February 4, 2013

Bruce Wallace
Director, Security and Privacy Policy,
Digital Policy Branch, Department of Industry
Jean Edmonds Tower North, 18th floor, Room 1891D
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RE: Industry Canada notice in the *Canada Gazette*, Part I dated January 5, 2013, the Electronic Commerce Protection Regulations

Dear Mr. Wallace,

Thank you for the opportunity to comment on the Draft Electronic Commerce Protection regulations, as they pertain to the Canadian Anti-spam Legislation (CASL), published in the Canada Gazette on January 5th, 2013. The Canadian Chamber of Commerce, on behalf of Canada's business community, shares the Government's goal of combating spam and malware, and our respective members support the basic principles that underlie CASL, namely disclosure, consent, and the capacity to unsubscribe.

The business community has now had two years to examine and scrutinize the potential impacts CASL will have on the conduct of electronic commerce. We continue to believe that CASL has the potential to create an effective framework and enforcement regime to significantly reduce spam and malicious online activity. However, we are increasingly concerned that the Government has not achieved balance. The objectives of promoting online economic activity and allowing responsible businesses to continue using this channel for electronic communication has not been met.

Our concerns over balance is exacerbated by the CRTC publication of CASL Compliance Guidelines (Compliance and Enforcement Information Bulletin CRTC 2012-548, October 10, 2012), expressing how the Commission, will interpret those provisions, including expectations for the demonstration of compliance. Examples of items which are of concern include: the implication that all messages from a company should be subject to the unsubscribe mechanism, not just CEMs; and the implication that the burden of proof for obtaining an oral consent would require an independent third party witness or a complete and unedited audio recording of the consent.

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A number of the concerns raised by business to the original draft regulations (July, 2011), were addressed by Industry Canada, which we applaud. However, many uncertainties remain in this latest draft.

The broad scope of CASL will impact every single business, association, club, charitable organization and foundation that conducts activities in Canada, regardless of country of origin or the destination of messages because, except for some very narrow exclusions (most of which are not available to the not-for-profit sector), every single CEM sent or received in Canada is captured under CASL.

This legislation will impose significant compliance costs on businesses and other organizations that, in many cases, are ill-equipped to undertake them. For instance, as of 2011, approximately 70% of small businesses polled stated they do not currently have a website. As is implied in the CRTC Compliance Guideline noted above, maintaining a website or the purchase of a service to maintain the necessary compliance data will be obligatory. Businesses already face many regulatory compliance burdens and in its current form, CASL will result in economic hardship for both business and not-for-profit organizations.

Without significant modifications to the regulations, this legislation will impede commercial speech, an essential ingredient of market competitiveness. Canadian companies will be at a distinct disadvantage when communicating outside our borders in countries that do not have the same stringent requirements, since the legislation and compliance costs will apply to Canadian companies even when operating outside our borders but will not apply to companies operating in the country where the message is received.

Moreover, it will impede innovation by channeling resources away from new ventures and opportunities by slowing the regular updating of computer software and systems. Because the rules respecting the installation of software are overly broad, the ability of organizations that maintain networks to secure and protect data will be impeded.

The extraterritorial implications of CASL are also cause for concern, imposing costly compliance burdens on legitimate multi-national corporations doing business in Canada, who will question the value of modifying their practices for a market the size of Canada.

Ultimately, it is not clear that CASL will solve the problem of nuisance/fraudulent messages or of nuisance/malicious software, which are generally initiated outside the jurisdictional reach of the CRTC, the agency tasked with enforcement. Imposing this kind of financial burden and economic disruption

without a very high expectation of solving the problem is counterproductive for all.

With these factors very much in mind, we suggest that the government consider reframing the legislation regarding business to business electronic communications so that CASL is based only on an opt-out scenario. Business would benefit from being able to electronically keep track of opt-out messages, and would dispense with the enormous cost of an opt-in program where the consent must be communicated by other than an electronic message.

Failing this consideration, our recommendations for amending the regulations are targeted at reducing the overreach and inefficiency in CASL, while preserving its important public interest objectives.

In paragraph 2,

- Although the stated objective of the definition of “family relationship” is to be consistent that of the Income Tax Act (sections 251 and 252), we note that the Income Tax Act actually allows for a broader interpretation than CASL. As many small businesses rely on a network of family and personal relationships for the conduct of their daily business, we recommend the definition of “family relationship” be expanded to include all blood relationships and not be limited to those with common grandparents.

- While we are pleased with the expansion of the definition of “personal relationship” from the original draft regulations to recognize the changing nature of virtual relationships, we are still concerned with the uncertainty introduced by the subjective evaluation of what constitutes a personal relationship and the bias toward in person meetings, potentially negating the benefit of the exemption. We recommend more technologically neutral language in the drafting and an expansion of the list of examples whereby a relationship will be considered “personal.”

