

December 3, 2012

**VIA OVERNIGHT DELIVERY**

Jean-Pierre Blais, Chairman  
Canadian Radio-television and Telecommunications Commission  
Les Terrasses de la Chaudière  
Central Building  
1 Promenade du Portage  
Gatineau, Quebec J8X 4B1

**Re: Comments of the Email Sender & Provider Coalition on Guidelines under Canada's Anti-Spam Legislation**

Dear Mr. Blais,

Please find below comments of the Email Sender & Provider Coalition (“ESPC”) on the 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*, (collectively the “Guidelines”).

The ESPC is an industry association comprised of many of the largest and most innovative technology providers in the email industry across North America, including Email Service Providers (“ESPs”), Mail Transfer Agents, application and solution developers and deliverability solution providers. Our members assist in the development and delivery of email and other forms of messaging to a significant number of Canadians.

The ESPC commends the CRTC for taking the initiative to issue interpretive guidance. Canada's Anti-Spam Legislation (CASL) is a lengthy and complex piece of legislation that introduces a number of new legal requirements for senders and service providers who market to Canadians. A lack of clarity in how these rules apply adds to an already significant compliance burden for brands and the providers who serve them. Interpretive guidance from enforcement agencies can therefore alleviate some of the uncertainty and risk that arises out of new legislation.

That being said, the ESPC has a few concerns about how the CRTC intends to interpret and apply CASL, and would like to offer its views based on the collective experience of its members. In particular, the ESPC has comments on the following issues:

- Definition of express consent: The requirement for an opt-in approach in all circumstances is overly prescriptive and will pose challenges for senders. A more flexible approach that allows for opt-out consent in some circumstances is preferable.

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- Further clarity on whom to identify in a Commercial Electronic Message (“CEM”): The ESPC agrees that service providers should not be required to be identified in a CEM. However, the types of providers referred to in the Guidelines is currently quite narrow, and should therefore be broadened.
- Confirmation message: The Guidelines state that a confirmation message should be sent in all cases after express consent is obtained. The ESPC is concerned that this is burdensome and creates unnecessary legal risk for senders.
- Evidence of express consent obtained orally: The evidentiary requirements for oral consent as specified in the Guidelines will make it difficult if not impossible to rely on oral consent. The ESPC urges the CRTC to take a more flexible approach.
- Transactional and relationship messages: The ESPC asks the CRTC to clarify that the Act does not apply to messages that are transactional or relational in nature.

Each of these issues is discussed in further detail below.

## **1. Definition of express consent**

Express consent can be "opt-in" or "opt-out." The Guidelines, however, state that express consent under CASL can only be "opt-in." In practical terms, this means that a check box cannot be pre-checked. Going forward, this will make it difficult for senders to obtain express consent, as consumers typically do not alter default settings. In addition, many senders have already obtained consent using pre-checked boxes, and based on the Guidelines senders will no longer be able to send email to individuals who have subscribed under such a model.

### **1.1. Challenges with a rigid opt-in approach**

There are important policy reasons why it is desirable to take a flexible approach that allows organizations to rely on a form of opt-out express consent for sending a CEM. Presumably these reasons informed the government's decision not to define express consent in CASL. If the government had intended for express consent to have such a meaning under CASL, then it could have easily defined it that way.

Default settings matter when requesting consent from consumers. Research shows that a request for express consent framed as an opt-out can result in almost twice as much participation over an

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opt-in approach (e.g., a box is pre-checked).<sup>1</sup> One common theory for why default matters so much is that consumers are increasingly pressed for time, and users may overlook the need to actively click a button. In many cases if a consumer is already on a sign-up or registration page they have expressed a clear interest in a product or service, and may not think to click on an extra check box.

Under such a model users are not in any way deceived into providing consent. CASL provides assurance that a request for express consent will be explained and presented in a clear and conspicuous manner. And in the rare case that an individual regrets his or her decision to subscribe to receiving emails, he or she can easily unsubscribe through the unsubscribe mechanism that is required in every CEM.

It is important to recognize that many existing lists of email subscribers have been compiled using an opt-out approach to express consent. The Guidelines will effectively render all of these lists automatically and retroactively non-compliant with CASL, despite the fact that subscribers may have been receiving email for months or even years without complaint. As a result, business may be forced to stop sending email to millions of subscribers once CASL comes into force, with no corresponding benefit to subscribers.

#### 1.2. Rigid requirement for opt-in consent is inconsistent with PIPEDA

For over a decade ESPC members in Canada and the United States have made efforts to understand and comply with privacy legislation such as the *Personal Information Protection and Electronic Documents Act* (PIPEDA). PIPEDA incorporates a flexible approach to consent, and the rigid opt-in requirement established in the Guidelines goes beyond the requirements for express consent under PIPEDA.

