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## REGULATIONS FOR ANTI-SPAM LEGISLATION RELEASED FOR CONSULTATION

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*By Ryan M. Prendergast\**

### A. INTRODUCTION

*Charity Law Bulletin* No. 238 reported on Bill C-28<sup>1</sup> concerning new legislation creating a regulatory scheme for spam and related unsolicited electronic messages (the “Anti-spam Legislation”). Although the Anti-spam Legislation will not apply to electronic messages — i.e., email or other electronically distributed messages — that a charity may send requesting donations or other solicitations for volunteers, charities and non-profit organizations which send “commercial electronic messages” as defined in the Anti-spam Legislation will need to ensure they are in compliance. In this regard, charities and non-profit organizations which send emails or other electronic messages which, for example, contain offers concerning goods, products or services, or that advertise or promote such opportunities will want to review the Anti-spam Legislation and the draft regulations described in this *Charity Law Bulletin*. According to a press release from the Minister of Industry released on August 1, 2011, the Anti-spam Legislation will likely come into force early in 2012.<sup>2</sup>

While the Anti-spam Legislation outlined the general prohibitions against the sending of commercial electronic messages, certain elements of the Anti-spam Legislation were to be further detailed in regulations

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<sup>1</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*, online: <http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Bill=C28&Language=E&Mode=1&Parl=40&Ses=3&View=1>.

<sup>2</sup> Government of Canada Protecting Canadian Consumers and Businesses: Consultations Have Begun on Draft Regulations for Canada's Anti-Spam Legislation and Fight Spam Website Launches (August 1, 2011), online: <http://www.ic.gc.ca/eic/site/ic1.nsf/eng/06636.html>.

to be released by Industry Canada and the Canadian Radio-television and Telecommunications Commission (“CRTC”). As such, both organizations have now released draft regulations, collectively referred to as the Electronic Commerce Protection Regulations, for comment from the public.

This *Charity Law Bulletin* summarizes the information contained in the draft regulations released by Industry Canada and the CRTC.

## B. DRAFT REGULATIONS

### 1. CRTC Draft Regulations

On June 30, 2011, the CRTC released draft regulations pursuant to section 64(2) of the Anti-Spam Legislation for comment (the “CRTC Regulations”). The deadline for the receipt of comments regarding the draft regulations is 29 August 2011.

As was summarized in *Charity Law Bulletin* No. 238, the Anti-Spam Legislation contains a general prohibition against the sending of a “commercial electronic message” (“CEM”) unless the sender has express or implied consent from the receiver and the email or message is in prescribed form.

In this regard, the CRT Regulations set out the form and certain information to be included in CEM. As such, the CRTC Regulation states that a CEM must contain the following information:

- (a) the name of the person sending the message and the person, if different, on whose behalf it is sent;
- (b) if the message is sent on behalf of another person, a statement indicating which person is sending the message and which person on whose behalf the message is sent;
- (c) if the person who sends the message and the person, if different, on behalf of whom it is sent carry on business by different names, the name by which those persons carry on business; and
- (d) 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 of the person sending the message and, if different, the person on whose behalf the message is sent and any other electronic address used by those persons.

The CRTC Regulations state that where it is not practical to contain this information in the CEM, this information can be contained in a hyperlink to a website which is “clearly and prominently set out” or by an alternative that is described of “equivalent efficiency”.

Furthermore, the CRTC Regulations state that the unsubscribe mechanism contained in the CEM which is required by the Anti-spam Legislation to allow the receiver to withdraw their express or implied consent must be able to be performed in no more than two clicks or another method of “equivalent efficiency.” Although what is meant by “equivalent efficiency” is somewhat unclear, the required two clicks makes it clear that the unsubscribe mechanism should be relatively straightforward.

Lastly, in addition to the information prescribed to be contained in a CEM, the CRTC Regulations set out the information to be contained in a message seeking consent under section 10(1) and (3) of the Anti-Spam regulations. In this regard, in addition to the information set out above under (a) and (d), an additional requirement is prescribed by the regulations for CEMs seeking consent:

(e) a statement indicating that the person whose consent is sought can withdraw their consent by using any contact information referred to in paragraph (d).

