
INDUSTRY CANADA PUBLISHES REVISED ANTI-SPAM REGULATIONS

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A. INTRODUCTION

On January 5, 2013, a revised set of the proposed Electronic Commerce Protection Regulations (the “Proposed IC Regulations”) were pre-published by Industry Canada in Part I of the *Canada Gazette* Vol. 147, No. 1 for a consultation period of 30 days. The Proposed IC Regulations are Industry Canada’s regulations under Bill C-28 (“Anti-spam Legislation”), which has been reported on in previous *Charity Law Bulletins and Charity Law Updates*. For information concerning the first draft of the regulations released by Industry Canada, as well as more information on the Anti-spam Legislation, see *Charity Law Bulletin No. 257*, dated August 18, 2011 available at <http://www.carters.ca/pub/bulletin/charity/2011/chylb257.htm>.

This *Charity Law Bulletin* will briefly review the portions of the Proposed IC Regulations that, although not new under the Proposed IC Regulations, remain of concern to not-for-profits and provides further commentary on the Anti-spam Legislation.

B. REVIEW OF ANTI-SPAM LEGISLATION

Generally, the Anti-spam Legislation prohibits a person from sending a “commercial electronic message,” which includes any electronic message that encourages participation in a commercial activity, regardless of whether there is an expectation of profit, without the person who receives it having provided consent. As such, although emails from charities or not-for-profits seeking donations are not generally “commercial electronic messages,” those that encourage participation in a commercial activity likely would be subject to

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the requirements of the Anti-spam Legislation. Consent under the Anti-spam Legislation can be either express or implied. In this regard, implied consent can arise where there is an “existing non-business relationship” between the sender and receiver of a “commercial electronic message.” As a reminder, an “existing non-business relationship” can arise where a donation or gift was made by the person to whom the “commercial electronic message” was sent within the two-year period “immediately before the day on which the message was sent...” and the person who sent the message was a registered charity. The same exemption and time period also applies where a person has done volunteer work with the charity within the past two year period. Of concern to not-for-profits, an “existing non-business relationship” also includes membership, *as defined by regulation*, in a club, association or voluntary organization, *as defined by regulations*.

C. DEFINITIONS FOR “MEMBERSHIP” AND “CLUB, ASSOCIATION OR VOLUNTARY ORGANIZATION UNDER THE IC REGULATIONS

In this regard, the Proposed IC Regulations at subsection 7(1) define membership as being “the status of having been accepted as a member of a club, association or voluntary organization in accordance with its membership requirements.” Furthermore, the Proposed IC Regulations define a club, association or voluntary association as “a non-profit organization that is organized and operated exclusively for social welfare, civic improvement, pleasure or recreation or for any purpose other than profit, if no part of its income is payable to, or otherwise available for the personal benefit of any proprietor, member or shareholder of that organization unless the proprietor, member or shareholder is an organization whose primary purpose is the promotion of amateur athletics in Canada.”

It should be noted that the definition of a non-profit under the Proposed IC Regulations mirrors the definition of a non-profit organization under the *Income Tax Act* (Canada) (“ITA”) under paragraph 149(1)(l). As a result, both the definition of membership and of a “club, association or voluntary organization” remain unchanged from the previous draft of the Proposed IC Regulations.

One concerning aspect of the adoption of the definition of a non-profit organization is that there are other tax-exempt entities under the ITA which are not non-profit organizations which would legitimately expect to be exempt under the definition of a “club, association, or voluntary organization.” For example, a fraternal benefit society, which may or may not meet the definition of non-profit organization, would have an equal expectation that there would be an “existing non-business relations” with its members. On the face of the

Proposed IC Regulations, though, Industry Canada has adopted a narrow interpretation of “club, association, or voluntary organization” which would not include a fraternal benefit society. In addition, it is also worth nothing that membership in a registered Canadian amateur athletic association would not be included in the definition of a “club, association or voluntary organization” adopted by the Proposed IC Regulations.

In this regard, by cross-referencing the definition of non-profit organization under the ITA, the Regulations might be interpreted to exclude other tax-exempt entities defined therein, including those at paragraphs 149(1)(e),(g),(i), and (k). While the Anti-spam Legislation makes specific reference to registered charities and political parties in relation to “existing non-business relationships,” it is unfortunate that the Proposed IC Regulations provide a very narrow definition of “club, association, or voluntary organization” with no reasonable justification for the exclusion of other not-for-profit entities which may not necessarily be non-profit organizations as defined in paragraph 149(1)(l) of the ITA.

D. CONCLUSION

It will be important for all not-for-profits to continue to monitor the Proposed IC Regulations once they are finalized to begin planning in advance for the proclamation of the Anti-spam Legislation in late 2013. Comments on the Proposed IC Regulations are being received by Industry Canada until February 4, 2013.

The Proposed IC Regulations and further background material can be found online at:
<http://www.gazette.gc.ca/rp-pr/p1/2013/2013-01-05/html/reg1-eng.html>