The Office of the Privacy Commissioner of Canada (OPC) has interpreted PIPEDA to require a form of opt-out express consent when organizations collect, use or disclose personal information for marketing purposes, which includes the use of email for marketing communications. The OPC states that opt-out consent is acceptable for marketing purposes so long as the following conditions are met:

- The personal information must be demonstrably non-sensitive in nature and context.

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<sup>1</sup> See E. J. Johnson, S. Bellman, & G. L. Lohse “Defaults, Framing, and Privacy: Why Opting in ≠ Opting Out” (2002) 13(1) Marketing Letters, [http://www8.gsb.columbia.edu/sites/decisionsciences/files/files/defaults\\_framing\\_and\\_privacy.pdf](http://www8.gsb.columbia.edu/sites/decisionsciences/files/files/defaults_framing_and_privacy.pdf).

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- The information-sharing situation must be limited and well-defined as to the nature of the personal information to be used or disclosed and the extent of the intended use or disclosure.
- The organization's purposes must be limited and well-defined, and stated in a clear and understandable manner.
- As a general rule, organizations should obtain consent for the use or disclosure at the time of collection.
- The organization must establish a convenient procedure for opting out of, or withdrawing consent to, secondary purposes. The opt-out should take effect immediately and prior to any use or disclosure of personal information for the proposed new purposes.<sup>2</sup>

The use of opt-out consent for marketing purposes requires that an individual be presented with "an opportunity to express non-agreement to an identified purpose" before a collection, use or disclosure takes place. The individual must be "clearly informed that the failure to opt out will mean that [the individuals] is consenting to the proposed use or disclosure of the information."

This is very similar to CASL, which requires that the purposes for seeking consent be explained to an individual in order to obtain express consent before a CEM can be sent. The hallmark of express consent under both laws is that an individual must be provided with notice and an opportunity to either opt in or opt out before a given act (e.g., sending an email) occurs.

With respect to the use of check boxes, the OPC states that:

An organization should ensure that the consent mechanism it chooses is clear and unambiguous. For example, where a consent mechanism consists of both a "Yes" and a "No" checkoff box, the organization should clearly state what occurs if an individual omits to check either box. The organization should consider the sensitivity of the personal information in this regard. It would be inappropriate, in cases where an individual omits to check either box, to treat the default arrangement as an opt-out and assume consent, where the personal information is sensitive.<sup>3</sup>

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<sup>2</sup> Office of the Privacy Commissioner of Canada, *Determining the appropriate form of consent under the Personal Information Protection and Electronic Documents Act*, [http://www.priv.gc.ca/resource/fs-fi/02\\_05\\_d\\_24\\_e.asp](http://www.priv.gc.ca/resource/fs-fi/02_05_d_24_e.asp).

<sup>3</sup> *Ibid.*

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Thus, the OPC advocates for a flexible approach that allows for pre-checked boxes, except where personal information is sensitive. If an opt-out approach is acceptable under PIPEDA, then it should be acceptable under CASL as well.

In most cases an email address would not be considered sensitive information. Nonetheless, the ESPC acknowledges that there may be instances where the use of an email address could involve sensitive information. For example, if an individual is asked to subscribe to a newsletter with information about medication for a medical condition, then an opt-in approach may be more appropriate. The essential point is that the definition of express consent must be flexible in order to adapt to the circumstances.

The ESPC urges the CRTC to consider the vast experience of the OPC in interpreting issues related to consent under PIPEDA, as well as the government's intentions in not specifically defining express consent. Express consent is not synonymous with "opt-in" under PIPEDA, and there is no reason to make such a dramatic change with CASL. Except in cases involving sensitive information about a consumer, the appropriate form of express consent should be a business decision, not a strict legal requirement.

### 1.3. Recommendation

The ESPC supports CASL, and recognizes that a consent-based regime is important in ensuring that consumers can continue to trust the use of email and other forms of electronic communications for marketing purposes. However, the requirement for a strict, opt-in approach in every circumstance will challenge the ability of brands to reach consumers through email, requiring the use of other methods that are more costly and intrusive.

The ESPC requests that the CRTC take a more flexible approach to express consent. It would be preferable if the Guidelines indicated that an opt-out form of express consent is acceptable, just as it has been under PIPEDA for several years.

At a minimum, it is essential that the CRTC take a more flexible approach to assessing consent obtained before CASL comes in to force so as to not invalidate existing relationships between brands and consumers based on a technically non-compliant form of express consent. The CRTC should therefore specify that it will not invalidate existing lists that have been compiled using an opt-out form of express consent.

