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March 24, 2006

Ms. Diane Rheume  
Secretary General  
Canadian Radio-Television and  
Telecommunications Commission  
Ottawa, Ontario  
K1A 0N2

Dear Ms. Rheume:

**Re: Public Notice CRTC 2006-4 Establishment of a National Do Not Call List Framework**

1. Advocis appreciates the opportunity to provide its comments to the Canadian Radio-Television and Telecommunications Commission (the Commission) on CRTC Public Notice 2006-4, the establishment of a national do not call list (DNCL) framework. We support the Government's efforts to alleviate telemarketing irritations for Canadians while recognizing the need to continue to foster a competitive environment for businesses in Canada.
2. Advocis is the largest voluntary professional membership association of financial advisors, with 12,000 members across Canada. Our members are financial advisors licensed to distribute life and health insurance, mutual funds and other securities. Advocis members provide financial and product advice to millions of Canadians across a variety of distinct areas, including: estate and retirement planning; wealth management; risk management; and tax planning.
3. Our Association traces its origins to the founding of the Life Underwriters Association of Canada (LUAC). This year marks our 100<sup>th</sup> anniversary. Advocis continues an uninterrupted history of serving Canadian financial advisors, their clients, and the nation for a century. Advocis is committed to professionalism among financial advisors.
4. Personal communication is an integral component of professional financial advisors' businesses. The do not call list (DNCL) framework is important to Advocis and we will work to ensure our members are aware of and comply with the requirements of the law. Advocis is interested in ensuring the framework achieves its objectives. To do so effectively in practice, it is important to take into consideration the impact the framework may have on independent financial advisors.
5. Our comments on Public Notice CRTC 2006-4, organized into three main areas – gaps, operational rules and ongoing monitoring – are as follows.

## Gaps

### **Financial Services Participants:**

6. Participants in the financial services industry are already subject to rigorous regulatory oversight by government bodies and/or agencies, which includes the submission of reports and information to their respective regulators on a regular basis.
7. In considering the DNCL environment in the U.S., it is interesting to note that the U.S. Federal Trade Commission's (FTC) Telemarketing Sales Rule (TSR) has limited or no authority over various financial services activities or parties as they are outside of the FTC's jurisdiction. For example the FTC's telemarketing rules do not apply to persons (including brokers, dealers and investment advisers) regulated by the Securities and Exchange Commission (SEC) as SEC laws and rules provide similar protection.<sup>1</sup> However, FTC rules do apply to situations where a non-exempted party conducts telemarketing for an exempted party, for example a broker outsources its telemarketing activities to a non-exempted for-profit telemarketing firm.<sup>2</sup> Similarly, the FTC has limited jurisdiction over the "business of insurance" as this activity falls under State regulation.<sup>3</sup> In a staff advisory opinion letter, the FTC stated that "[a]s an example, a telemarketing campaign that constitutes "the business of insurance" under state law, and is regulated by state law, is outside the coverage of the TSR, regardless of whether the telemarketing is conducted by an insurance company's own employees or by a third-party telemarketer."<sup>4</sup>
8. The financial services industry is one of the most heavily regulated sectors in Canada, often including oversight by multiple jurisdictions. The businesses of insurance and securities are primarily regulated provincially. Financial advisors who sell securities and/or insurance must be licensed in their province of business and advisors who conduct business in multiple jurisdictions must meet each jurisdiction's requirements. Financial advisors who sell both securities and life and health insurance must be licensed and regulated by the respective securities commission as well as insurance council or financial services commission overseeing insurance regulation. This entails, as an example, the filing of annual returns, including a certified statement of education completed and certified statement of errors and omissions (or other) insurance coverage, as appropriate for licensed life and health insurance agents. As both insurance and securities licenses must be renewed annually, regulators have an opportunity to assess registrants each year and take action if there is concern as to whether a registrant should continue to operate within its jurisdiction.
9. In addition to ensuring the soundness and integrity of financial services institutions and markets, regulation serves to protect and ensure the rights of consumers. A majority of Canadian securities commissions have either existing legislation or an explicit right to make an order regarding the placement of telephone calls by their registrants to private residences.<sup>5</sup> Several financial services industry segments have established codes of