In Paragraph 3,

- While we commend the business-to-business exemption in paragraph 3a), we are concerned the exemption does not extend to business-to-non-business organizations. We view this as a likely oversight but one

that would result in a similar unintended consequence of capturing regular business communications between a for-profit business and a not-for-profit organization. We recommend the exemption be expanded to include business to non-business organizations.

- We are also concerned that the time limit of 2 years imposed by this business to business communication for prior business relationships is not compatible with typical business cycles, where supply contracts can extend well beyond that 2 year limit. We recommend that the limits imposed on the length of time for prior business relationships, be eliminated.

- The broad scope of the definition of electronic messages means any electronic message containing a hyperlink to a web page designed for commercial intent would be considered a CEM. Most business email will contain a link to the company home page yet it is unreasonable to assume that every message sent is of a commercial nature. We recommend an exemption under section 6(5) for the commercial electronic messages in these circumstances. .

- We also recommend an exemption for online and mobile advertising, including but not limited to where such advertising is targeted at a specific address, device, browser or user.

- The requirement to “disclose the full name” of the individual making a referral in a CEM instead of just an email address, may cause concerns for individual privacy in some circumstances such as forwarding items from a news site. It also causes concerns for due diligence in ensuring the accuracy of disclosure on the part of the sender. The Chamber recommends that the government of Canada revise the regulation to require that only email addresses be disclosed.

- In order to address the disadvantage imposed on Canadian businesses when sending messages outside of Canada, we recommend adding an exemption for CEMs that are not sent in violation of an opt-out request in the country in which it is received and is not misleading or fraudulent. We

also recommend a similar exemption for computer programs that are installed on a computer system in a country outside of Canada.

- Closed messaging systems and managed messaging services have adequate protocols in place without regulation to limit unsolicited CEMs and should be exempt from section 6 of the Act.

- We are concerned about the lack of clarity surrounding the status of consents when a business is sold. We recommend that the regulations be clear that when a business is sold, the consents become the property of the new owner. A similar exemption is needed for computer programs.

In Paragraph 4,

- "Referral relationships" were added to this latest draft of the regulations. We agree that the use of referral relationships will be very useful in many industries. However, we are concerned about the restriction of the exception applying only to individuals when it may be the individual's employer who has the personal or business relationship.

In Paragraph 5,

- We are very concerned over the list management and documentation requirements and the burden of due diligence that will be imposed on third party referrers to effect the unsubscribe mechanism on the message sender, which will have significant implications for many businesses that compile lists and directories and in particular, not-for-profit organizations. In many cases, such as affinity programs, it will be very difficult to maintain an accurate list of persons who are authorized to use consent. The regulations in this circumstance do not take into account the business and technical realities of what they require. We suggest that the onus for liability and notification of withdrawal of consent to the third party referrer should be on the sender.

In Paragraph 6,

- With respect to consent requirements for specified computer programs, we submit that the exemptions for consent are far too narrow which could have the unintended consequence of permitting an increase of damage by malicious software that the Act is attempting to eliminate. Many organizations, such as banks, health networks and retailers, operate computer networks. The regulatory exemption is only for telecommunications service providers. This restriction could prevent other network administrators from protecting the integrity of their systems.

- We are also concerned about the limitations of the exemption applying only to contraventions of an Act of Parliament and reaction to imminent risk, preventing networks from taking proactive measures.

- The unintended consequences of regulating all computer programs - rather than programs which are harmful - have been exacerbated by the CRTC regulations and the CRTC interpretation bulletins. It is unnecessary and unreasonable to expect that all Canadian and foreign publishers and distributors of software will change their software distribution practices to meet CASL's prescriptive rules. Targeting harmful software only will allow the policy objective behind CASL to be achieved without imposing unnecessary costs/competitive disadvantages on businesses operating in Canada. We recommend limiting the application of the Act to malware.

In Paragraph 7,

- In many trade associations, the "member" is a business or corporation. Individuals (employees or Directors) within that business are not considered members of the association. We recommend a new exemption to recognize the relationship between associations and its members' employees.

In Paragraph 8,

- With respect to transition issues, we strongly urge the government reconsider its position and deem consent to be implied where has been obtained in accordance with requirements of the *Personal Information Protection and Electronic Documents Act* or similar Provincial legislation. Similarly, we recommend that implied consent be extended if a computer program was installed on a person's computer system before section 8 comes into force.

- To alleviate the impact of potential litigation we recommend that the private right of action created under CASL be suspended for at least the full transition period.

Despite the enduring need to combat nuisance messages and malware, the multitude of compliance problems introduced through the "opt-in" approach to regulating commercial electronic messages and software needs further scrutiny. We strongly urge the government to undertake further research on the economic impact of this approach. The regulatory impact statement published with the regulations in the Canada Gazette does not give any attention to the cost of compliance and the impact on the economy. We also strongly urge the government to undertake another round of public consultation once the draft regulations have been revised in response to comments received during this round. Finally, we recommend the Act not be proclaimed into force until at least twelve months after the final regulations have been published.

Sincerely,

Scott Smith,
Director, Intellectual Property and Innovation Policy
Canadian Chamber of Commerce