## 2. Further clarity on whom to identify in a CEM

The ESPC appreciates the CRTC's intent of providing much needed clarity regarding who should be identified in a CEM. On this issue, the Guidelines state as follows:

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The Commission considers that section 2 of the Regulations does not require that persons situated between the person sending the message and the person on whose behalf the message is sent need necessarily be identified. For example, persons so situated may facilitate the distribution of a CEM but have no role in its content or choice of the recipients. In that event, the Commission considers that they do not need to be identified.<sup>4</sup>

The ESPC agrees that persons "situated between the person sending the message and the person on whose behalf the message" should not need to be identified. The ESPC also agrees that persons who facilitate the distribution of a CEM but have no role in the content or choice of recipients should not need to be identified.

It seems reasonable to assume that the CRTC takes the position that most service providers do not need to be identified in a CEM. As described in our September, 2011 submission provided in response to the call for comments on draft *Electronic Commerce Protection Regulations (CRTC)*, there are several reasons why it is not desirable to require that service providers be identified.

However, the Guidelines are somewhat unclear, as the class of providers referred to in the paragraph quoted from the Guidelines above is much too narrow to account for the various types of service providers that should not be required to be identified. The Guidelines refer only to providers that are "situated between the person sending the message and the person on whose behalf the message." This should also include providers that are situated between the person sending (or the person on whose behalf the message is sent) *and the recipient*. This is where most service providers are situated. The way the Guidelines are currently drafted, providers would only be exempted from this requirement where one person is sending on behalf of another; yet, the Guidelines do not clarify what it means to send on behalf of another person.

Furthermore, the example cited in the Guidelines refers only to providers who "have no role in the content or choice of recipients." It is important to recognize that service providers often do play a role in determining the content of a message or the choice of its recipients. For example, determining the content of an advertising campaign is a primary function of advertising agencies. It is also commonplace for providers - including advertising agencies and email service providers - to assist in determining who should be the recipient of a given advertising campaign. It seems unlikely that the government intended for any of these providers to be identified in a CEM.

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<sup>4</sup> Compliance and Enforcement Information Bulletin CRTC 2012-548: *Guidelines on the interpretation of the Electronic Commerce Protection Regulations (CRTC)* ["Bulletin CRTC 2012-548"], para 6.

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The ESPC agrees that service providers should generally be exempt from the need to be identified in a CEM. However, as currently drafted, the Guidelines could suggest that many service providers do in fact need to be identified in a CEM, thereby failing to alleviate much of the uncertainty around this requirement under the legislation.

The ESPC therefore recommends that the CRTC provide further clarity by broadening the class of providers that are exempt from the need to be identified. In this regard, it would be preferable for the Guidelines to state that any person who *merely provides services facilitating the transmission or creation of a commercial electronic message* does not need to be identified in a CEM.

### **3. Requirement to send confirmation message**

The Guidelines state "that following receipt of express consent, confirmation of this receipt should be sent to the person whose consent was being sought."

Many ESPC members already send confirmation messages following receipt of express consent, often in the form of a "welcome" message. However, the decision to do so should be a business decision, as attempting to make this a legal requirement through the Guidelines creates unnecessary risk for senders. For example, there is always a risk that a confirmation message could be caught in a spam filter, and therefore never received. Furthermore, the Guidelines do not specify what "confirmation of receipt" means, and whether such a message could also be a CEM.

The ESPC recommends that CRTC clarify that sending a confirmation of receipt is not a legal requirement under CASL. At most it should be a recommended practice.

### **4. Evidence of oral consent**

Section 4 of the *Electronic Commerce Protection Regulations (CRTC)* provides that "[f]or the purposes of subsections 10(1) and (3) of the Act, a request for consent may be obtained orally." The Guidelines state the CRTC's view that the following methods are "sufficient to discharge the onus of demonstrating oral consent":

- where oral consent can be verified by an independent third party; or

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- where a complete and unedited audio recording of the consent is retained by the person seeking consent or a client of the person seeking consent.<sup>5</sup>

This is a significant burden that many senders will not be able to meet. Even where consent may be obtained through a medium that would allow for an audio recording to take place (e.g., over the phone as opposed to in person), most senders do not have the resources to make and store an audio recording of every single call. Furthermore, it is difficult to understand what might be meant by an “independent third party.”

As a result, the Guidelines render it very difficult and costly to obtain consent over the phone, and virtually impossible to do so in person. This will have a considerable and costly impact on business, as it is currently quite common for retailers to ask for consent when processing purchases or service requests over the phone, as well as at the point of sale (POS).