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<sup>1</sup> Section 6102(d)(2), United States Code, 15 – Commerce and Trade

<sup>2</sup> 16 CFR Part 310, *Telemarketing Sales Rule; Final Rule*, Federal Register, Vol. 68, No. 19, Federal Trade Commission, January 29, 2003, page 4586

<sup>3</sup> 16 CFR Part 310, *Telemarketing Sales Rule; Final Rule*, Federal Register, Vol. 68, No. 19, Federal Trade Commission, January 29, 2003, page 4587; Section 1012, United States Code 15 – Commerce and Trade

<sup>4</sup> *Letter to Robert Corn-Revere, Davis Wright Tremaine LLP*, from Shira Pavis Minton, Acting Secretary, Federal Trade Commission, August 19, 2003, [www.ftc.gov/bcp/rulemaking/tsr/tsrrulemaking/index.htm](http://www.ftc.gov/bcp/rulemaking/tsr/tsrrulemaking/index.htm)

<sup>5</sup> *Canadian Securities Course*, Canadian Securities Institute, page 111

conduct as overriding principles in their members' conduct of business. For example, Advocis and its predecessor organizations have had a professional code of conduct in place since the Association's inception in 1906, which our members are bound to abide by in their business activities and in liaising with clients and suppliers of financial products and services as a condition of membership. Enshrined in the *Advocis Code of Professional Conduct* are the requirements that:

An Advocis member shall act diligently.

An Advocis member shall respect and protect the privacy of others.

An Advocis member shall act in accordance with the spirit and the letter of the law.

10. Furthermore, the financial services industry has well-established complaint resolution structures, starting with the individual firm level through to the Centre for the Financial Services OmbudsNetwork and industry ombudsman.
11. Given the stringent regulatory regime overseeing financial services participants, we recommend that financial services participants be exempted from the DNCL requirements. The *Telecommunications Act* provides the Commission with the power to exempt any class of Canadian carriers from the Act's application<sup>6</sup> and we believe the Commission has a similar authority to exempt entities already subject to rigorous regulations that requires them to comply with the spirit of the DNCL legislation. For example, the New Brunswick Securities Commission in restricting telecommunications in Order 33-501, *Calls to Residences by Registrants* determined that the restrictions "...do not apply to a dealer that is registered in any Canadian securities commission or to an individual registered to trade securities on behalf of a registered dealer." We suggest a similar approach be applied to exempt not only securities registrants but also registrants of a financial services regulatory body such as the Financial Services Commission of Ontario.
12. Under this proposal, financial services participants would be subject to the same requirements placed on the exempted parties named in the legislation. The existing annual review exercises and complaint structures provide an effective framework to ensure any infractions against the spirit of the DNCL legislation are addressed. We strongly recommend that individuals licensed by an insurance regulatory body or securities commission be fully exempted from the DNCL restrictions.

### **Group of Companies:**

13. The DNCL legislation exempts telecommunications made to a person with whom the person making the call, or person/organization on whose behalf the call is being made, has an existing business relationship and the person being called is not registered on the national DNCL. It defines an existing business relationship as a business relationship formed by a voluntary two-way communication between the person making the telecommunication and the person to whom the call is being made and describes the circumstances in which this is acceptable.
14. It is unclear how this exemption applies to a "group of companies" where an individual does not have an existing business relationship with all of the member companies within

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<sup>6</sup> Section 9(1), Telecommunications Act

the group. In this situation, would a member company without a direct relationship with the individual be permitted to contact the individual by telecommunication? Currently, the law accommodates this activity unless the client has advised that he/she does not wish to have their information shared with or receive communications from the other member companies.

