



THE INVESTMENT FUNDS INSTITUTE OF CANADA
L'INSTITUT DES FONDS D'INVESTISSEMENT DU CANADA

BY ELECTRONIC MAIL: Transcom@sen.parl.gc.ca

April 19, 2010

Keli Hogan
Clerk of the Senate Committee on Transport and Communications
The Senate of Canada
Ottawa, Ontario
Canada, K1A 0A4

Dear Ms. Hogan:

Re: Electronic Commerce Protection Act (Bill C-27)

We are writing to provide the comments of The Investment Funds Institute of Canada ("IFIC") with respect to Bill C-27, the Electronic Commerce Protection Act. The Investment Funds Institute of Canada is the national association of the Canadian investment funds industry. IFIC's membership includes fund managers, retail distributors of funds and service organizations that work together in a co-operative forum to enhance the integrity and growth of the industry. IFIC's mutual fund manager members represent approximately \$597 billion in mutual fund assets under management in Canada and mutual funds represent approximately 27% of Canadians' financial wealth.

General Comments

It is widely accepted that with advancing electronic options for communication and business transactions there are tremendous new opportunities for small, medium and large businesses to operate more efficiently, and for individual Canadians to have easy access to competitive and comprehensive information about products and services prior to making their purchase decisions. The abundance of information means consumers are better informed and businesses are more competitive. Unfortunately, along with the positive benefits of electronic communication and commerce, a small percentage of individuals have exploited e-commerce opportunities to conduct illegal, fraudulent, and harmful activities while posing as legitimate businesses. Others have recklessly used mass generic e-mailings without regard to the costs and inconveniences that have resulted for the ultimate recipients.

Sections of Bill C-27 that develop and implement methods to combat and punish illegal and harmful activities that damage the reputation and trust surrounding electronic commerce are necessary and welcomed by our members. We are fully supportive of the

recommendations that are outlined in sections 7 and 8 regarding the prohibition on the altering of transmission data and the unauthorized installation of computer programs on another's computer. We also are supportive of the proposed amendments to the Competition Act to prohibit misleading commercial emails and to the Personal Information Protection and Electronic Documents Act ("PIPEDA") regarding the use of emails collected through selected computer programs.

While we are supportive of the general intent of section 6 with regard to unsolicited commercial emails, **we believe that a number of changes in the drafting of this section 6 and related definitions are required to balance the need to protect individuals and businesses from unwanted emails with the need for legitimate businesses to be able to provide responsible communication about products and services to their markets.**

Individual Messages based on Referrals

IFIC supports the purpose of Bill C-27 set out in its name, and in the preamble to the legislation: electronic commerce needs appropriate regulation if it is to grow in Canada. Without such regulation the indiscriminate dissemination of millions of email marketing messages will undermine legitimate electronic communications by adding costs to businesses receiving such mass emails and individuals unable to differentiate spammers from legitimate service and product providers.

However, it is of substantial benefit to hundreds of thousands of small businesses across Canada, the drivers of our economy, that individually addressed electronic communication, based on referrals from friends, family, and business associates, be allowed to continue, as it is an efficient and cost effective method of offering services.

The net cast by proposed section 6 extends to prohibit one-to-one emails of specifically directed marketing communication based on third party referrals, which are not by their nature intrusive into the lives of recipients, do not create economic harm, and provide awareness of a business' products or services. An example would include a residential real estate professional sending an e-communication to an individual who the salesperson has been advised is in the market for a specific type of property that such a property is now available in their targeted neighbourhood. A second example is of a financial advisor sending an email as a follow-up to a referral from an existing client, to a friend or family member who is approaching retirement and looking for a trustworthy individual to help answer questions relating to their retirement income needs.

In many cases, referrals of this sort are the very lifeblood of small business, especially in the professional and personal services sectors, a growing segment of the Canadian economy.

Referrals from existing clients represent a significant source of business for IFIC's members. With the current 'Do Not Call' legislation prohibiting contacting referred individuals by phone, our members have turned to email in order to contact those referred to them as potential clients. Emails are an efficient means of reaching out to potential new customers, without being disruptive to the recipient --- a simple click on the delete button removes the email if it is unwanted, and because the email comes from a referral there is no danger of the receiver being inundated with other unsolicited emails from this sender. The only alternative would be paper based mail and that is an unnecessary use of paper products when there is a meaningful alternate form of communications. In our view, legislation that simply increases business and environmental costs without any benefit to Canadians is misguided public policy.

By carefully drafting an applicable exemption and related regulations, the concern about possibly creating a "loophole" for mass email "spammers" can be avoided.

We propose that subsection 6(5) be amended to address this critical issue, by the addition of a new paragraph (c) (and renumbering of existing paragraphs) for a commercial electronic message:

“(c) that is sent to a person as an individually addressed message as a result of a referral given to the person who sends, causes or otherwise permits to be sent, the message, by another individual person, identified by name in the message, who has an existing business relationship or an existing non-business relationship, as defined in section 10, or a personal or family relationship, as defined in the regulations, with the person to whom the message is sent;”

Industries with Regulatory Responsibility to Maintain Contact

Subsection 10(4) of Bill C-27 defines 'existing business relationship'. The current proposal, while sufficient for relationships defined only by specific contract dates or sales transactions, does not adequately address an advisory relationship where there is a regulatory responsibility to contact and inform a client/customer. Such advisory relationships need to be addressed differently. Examples of these types of relationships include lawyer-client and financial advisor-client.

