VIA EMAIL

September 7, 2011

Mr. Bruce Wallace
Director, Electronic Commerce Policy
Electronic Commerce Branch
Department of Industry
Jean Edmonds Tower North, 18th Floor, Room 1891D
300 Slater St.
Ottawa, ON.
K1A 0C8

Dear Mr. Wallace:

Re: *Electronic Commerce Protection Regulations*
Canada Gazette, Part I (July 9, 2011)

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-

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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] *Electronic Commerce Protection Regulations*, C. Gaz. 2011.I.2244.
[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).

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 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 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 Canadian Radio-television and Telecommunications Commission ("CRTC") 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 federal government's objectives in terms of this legislation. The balance of this submission (together with our submission to the CRTC) sets out our recommendations in this regard.

I. SUMMARY

This submission consists of our comments and recommendations on (i) the definition of personal relationship; (ii) the definition of family relationship; (iii) the requirement for an unsubscribe mechanism in the CEMs listed in subsection 6(6) of the Act; (iv) exceptions for messages required by law; and (v) the validity of consents obtained in accordance with Canadian privacy legislation.

II. DEFINITION OF PERSONAL RELATIONSHIP

General Comments

5. CASL sets out specific circumstances where commercial electronic messages ("CEMs") are exempt from the Act's consent, content and unsubscribe requirements.

[5] CASL, s.3.
[6] Notice of Consultation (*Call for Comments on draft* Electronic Commerce Protection Regulations (CRTC)), C. Gaz. 2011.I.2029 ("CRTC Draft Regulations").

One of the exempted classes of CEMs are those sent by or on behalf of an individual to another individual with whom he or she has a "personal or family relationship".[7]

6. In our view, the current draft definition of "personal relationship" is far too restrictive and will undoubtedly serve to adversely impact organizations and consumers. The current definition provides that a

> "personal relationship" means the 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. (our emphasis)

7. This definition contains several elements which must be satisfied, including that the individuals must have had (i) "an in-person meeting"; and (ii) within the "previous two years", a two-way communication. Both these elements pose unnecessary practical restrictions on the ability to rely on the "personal relationship" exception.

Removal of the requirement for an "in-person meeting"

8. We recommend that the reference to "an in-person meeting" be removed from the definition of personal relationship. There are currently numerous (and a steadily increasing number of) instances where *bona fide* personal relationships are initiated, formed and maintained entirely in an online or other electronic context, including on ubiquitous social networking platforms, online dating services, gaming applications, Skype, video chat, and instant messaging. In our view, the definition of a "personal relationship" for the purposes of the Act must be conceptualized entirely in a technologically neutral fashion. If two individuals have a *bona fide* personal relationship, the manner and circumstances in which such relationship was initiated and maintained are irrelevant for the purposes of the Act. There is no policy rationale for distinguishing among types of *bone fide* personal relationships, and consumers would not expect to be restricted in this fashion. From a compliance perspective, it is entirely impractical for organizations and consumers to consider and differentiate their personal relationships based on this requirement. We are thus recommending the removal of the "in-person" meeting element, as a technologically neutral definition is far more suitable in the circumstances.

[7] CASL, s.6(5)(a).

Removal of the requirement for a two-way communication "within the last two years"

9. In our view, the requirement that there be a two-way communication within the "previous two years" unnecessarily restricts the scope of the personal relationship definition, and should be removed from the Draft Regulations. The two-year time frame is completely arbitrary and, in our view, does nothing to advance the purposes of the Act. It is entirely impractical to establish a regulatory regime where consumers would have to consider a time frame from when they last had an interaction with someone with whom they have a *bona fide* personal relationship in order to send a CEM without consent to that individual.

10. This two-year time restriction is particularly problematic for send-to-a-friend, forward-to-a-friend and similar types of digital functionality ("Forward-to-a-Friend Functionality"). This type of functionality is now a staple of, and widely accepted legitimate form of, digital marketing initiative. The functionality is deployed by large, medium and small Canadian companies, and used regularly by Canadian consumers. By their nature, messages sent via Forward-to-a-Friend Functionality are initiated by individuals/consumers who merely want to share some website-based content. As noted above, no individual consumer would expect to be restricted as to whom he or she may send a message for the purposes of the Act. Similarly, Canadian companies should not have to be concerned about potential liability for a circumstance where an individual sends content from the company's website to a friend that he or she has not communicated with in the last two years. Furthermore, millions of Canadians have joined (and are continuing to actively participate in) online services and social networking platforms that enable individuals to easily reconnect and communicate with friends for purely personal purposes. Often these "reconnections" take place between individuals who have not communicated with each other for years. No individual using such a service would expect to be restricted, in any fashion, as to whom he or she may send an electronic message to "reconnect" with (and certainly not on the basis of a time frame for previous communication).

