting the form of a request for consent, Act does not provide the CRTC with the authority make regulations respecting the unsubscribe requirement.

49. As such, we recommend that paragraph 4(e) be removed from the draft regulations.

D. Remove or amend conditions on the unsubscribe requirement

50. Subsection 3(2) of the Draft CRTC Regulations specify that "the unsubscribe mechanism referred to in paragraph 6(2)(c) of the Act must be able to be performed in no more than two clicks or another method of equivalent efficiency."

51. This requirement is not necessary. Paragraph 11(1)(a) of the Act already specifies that a request to unsubscribe must be able to be made by the same electronic means, and at no cost to the recipient. Furthermore, the requirement for "no more than two clicks" is overly prescriptive, and it could preclude reasonable and widely used practices. For example, it is commonplace to include a link to a webpage where the recipient is asked to indicate certain preferences, as they may be subscribed to more than one list, or the sender may be able to offer the recipient a list for products or services that are more relevant to the interests of the recipient. It is also common to ask a recipient to confirm their email or other electronic address on an unsubscribe page. Such processes are not difficult, time consuming nor inconvenient, yet they may require a total of more than two "clicks". In addition, it is unclear what would constitute a method of "equivalent efficiency".

52. Finally, the CRTC does not appear to have the authority to make regulations with respect to the unsubscribe mechanism under subsection 64(2). As such, we recommend removing this requirement from the regulations altogether.

53. Alternatively, if it is determined that further clarity is required, and that the CRTC does in fact have authority to regulate on this matter, we recommend that the CRTC adopt the approach taken by the Federal Trade Commission ("FTC") in developing rules under the CAN-SPAM Act. Rule 316.5 provides that a person seeking to unsubscribe cannot be required to:

- pay a fee (already in CASL);
- provide any information other than their electronic address;
- take any steps other than replying to a message or visiting a single internet web page.

54. This rule is more flexible and consistent with existing industry best practices. The following is a proposal for a draft regulation:

[x] The unsubscribe mechanism referred to in paragraph 6(2)(c) of the Act

(a) must not require a person to provide any information other than an electronic address;

(b) must not require any a person to access more than a single page where a link is

provided to a page on the World Wide Web that can be accessed through a web browser to which the indication may be sent.

E. Remove requirement for consent to be in writing

55. Section 4 of the Draft CRTC Regulations stipulates that a request for consent to send a CEM, or to perform an act under sections 7 (alteration of transmission data) or section 8 (installation of computer programs) must be "in writing".¹⁰

56. The requirement to seek express consent in writing is overly prescriptive and unnecessary. In most cases electronic addresses are collected electronically, and consent is therefore requested in writing (e.g., via a web-based form). However, this requirement would preclude a person from seeking express consent orally, such as during an in-person meeting or telephone call. CASL already creates incentives to obtain consent in writing where possible by stating that any person claiming to have consent bears the burden of proving it. Senders should have the discretion to determine how consent is most appropriately obtained according to various factors, including what is practical in the circumstances as well as the likelihood that evidence of consent obtained is sufficient to meet the burden of proof under CASL.

57. We therefore recommend that the requirement to obtain consent in writing be removed from the Draft CRTC Regulations.

End of document

¹⁰ The regulations only specify that the request must be in writing; however, they do not stipulate that the expression of consent must also be in writing.