September 7, 2011

Secretary General
Canadian Radio-television and
Telecommunications Commission
Ottawa, Ontario
K1A 0N2

Dear Secretary General:

Re: Response to Telecom Notice of Consultation CRTC 2011-400 on draft *Electronic Commerce Protection Regulations* (CRTC)

1. Heenan Blaikie LLP and AccessPrivacy[1] are pleased to provide this joint submission on the draft *Electronic Commerce Protection Regulations*[2] ("Draft Regulations") to Canada's Anti-spam Legislation[3] ("CASL").

2. The comments and recommendations in this submission are based on the discussion during several AccessPrivacy workshops and a conference session that focused on CASL.[4] The participants in these workshops, and attendees of our conference, included Chief Privacy Officers, senior in-house counsel and compliance professionals from major Canadian companies in the financial services, retail, outsourcing, and on-line/digital services sectors. Our submission is also based on our experience advising clients from all industry sectors on their CASL compliance. We confirm that neither AccessPrivacy nor Heenan Blaikie has been retained to provide this submission. As

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[1] AccessPrivacy, a division of HB Global Advisors Corp., is a Heenan Blaikie LLP consulting and information services company that focuses on privacy, compliance and information management solutions.
[2] Notice of Consultation (*Call for Comments on draft* Electronic Commerce Protection Regulations (CRTC)), C. Gaz. 2011.I.2029 ("CRTC Draft Regulations").
[3] *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*, S.C. 2010, c. 23 ("CASL").
[4] AccessPrivacy CPO Forum - Workshop on CASL and its Regulations (July 26, 2011); AccessPrivacy 2011 Annual Privacy Conference (June 3, 2011); AccessPrivacy CPO Forum - FISA (Fighting Internet and Wireless Spam Act) (October 25, 2010).

such, while this submission is informed by our client engagements and workshop discussions, the views in the submission are our own.

3. We fully support the efforts of the federal government and the Canadian Radio-television and Telecommunications Commission ("CRTC") to implement legislation designed to combat spam and other fraudulent and deceptive electronic communications practices. We are specifically supportive of CASL's purpose to promote "the efficiency and adaptability of the Canadian economy by regulating commercial conduct that discourages the use of electronic means to carry out commercial activities".[5]

4. However, we are very concerned that CASL and the Draft Regulations, in their current form, will have a significant adverse impact on legitimate marketing and other business activities. We believe that the Draft Regulations (and the Industry Canada Draft Regulations[6]) can be revised to limit the adverse impact on organizations subject to the Act. We also believe that the Draft Regulations can be revised in a manner that will not, in any way, impact the objectives of this legislation. The balance of this submission (together with our submission to Industry Canada) set out our recommendations in this regard.

I. SUMMARY

5. This submission consists of our comments and recommendations on the requirements for (i) express consent; and (ii) the subsection 6(2) form and content requirements.

II. REQUIREMENTS FOR EXPRESS CONSENT

6. Section 4 of the Draft Regulations sets out form and notice requirements for a valid express consent under CASL. In our view, the requirements are unnecessarily onerous and restrictive and will pose significant challenges for organizations seeking to obtain express consent in compliance with the Act.

Removal of the "in writing" requirement

7. Section 4 requires that express consent be "in writing". In our view, the writing requirement will effectively preclude organizations from obtaining express consent for the sending of Commercial Electronic Messages ("CEMs") in person or over the phone. By way of example, it is a common practice in the retail sector for express consents to be obtained verbally at points of sale, at customer service desks or on the phone through

[5] CASL, s.3.
[6] *Electronic Commerce Protection Regulations*, C. Gaz. 2011.I.2244.

customer service agents. Once the regulations come into force, retailers and other organizations will practically no longer be able to use these entirely legitimate means of obtaining express consent of consumers, thus adversely impacting both business and consumers.

8. Valid express consent can be obtained orally under the *Personal Information Protection and Electronic Documents Act*[7] ("PIPEDA") and provincial private sector privacy legislation, under the CRTC Unsolicited Telecommunications Rules,[8] and at common law. In our view, there is no policy rationale for imposing the burden of a writing requirement on organizations in the course of obtaining express consent. Such a requirement, in and of itself, will not serve to advance the purposes of the Act in any respect. We are therefore recommending that the reference to "in writing" be removed from section 4.

Clarification and removal of certain notice requirements

9. Section 4 also sets out very detailed information for organizations to provide individuals when seeking express consent. In our view, these information requirements are overly prescriptive and drafted in a manner that raised a series of ambiguities among participants in our stakeholder discussions.

10. Under subsection 4(d), organizations would be required to provide the following information for the person seeking consent and (if different) the person on whose behalf consent is sought:

- the physical address,
- the mailing address,
- a telephone number providing access to an agent or a voice messaging system,
- an email address,
- a web address, and
- any other electronic address used by those persons (which, based on the definition of electronic address, means any electronic mail account, instant messaging account, telephone account or any similar account).

In addition, subsection 4(e) also requires an organization to provide a statement indicating that the person whose consent is sought can withdraw their consent by using the above contact information.

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[7] S.C. 2000, c.5.