11. In our experience advising organizations to date, the restrictive definition of "personal relationship" is posing practical and unnecessary challenges. Responsible organizations (especially those that operate exclusively in the digital space) want to avoid the potentially severe penalties under the Act. Accordingly, organizations want to take appropriate measures to establish that they have taken diligent steps to ensure that they comply with the Act, and that they are not otherwise facilitating others to contravene the Act. As such, as part of an effort to demonstrate diligence that a Forward-to-a-Friend Functionality falls within the scope of this exemption, organizations are considering the inclusion of a notice advising individuals to only send invites to those with whom they have a personal relationship that meets the criteria of an "in-person meeting" and a "two-

way communication" within the "previous two years". This is proving to be cumbersome, confusing for consumers, and especially problematic for those organizations that establish platforms that operate across multiple geographical boundaries.

12. In our view, the two year time frame will serve to impede entirely legitimate and *bona fide* personal communications, and pose restrictions on organizations that wish to implement a widely accepted form of legitimate digital marketing. These types of business activities have not resulted in harm to consumers. In our experience in structuring, advising and helping organizations implement these types of processes, they almost never result in consumer complaints, and certainly are not the type of messages that one would reasonably consider as spam. On the contrary, Canadian consumers have embraced this functionality by actively initiating these forms of communications. We are therefore recommending that the reference to "previous two years" be removed from the definition of "personal relationship", and that such definition contain no time restriction.

13. In sum, we are recommending that the draft definition of "personal relationship" be revised by excluding the "in-person" and the two year requirement. Such a revision will result in a more appropriate and commonly understood definition of a "personal relationship" and, in our view, will have no impact on the effectiveness of the Act in meeting its stated purposes.

III. DEFINITION OF FAMILY RELATIONSHIP

14. As a drafting note, there appears to be a typographical error in the definition of "family relationship" that would render the definition effectively unworkable.

15. The proposed definition of "family relationship" sets out several possible types of familial relationships that would fall within the definition. Upon our review of the language, we note that there appears to be a typographical error at the end of the paragraph 2(a)(iii) where the word "and" is used instead of the word "or". Technically, based on the current drafting, a given relationship would only fall within the definition of "family relationship" if the relationship could be categorized as (1) a blood relationship (s.2(1)(i)); (2) marriage (s.2(1)(ii)); (3) a common-law partnership (s.2(1)(iii)); and (4) adoption (s.2(1)(iv)).

16. We recommend revising the definition by replacing the word "and" with the word "or" to clarify the intent of the definition (i.e. that the relationship meets only one of the listed familial relationships).

IV. TRANSACTIONAL EMAILS

17. A key challenge posed by CASL is the obligation for CEMs listed in subsection 6(6) of the Act ("Transactional Messages") to include an unsubscribe mechanism. Consent is not required under the Act to send a Transactional Message, although subsection 6(2) obligates organizations to include an unsubscribe mechanism in Transactional Messages.[8] For the reasons outlined below, we are recommending a regulation to provide that Transactional Messages be exempt from the requirement to include an unsubscribe mechanism.

18. Transactional Messages are examples of how businesses make "optimal use of electronic means to carry out commercial activities" (as per the Purposes set out in section 3), and thus precisely a type of conduct that the Act is intended to promote and facilitate.

19. In many instances, organizations do not presently include an unsubscribe mechanism for most Transactional Messages, as there is typically no practical rationale for doing so. In most instances, businesses do not need to include the option for operational purposes and consumers do not expect an unsubscribe feature for a message that is directly tied with the primary purpose for which they are engaging with the organization. Transactional Messages, by their definition, are sent within the context of a broader trust relationship (formed by a business transaction or an employment relationship). Based on our client experience, Transactional Messages do not give rise to consumer or employee complaints, and would never be characterized or perceived by consumers or employees as "spam".

20. An unsubscribe mechanism for a Transactional Message raises practical problems for organizations to implement. Transactional Messages form a core part of an increasingly large number of product and service offerings and employment relationships. These types of messages are cost effective and efficient, therefore benefitting both businesses and consumers. A requirement to include an unsubscribe mechanism for Transactional Messages (especially those businesses that operate exclusively online) will only serve to increase the cost of services to consumers without offering any compelling public policy benefits to consumers.