15. The DNCL legislation is silent on this point – and if silence is deemed acceptance – multi-disciplinary companies would appear to have an unfair advantage where an individual is registered on the national DNCL. In the situation described above, a member company could approach an individual who has an existing business relationship, no matter how minor, with another member company within the group and solicit additional business on multiple fronts. The same company; however, would be prohibited from calling the individual if it was not connected to the member company with whom the individual has an existing business relationship through the group of companies.
16. One of the stated objectives of Canada's telecommunications policy is "to respond to the economic and social requirements of users of telecommunications services."<sup>7</sup> Permitting all members of a group of companies to place telecommunications with an individual, who is registered on the national DNCL but has an existing business relationship with one of the member companies in the group, will provide the group of member companies with an unfair advantage over companies outside of the group. We do not believe Bill C-37 envisioned extending the existing business relationship exemption to a point where it could result in an unfair playing field and recommend steps be taken to address the unintended marketplace inequities. We recommend the Commission clearly define if an existing business relationship applies to member companies within a group of companies and the circumstances in which a member company without a direct relationship to an individual registered on the DNCL would be permitted to place a call to the individual. We suggest that the existing business relationship exemption be based on separate legal entities with a distinct product line or function within the related group of companies. Therefore, as an example, a subsidiary could not claim it has an existing business relationship with a consumer whose relationship is with the parent company.

#### **Referrals:**

17. Personal referrals are the foundation upon which professional financial advisors develop their client base. A personal referral occurs only when there is a bridge of trust between an advisor and an existing client. In this situation, the existing client believes the financial advisor can help a specific individual find solutions to the financial issues they face. Ideally, the existing client will personally introduce the individual to the financial advisor; however, this can be a challenge in today's hectic world. When this is not possible, it is common industry practice for the financial advisor to carry out the client's suggestion by providing background information regarding the financial advisor's services and placing an introductory phone call to the specific individual referred. At a minimum, we recommend individuals licensed by an insurance regulatory body or securities commission be permitted to undertake word-of-mouth and personal referral telecommunications within the DNCL framework. Advisors may also call a potential client following an initial face-to-face meeting and suggest that such action would meet the criteria of an existing business relationship as it pertains to consumer inquiries.

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<sup>7</sup> Section 7(h), Telecommunications Act

18. We also suggest that calls placed to a related person as defined in section 251(2)(a) of the *Income Tax Act* be supported in the DNCL environment. We understand the concern that exempting personal relationship calls could be applied too broadly but believe that the definition established in the *Income Tax Act* will strictly limit the extent of exempted calls. The definition of “related persons” in the Act reads as: “individuals connected by blood relationship, marriage or common-law partnership or adoption.”

#### **Book of Business Sales:**

19. It is important that the existing business relationship exemption accommodate situations where a financial advisor, among other professionals, may sell his/her book of business to another advisor. In this situation, it is common practice for the selling advisor to inform his/her clients of the new advisor who would then introduce him/herself, usually by phone, to the new set of clients. Some clients; however, may choose to find another financial advisor rather than automatically accept the advisor who has purchased the book of business. In this case, the purchasing advisor would be placed at risk if the client was registered on the national DNCL and decided to log a complaint. We do not believe the DNCL legislation contemplated putting financial advisors, and others, at risk of non-compliance through the regular course of business and recommend the rules supporting “existing business relationship” clearly provide for an introductory telecommunication to individuals who have registered on the national DNCL where a book of business has changed hands.