[8] *Unsolicited Telecommunications Rules framework* and the *National Do Not Call List*, Telecom Decision CRTC 2007-48, 3 July 2007, as amended by Telecom Decision CRTC 2007-48-1, 19 July 2007, and Telecom Regulatory Policy 2009-200, 20 April 2009, available online:< http://www.crtc.gc.ca/eng/trules-reglest.htm>.

11. In our experience in advising numerous retailers and other organizations on the consent requirements under Canadian privacy legislation, it seems clear that consumers would not expect (let alone want) to receive the above list of contact information at the time they give their permission to be placed on an email list. For any large organizations this list would be unnecessarily extensive (e.g. the provision of both a physical and mailing address). Moreover, the wording of the regulation technically requires an organization to provide the standard contact information "and any other electronic address used by those persons" (our emphasis). Given the expansive definition of an "electronic address", a list of an organization's electronic addresses could be extensive and completely irrelevant for the purposes of obtaining express consent or otherwise.

12. More generally, in our view, none of the information in subsections 4(d) and 4(e) needs to be provided to a consumer at the time of obtaining express consent from the consumer, as all of this information will be contained within every CEM as per the form and content requirements in subsection 6(2) of the Act.

13. For the reasons above, we are therefore recommending that the information requirements in subsections 4(d) and 4(e) be removed.

14. In addition, during our stakeholder discussions, there appeared to be considerable confusion as to precisely what notice is required in, and the interplay between the requirements of, subsections 4(a), 4(b) and 4(c). For instance, the requirements in subsections 4(a) and 4(c) seem unnecessarily repetitive. If an organization articulates the name of the person on whose behalf consent is sought under subsection 4(a), it is not clear what additional information (if any) is required under subsection 4(c) which references business names. Under privacy legislation and at common law, the obligation of organizations would be to clearly notify individuals of the organization who is seeking consent, and the circumstances will dictate how much information will need to be provided in each case.

15. We therefore recommend that the CRTC clarify the wording in subsections 4(a), 4(b) and 4(c) to remove the ambiguities discussed above.

III. SUBSECTION 6(2) CONTENT & UNSUBSCRIBE REQUIREMENTS

16. We have a number of recommendations for revisions to sections 2 and 3 of the Draft Regulations that would remove unnecessary challenges for organizations, without impacting the effectiveness of subsection 6(2) in carrying out the objectives of the Act.

Clarifying certain notice requirements

17. The language in subsection 2(1) is identical to the language in section 4 of the Draft Regulations. With respect to paragraphs 2(1)(a) to 2(1)(c), our comments and recommendations above for subsections 4(a) to 4(c) would be equally applicable here.

Clarifying reference to "electronic address"

18. In addition, our comments with respect to subsection 4(d) above are also applicable to paragraph 2(1)(d). For the purposes of the wording of paragraph 2(1)(d), we recommend that the phrase "and any other electronic address" be replaced with "and any other relevant electronic address". The inclusion of the word "relevant" would clarify to organizations that they need only include another electronic address (if any) that could be used by individuals to contact the organization for these purposes.

Drafting unsubscribe process in a technologically neutral manner

19. Subsection 3(2) references the unsubscribe mechanism that must be able to be performed "in no more than two clicks or another method of equivalent efficiency." Similarly, in subsection 2(2) there is a reference to an individual being able to access an unsubscribe mechanism "in a single click or another method of equivalent efficiency". We strongly recommend that the CRTC draft this language in a more technologically neutral fashion. The reference to "clicks" could be rendered obsolete in view of increasingly rapid technological change and innovation.

20. More importantly, the reference to one or two clicks does not take into account the realities of consent management processes that are implemented by many large organizations. For instance, it is very common for consumers to be provided with a series of granular choices for the use of their email and other contact information. Accessing and manipulating these choices often takes more than one or two actions by an individual, yet the number of actions in and of itself has no bearing on the ease and efficiency to which a user may exercise his or her choice and control. Moreover, to satisfy safeguarding requirements under Canadian privacy legislation (and industry best practices), users sometimes are required to enter their user name and password information to access their account and consent preference functionality. By implication, there will always be one or two clicks in this context.

21. For these reasons, we recommend revising the wording in subsection 2(2) and 3(2) in a more technologically neutral fashion, and for the CRTC to provide organizations with administrative guidance on this issue that can be easily adapted and changed in a timely fashion. We specifically recommend that the wording in subsection 2(2) "and that can be accessed by a single click or another method of equivalent efficiency at no cost to

the person to whom the message is sent" be revised to "and that can be accessed in a simple manner at no cost to the person to whom the message is sent."

22. We also recommend that the wording in subsection 3(2) of the Draft Regulations, "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," be revised to "the unsubscribe mechanism referred to in paragraph 6(2)(c) of the Act must be simple and efficient for the person to perform."

IV. CONCLUSION

23. Heenan Blaikie LLP and AccessPrivacy appreciate the opportunity to provide comments and recommendations on the Draft Regulations. We would be pleased to respond to any questions or comments about this submission.

Yours Truly,



Adam Kardash

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Managing Director-Head, AccessPrivacy, a division of HB Global Advisors Corp.

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