The regulatory bodies that govern our industry require industry participants to provide a wide range of regular communication to our clients, and in many cases the electronic contact would constitute a 'commercial electronic message' as defined by sections 2 and 3. Accordingly, **the legislation should include a specific provision that allows our industry the ability to communicate with clients, where an ongoing advisory / professional relationship exists, as per the requirements of our regulatory bodies – the Mutual Fund Dealers Association (MFDA) and the Investment Industry Regulatory Organization of Canada (IIROC) - regardless when any relevant contract was signed.**

In many cases an advisor's relationship with their client is related to an investment the client has made and after which there are no further transactions such as would fall within subsection 10(4). **To address such regulatory relationships, we propose the addition of a new paragraph 10(4)(d) (and renumbering of existing paragraphs) to include within an "existing business relationship":**

“(d) an ongoing regulatory, advisory or professional relationship in respect of which applicable laws, rules of professional conduct or requirements of a prescribed self-regulatory organization require or encourage communication by the person who sent or caused or permitted to be sent the message, with the person to whom the message is sent, if the relationship is currently in existence or expired within the period referred to in paragraph (a);”

Social Networking Relationships

Canadians are world leaders in the use of social networking sites such as Facebook, Twitter, LinkedIn, and similar electronic clubs and associations. Individuals voluntarily join these groups based on a common affiliation and members encourage the open, and often unrestricted, sharing of opinions, ideas, experiences and preferences on a wide variety of topics. Each group establishes its own parameters on acceptable and relevant topics of interest as a condition of membership. Electronic social networking sites have become an important forum in which small businesses, particularly in the professional and personal services sectors, can make other voluntary participants in the network aware of their services, in a cost effective and non-intrusive manner. The proposed definition of "existing non-business relationship" sits uneasily with electronic social network users, as it refers only to messages from "a club, association or voluntary organization". We are concerned this phrase could be interpreted not to include messages among participants in social networking facilities.

Accordingly, we propose that subsection 10(6) be amended so that paragraph 10(6)(c) reads as follows, and a new related definition be added in a new subsection 10(7), to establish an "existing non-business relationship" for:

“(c) voluntary participation by the person to whom the message is sent, in a social networking facility, where the other person is, or also participates in, such social networking facility.

10(7) For the purposes of subsection (6), a "social networking facility" means a voluntary grouping of persons organized in relation to a matter of common interest of any nature, commercial, personal or otherwise, which facilitates communication in any form between or among the persons participating in the grouping, and includes:

- (a) a club, association or voluntary organization as defined in the regulations; and
- (b) an electronic social networking facility, as defined in the regulations.”

Private Right of Action

IFIC supports the creation, as proposed in section 47, of a private right of action for violations of sections 7 and 8 where prohibited actions have the potential to result in large scale system damage or fraud. However, in our view, given the extensive regime of Administrative Monetary Penalties (section 14 ff.), Injunction (section 41), Offenses (section 42 ff.), and related warrants, violations, undertakings and enforcement procedures, there is no need to extend a private right of action to violations of section 6, which in their worst instance would be mass emailed "spam". In the more common case, we would expect section 6 to apply to more modest distributions of unsolicited email which, on analysis, do not have the benefit of one of the exemptions provided. We note, in this regard, that section 13 contains a "reverse onus" provision, placing the onus of proving an exemption upon the person asserting it.

In this context, we foresee the mischief that could be created by a private right of action in the hands of persons who simply allege they have received as little as a single unsolicited email. The potential for frivolous and extortionate nuisance claims is real and serious and could divert the efforts of legitimate small businesses to the defense of spurious claims.

In our submission, the tool box of remedies for violations of section 6 is sufficiently full that it does not need to be augmented by a private right of action that holds the potential for abuse.

We therefore propose that sections 47 ff. be amended so as not to apply in respect of section 6, and that references to section 9 therein (concerning procurement of offences) be similarly restricted to exclude section 6.

Employment Opportunities

Electronic communications have evolved to be a convenient, quick, and cost effective way to communicate employment opportunities. One way our members grow is by recruiting new financial advisors, and electronic communication is a very effective way to make people aware of employment opportunities in the financial services sector.

We propose that subsection 6(5) be amended to add a new paragraph (d), (with resultant renumbering) to provide an exemption for a message:



"(d) of which the sole purpose is to convey information regarding a bona fide employment or independent contractor opportunity offered by the person who sends, causes or otherwise permits to be sent, the message, in the circumstances specified in the regulations;"

Penalties

IFIC supports the proposed penalties (maximum penalty for a violation is \$1,000,000 in the case of an individual, and \$10,000,000 in the case of any other person) for violations of sections 7 and 8 where prohibited actions have the potential to result in large scale system damage or fraud.

In the case of section 6, however, we believe that the penalties are excessive and out of proportion to the potential harm caused by a breach of the section, by comparison to the damage which may be caused by violations of sections 7 and 8.

We propose that subsection 20(4) be amended as follows:

"20(4) The maximum penalty for a violation:

- (i) under sections 7 and 8 is \$1,000,000 in the case of an individual, and \$10,000,000 in the case of any other person; and**
- (ii) under section 6 is \$100,000 in the case of an individual, and \$1,000,000 in the case of any other person."**

Thank you for providing us with an opportunity to comment. If you have any questions regarding this submission, please contact me directly by phone at 416-309-2300 or by email at jdelaurentiis@ific.ca or Jon Cockerline, Director - Policy, Dealer Issues by phone at 416-309-2327 or by email at jcockerline@ific.ca.

Yours truly,

THE INVESTMENT FUNDS INSTITUTE OF CANADA



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