There are more reasonable ways to maintain evidence of express consent obtained orally. For example, it should be sufficient for a person to indicate the time, date and method of consent in a database. The CRTC is provided with broad investigatory powers which allow it to assess whether express consent has been properly obtained on a standard of proof commensurate with a regulatory regime.

Without evidence that such a strict evidentiary burden will in any way contribute to a reduction in spam, there is no reason for taking such a dramatic approach to oral consent. We therefore urge the CRTC to amend the Guidelines to indicate that it is sufficient to record the time, date and method of consent, and that there is no need to make an audio recording or obtain verification from an independent third party.

## **5. Transactional or relationship messages**

There appears to be a possibility to interpret CASL in such a way that senders would be required to meet the identification and unsubscribe requirements in transactional or relationship messages. A transactional or relational message is generally any electronic message sent in a business context, but not necessarily for advertising purposes, including a number of those referred to in subsection 6(6) of CASL. This would include, but is not limited to, any message that:

- facilitates, completes or confirms a previously agreed to commercial transaction;
- delivers a previously purchased product, service or update;

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<sup>5</sup> Bulletin CRTC 2012-548, para. 23.

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- provides warranty information, product recall information or safety or security information about a product or service;
- provides information about an ongoing subscription, membership, account, loan or similar relationship; or
- provides a notification of a change in terms or features of a service.

Any message that is sent solely for purposes such as those described above could not be considered a CEM according to the definition in subsection 1(2) of CASL. However, the existence of subsection 6(6), which merely exempts any of these messages from the need to obtain consent, implies that these messages *are* subject to CASL.

The Guidelines suggest that the CRTC may be of the view that CASL applies to transaction and relational messages. In particular, the example provided immediately following paragraph 12 of Bulletin CRTC 2012-548 provides a choice between unsubscribing from “promotional” messages, or all messages, including “factual information about...account and purchases.” This seems to imply that senders must provide the ability to unsubscribe from messages that would not fit the definition of a CEM.

There are problems with such an interpretation. Most importantly, allowing a consumer to unsubscribe from receiving important information related to warranty, safety, product recall, or changes to the terms of service can threaten the health and safety of consumer, and create legal risk for senders who are no longer able to communicate important information to consumers. Email is often the most effective (and only) method of contacting a consumer, and allowing a consumer to unsubscribe from these types of messages creates unnecessary risk.

This issue is addressed under the U.S. *Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003* (CAN-SPAM Act) with the “Primary Purpose Rule,”<sup>6</sup> developed by the Federal Trade Commission (FTC) following consultation with industry in a notice and comment process. This rule establishes a number of criteria to determine whether the primary purpose of a message is commercial, transactional or relational, or some other purpose. Under the CAN-SPAM Act, a message for which the primary purpose is not commercial is not subject to the identification or unsubscribe requirements.

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<sup>6</sup> 16. C.F.R. § 316.3(b).

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Although the CRTC may not have the jurisdiction to establish a legal rule to determine the primary purpose of an electronic message, it does have the ability to interpret CASL in a manner to achieve similar results. A CEM is defined under CASL as:

an electronic message that, having regard to the content of the message, the hyperlinks in the message to content on a website or other database, or the contact information contained in the message, it would **be reasonable to conclude** has as its purpose, or one of its purposes, to encourage participation in a commercial activity... [emphasis added]<sup>7</sup>

The reasonableness test in this definition is essential to ensuring that CASL does not inadvertently apply to every electronic message sent between a business and a consumer (or between two businesses), and prevent organizations from sending important information by email or other electronic means. As a specific example, CASL should not apply to message containing product or warranty information merely because it includes a hyperlink to a business website.

Many senders already have systems in place that distinguish between messages that are commercial and those that are transactional or relational, and treat these messages according to different rules. In addition to the problems identified above, it would be very costly to require senders to make such a burdensome change to existing practices, with no corresponding benefit from an anti-spam perspective.

The ESPC therefore urges the CRTC to take into account the reasonableness test when interpreting the definition of a CEM under CASL, and clarify in its Guidelines that:

- a message must promote participation in a commercial activity in order to be considered a CEM; and,
- a message will not be deemed a CEM merely because it includes a link to a business website.

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<sup>7</sup> *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*, SC 2010, c 23 [CASL], ss. 1(2).

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Thank you for taking the time to consider our submissions on the Guidelines. The interpretation and application of CASL will have a significant impact on our members and their clients, and is therefore of great interest to the ESPC. We hope to have the opportunity to meet with you or your staff to discuss these issues in person once you have had the chance to review the forgoing.

Sincerely,



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