## 2. Industry Canada Regulations

On July 9, 2011, Industry Canada released draft regulations which were published in the Canada Gazette, Part I, for a 60-day consultation period (the “IC Regulations”).

Whereas the CRTC Regulations outlined the form and content of a CEM for compliance purposes with the Anti-spam Legislation, the IC Regulations add clarity to certain terms contained in the Anti-spam Legislation for definitional purposes.

As such, section 6(5)(a) of the Anti-spam Legislation provides an exemption to the general prohibition against the sending of a commercial electronic message where it is sent on behalf of an individual to another individual with whom they have a personal or family relationship.

As such, the IC Regulations define a “family relationship” as follows:

- (i) a blood relationship, if one individual is the child or other descendant of the other individual, the parent or grandparent of the other individual, the brother or sister of the other individual or of collateral descent from the other individual's grandparent,
- (ii) marriage, if one individual is married to the other individual or to an individual connected by a blood relationship to that other individual,
- (iii) a common-law partnership, if one individual is in a common-law partnership with the other individual or with an individual who is connected by a blood relationship to that other individual; and
- (iv) adoption, if one individual has been adopted, either legally or in fact, as the child of the other individual or as the child of an individual who is connected by a blood relationship to that other individual

In addition, a “personal relationship” is defined as a relationship: “other than in relation to a commercial activity, between an individual who sends the message and the individual to whom the message is sent, if they have had an in-person meeting and, within the previous two years, a two-way communication.”

Section 10(2)(b) of the Anti-spam Legislation states that a person who is seeking consent from a person whose identity is not known, the email or message seeking the consent must comply with the regulations. For this purpose, the IC Regulations require that any CEM sent to the person from whom the consent was obtained contains the identification of the person who obtained the consent as well as the option to unsubscribe. However, if that unsubscribe option is utilized, the IC Regulations also require that the person who obtained the consent must notify the sender of the CEM that the consent has been withdrawn “without delay” and that the provisions within the Anti-spam Legislation concerning the withdrawal of consent are followed.

Lastly, the IC Regulations provide greater clarity to the term “member” in a club, association or voluntary organization. As such, “membership” is defined as the, “status of having been accepted as a member of a club, association or voluntary organization in accordance with the membership requirements of the club, association or organization.” It is assumed that this is referring the membership requirements contained in the club, association or voluntary organization's by-laws or other means of determining membership by that organization. The terms club, association or voluntary organization are further defined as being 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 the primary purpose of which is the promotion of amateur athletics in Canada.”

### C. NEW INDUSTRY CANADA WEBSITE

The draft regulations, as well as other helpful information published by Industry Canada are also available on a website which recently was announced by Industry Canada at <http://fightspam.gc.ca>. Industry Canada has stated that the “Fight Spam” website will include more detailed information once the consultation process concerning the regulations has concluded. In addition, the website also contains a link to a Spam Reporting Centre. At the present time, the Spam Reporting Centre is not operational, but the website states that it will be responsible for identifying and analyzing trends in spam and other threats to electronic commerce.

### D. CONCLUSION

It should be noted that, in addition to the sending of a CEM, the Anti-spam Legislation also applies to anyone that is involved with the alteration of transmission data, or produces or installs computer programs, although such activity is not usually carried out by charities. As such, although this *Charity Law Bulletin* has provided a brief summary of the provisions pertinent to CEMs contained in the Anti-Spam Legislation and Electronic Commerce Protection Regulations, a fuller review of the two documents should be done where a charity is conducting either of the said activities. Although the prediction contained in the press release by the Minister of Industry indicates that charities and non-profit organizations that send CEMs will likely have until 2012 to comply with the Anti-Spam Legislation, it is recommended that such organizations review the statute and Electronic Commerce Protection Regulations to begin planning in advance for their coming into force.