21. We are therefore recommending that Industry Canada remove the obligation to include an unsubscribe mechanism for Transactional CEMs by way of the following regulation under paragraph 64(1)(m) of the Act:

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[8] CASL, s.6(6).

A sender of a commercial electronic message referred to in subsection 6(6) is not required to include an unsubscribe mechanism as described in paragraph 6(2)(c).

V. EXCEPTIONS FOR MESSAGES REQUIRED BY LAW

22. Many organizations send electronic messages to comply with legal requirements, or where they are expressly authorized by law to provide a notice or other information. Canadian provincial electronic commerce statutes enable organizations to satisfy notice requirements through electronic means.[9] There are also specific statutory provisions that contemplate the provision of electronic notices. For instance, consumer protection statutes[10] and certain product safety legislation.[11]

23. Based on the current drafting of the Act, the above types of electronic messages may very well fall within the definition of CEM and are therefore subject to the Act's consent, content and unsubscribe requirements. In many respects, electronic messages sent to comply with a legal requirement (or as otherwise authorized by law) appear fully consistent with the type of transactional messages contemplated by subsection 6(6), such as information required to complete a commercial transaction, or to communicate product recall information, safety or security information.[12] While electronic messages sent to comply with a legal requirement would appear to be a class of messages that would (and should) not be subject to the Act, the express application of the Act to subsection 6(6) transactional messages raises ambiguities as to the precise scope of the Act in these circumstances.

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[9] *Electronic Commerce Act*, 2000, SO 2000, c 17. See also: *Electronic Transactions Act*, S.A. 2001, c. E-5.5; *Electronic Transactions Act*, S.B.C. 2001, c. 10; The *Electronic Commerce and Information Act*, C.C.S.M. c. E55; *Electronic Transactions Act*, S.N.B. 2001, c. E-5.5; *Electronic Commerce Act*, S.N.L. 2001, c. E-5.2; *Electronic Commerce Act*, S.N.S. 2000, c. 26; *Electronic Commerce Act*, S.Nu. 2004, c. 7; *Electronic Commerce Act*, R.S.P.E.I. 1988, c. E-4.1; An *Act* to establish a legal framework for information technology, R.S.Q. c. C-1.1; *Electronic Information and Documents Act*, 2000, S.S. 2000, c. E-7.22(Saskatchewan); and *Electronic Commerce Act*, R.S.Y. 2002, c. 66.

[10] For example, see: *Consumer Protection Act*, 2002, SO 2002, c.30, Sch A, s.39(3) and *General*, O Reg 17/05, s.33(3). The Ontario *Consumer Protection Act Regulations* specifically permit delivery of the agreement by "[t]ransmitting it in a manner that ensures that the consumer is able to retain, print and access it for future reference, such as sending it by e-mail to an e-mail address that the consumer has given the supplier for providing information related to the agreement."

[11] For example, see: *Motor Vehicle Safety Act*, S.C. 1993, c. 16, s.10(1). The federal *Motor Vehicle Safety Act* requires organizations "on becoming aware of a defect in the design, construction or functioning of the vehicle or equipment that affects or is likely to affect the safety of any person, cause notice of the defect to be given in the prescribed manner to … (b) each person who has obtained such a vehicle or equipment from the company; and (*c*) each current owner of such a vehicle or equipment …".

[12] CASL, s.6(6)(b) and 6(6)(c).

24. To provide organizations with clarity as to the extent of their obligations under the *Act* when sending notices required by law (or authorized by law), we recommend that such messages be expressly exempted from the Act's consent, content and unsubscribe requirements.[13] We specifically recommend the inclusion in the Draft Regulations of the following class of CEMs in paragraph 6(5)(c):

> *Commercial electronic messages that contain information or a document required or authorized by law to be sent to the recipient.*

VI. CLARIFY VALIDITY OF PREVIOUSLY OBTAINED CONSENTS

25. There are numerous circumstances where consumers have provided their consent to organizations to use their email addresses for the purposes of receiving CEMs. However, the Act is currently unclear as to its treatment of such consents obtained by organizations prior to the Act coming into full force.