#### **Operational Rules**

##### **Requirements:**

20. The overriding requirement of the legislation is for a non-exempted business to place telemarketing calls only to those individuals with whom they have an existing business relationship or who have not registered on the national DNCL. Therefore all requirements and prohibitions should centre on the effective fulfillment of this obligation.
21. We would suggest that the DNCL Rules include details to support the following:
  - require the DNCL operator to input new registrations (additions and deletions) to the national DNCL as soon as possible but within 24 hours upon receipt
  - require the DNCL operator to maintain a record of changes (dates of telephone number additions and deletions) for a period of time required to support an investigation
  - require businesses to draw down the national DNCL at least every thirty days and remove the telephone numbers for new registrants from their telemarketers’ lists.
22. We also suggest that the existing business relationship exemption be based on separate legal entities with for example, a distinct product line or function.

##### **Violations:**

23. We support the establishment of a grace period during which time calls made to a new DNCL registrant do not constitute an offense and agree with the concept of a calendar month grace period as extended in the Public Notice. We suggest it would be useful to follow the U.S. example and require businesses to draw down the DNCL at least every thirty days and drop the telephone numbers for new registrants from their telemarketers’

lists. This will allow businesses the flexibility to analyze the DNCL on a periodic rather than daily basis while ensuring the overall integrity of the list.

24. We support the development of non-binding guidelines for the imposition of penalties. While the assignment of monetary penalties is often required as a deterrent against an undesired activity, the penalties themselves must be commensurate with the infraction. It is important to develop a clear description of the violations and what is considered to be a minor versus major violation. We recommend a graduated penalty scheme be established, with first-time offenses being penalized less than repeated infractions. We suggest the DNCL operator's system track complaints logged so as to easily identify a first-time offender from a repeat.
25. The legislation, as written, allocates maximum penalties per infraction of up to \$1,500 or \$15,000 depending on whether the violator is an "individual" or "corporation;" however, does not define what makes up each category. While the meaning of each may seem straightforward, specific definitions of each category classification are necessary to ensure participants clearly understand their potential penalty structure and ensure penalties are applied fairly and consistently. For example, a financial advisor may have decided it is best to operate his/her business as an incorporated entity but in reality, operate as a "one-person shop." Furthermore, it is the individual that is the licensee or registrant within his or her respective provincial jurisdiction, enabling that individual to conduct activities such as the distribution of insurance or mutual funds, regardless of whether their business is conducted through a corporation. In such a situation would the financial advisor be penalized as an "individual" or as a "corporation" if the DNCL was violated? It is important that some consideration be given to defining a single-shareholder corporation as an "individual" rather than a "corporation" for the purpose of assigning penalties.

#### **Complaints:**

26. We support the development of non-binding guidelines regarding the investigation of complaints and issuance of violation notices. We agree the establishment of a complaint threshold would assist in efficiently applying investigative resources and support a risk-based principle of regulation.

#### **Violation Notice:**

27. We suggest that the Notice of Violation also provide information on the defences available to the accused. The Notice could include full details regarding the various defences contemplated in Public Notice 2006-4 or provide reference as to where this information is available (e.g., the anticipated interpretation guidelines) on the Commission's website.

#### **Ongoing Monitoring**

28. In preparation for the three-year review of Bill C-37, *An Act to amend the Telecommunications Act*, the Standing Senate Committee on Transport and Communications called upon the Commission to gather information and prepare recommendations on how the legislation can accommodate calls based on personal relationships and referrals.<sup>8</sup> We call on the legislation to support the placement of

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<sup>8</sup> *Issue 23 - Ninth Report of the Committee*, Standing Senate Committee on Transport and Communications, November 22, 2005, page 2

telecommunications to individuals with whom the caller has a personal relationship as is accommodated in U.S. legislation. We support the Federal Communications Commission definition of a "personal relationship" to include "a family member, friend or acquaintance" of the caller. We also call on the legislation to support the placement of calls to individuals referred by an existing client as a component within the definition of an existing business relationship.

29. In addition to our comments presented in this letter, we encourage the Commission to carefully monitor the legislation's affect and take action to address any unintended limitations it may impose on the conduct of business, especially in the areas noted immediately above.

Yours truly,

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke extending to the right.

\*\*\* End of document \*\*\*