Express Consents

26. Many Canadian organizations have created lists of email addresses of individuals by way of an express consent process in compliance with the *Personal Information Protection and Electronic Documents Act*[14] ("PIPEDA") and/or applicable provincial privacy legislation.[15] The Act prescribes the requirements for express consent in subsection 10(1) of the Act and the CRTC Draft Regulations.[16] These requirements for express consent are far more onerous than as required under PIPEDA or other provincial privacy legislation. For instance, under PIPEDA, a valid express consent need not be in writing (as currently required under the CRTC Draft Regulations). Moreover, under PIPEDA, an organization would be able to obtain an express consent from an individual without the detailed contact information or a statement related to withdrawal of consent as required under the CRTC Draft Regulations.[17] As currently drafted, once the Act comes into force, it would appear that organizations would not be able to rely upon express consents of individuals obtained validly under PIPEDA and/or provincial privacy legislation for the purposes of sending CEMs unless and until such organizations obtained another express consent in accordance with CASL. In essence, CASL appears to require the "re-consenting" of such lists. In certain

[13] CASL, s.6(1) and 6(2).
[14] S.C. 2000, c.5.
[15] *Personal Information Protection Act*, S.B.C. 2003, c. 63; *Personal Information Protection Act*, S.A. 2003, c. P-6.5; and *An act respecting the protection of personal information in the private sector*, R.S.Q. c. P-39.1.
[16] CRTC Draft Regulations, s. 4.
[17] CRTC Draft Regulations, s. 4(d) and 4(e).

circumstances, organizations could rely on one or more "existing business relationship" provisions, but this would impose time restrictions on such organizations for the sending of CEMs.

27. Consumers who provided their express consent under PIPEDA for an organization to use their email addresses for the purposes of sending CEMs would not expect the Act to impact their permission to such organizations in this regard, nor would they expect or desire to receive multiple requests by organizations for another express consent prior to CASL coming into full force. Moreover, there would appear to be no policy rationale for adversely impacting organizations for obtaining legally valid express consents prior to the Act coming into force. We highlight that any CEMs sent to recipients would still have to include an unsubscribe mechanism and other notices required by the Act

28. We are therefore recommending that the regulations to the Act include a provision that addresses legally valid express consents under PIPEDA and other privacy legislation obtained by organizations prior to the Act coming into force. We recommend that Industry Canada, pursuant to paragraph 64(1)(m), include such a clarifying provision in the regulations which expressly states that a valid express consent under PIPEDA and/or other provincial privacy legislation obtained prior to the Act coming into force would be deemed a valid express consent for the purposes of sections 6 to 8 of the Act.

Implied Consents

29. In the same way that organizations have obtained the express consent of individuals to send CEMs, many organizations have obtained implied consent under PIPEDA and/or provincial privacy legislation to create valuable marketing lists.

30. In many circumstances, organizations will be able to rely upon an existing business relationship and the transitional provisions of the Act in order to continue to send CEMs to such individuals once the Act comes into force. And the transitional provisions of the Act permit an organization to rely on an implied form of consent under CASL in cases where there is an existing business or an existing non-business relationship and the relationship includes the communication of CEMs between the two parties.[18] However, there will be many instances in which organizations have developed email marketing lists based on valid implied consent under PIPEDA and/or provincial privacy legislation but there will be no “existing business relationship” or “existing non-business relationship” for such organizations to rely upon in order to send CEMs. In

[18] CASL, s.66.

these circumstances, the organizations will be precluded from continuing to use some, if not all, of their email marketing lists.

31. In our view, it is not necessary to preclude organizations' use of email marketing lists obtained via valid implied consents under PIPEDA and/or provincial privacy legislation. Many Canadian organizations use such email marketing lists regularly and with virtually no consumer complaints (given sufficient notice and unsubscribe functionality). Without any additional regulations in this regard, organizations will unnecessarily be compelled to cease using valuable marketing assets for the purposes of sending CEMs, despite such electronic messaging not being the type considered unwanted or harmful to consumers.

32. We are recommending a regulation that aligns CASL's treatment of all marketing lists obtained via valid implied consents under PIPEDA and/or provincial privacy statutes. We are specifically recommending that the regulations to the Act include a provision that permits the sending of CEMs where implied consents have validly been obtained under PIPEDA and/or provincial privacy statutes by organizations prior to the Act coming into force, where such implied consents would otherwise not be caught by the transitional provisions of the Act. We propose that Industry Canada, pursuant to paragraph 64(1)(m), include a provision in the regulations which expressly states that where an organization has (i) obtained a valid implied consent under Canadian Privacy Legislation prior to the Act coming into force, and (ii) there is no "existing business relationship" or "existing non-business relationship" in the circumstances, the sender of the CEM and the recipient of such message will be deemed to have an "existing business relationship" for the purposes of the Act commencing on the date the Act comes into force.

VII. CONCLUSION

33. 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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