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June 6, 2006

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

BY E-MAIL

Dear Ms. Rhéaume:

Re: **Telecom Public Notice CRTC 2006-4: Proceeding to establish a national do not call list framework and to review the telemarketing rules**

1. The Canadian Marketing Association (CMA) has been pleased to be involved in all aspects of the proceedings related to the Canadian Radio-television and Telecommunications Commission (CRTC or "the Commission") Telecom Public Notice CRTC 2006-4 (PN 2006-4). Over the past few months we have taken the opportunity to read the submissions and undertaking responses of other interested parties, participate in the CRTC's Interconnection Steering Committee (CISC) sub-committee activities, and attend and participate in at the public proceedings surrounding this Public Notice process. Based on a greater understanding of new information and processes, on the position of other interested parties, and perhaps most importantly, on questions that seem to be outstanding for the Commission, the CMA welcomes the opportunity to provide reply comments on PN 2006-4.

2. CMA is the largest marketing association in Canada with 800 corporate members and subsidiaries, including the country's major financial institutions, insurance companies, publishers, retailers, charitable organizations, agencies, relationship marketers and those involved in e-business and Internet marketing. CMA members are engaged in a range of marketing activities and reach Canadians using a variety of media, including the telephone. CMA statistics estimate that marketers directly support over 482,000 jobs and generate more than $51 billion in overall annual sales through various marketing channels[1].

[1] Canadian Marketing Association 2001 Fact Book: A report on the economic impact of Direct Response Advertising in Canada.

3. At the outset, we would like to reiterate that the telemarketing[2] channel is growing in its economic importance both in terms of employment and the economic activity it generates. Most businesses in Canada use the telephone to provide customer service, to offer Canadians goods or service or to acquire new customers or donors. In 2000, CMA conducted a major study of the economic impact of direct response advertising in Canada (CMA 2000/2001 Fact Book). The study defined telephone marketing as including all outbound[3] communications (either out-sourced or in-house) conducted over the telephone using conventional, WATS, privacy line or other telecommunication services. The study found that the total number of jobs generated throughout the economy by telemarketing in 2000 was 270,000. Total sales generated through telemarketing were $16 billion and was projected to grow by 51% by 2005 to $24.3 billion.

4. CMA would like to reiterate the fact that most businesses in Canada use the telephone to acquire new customers or donors or to offer existing customers goods or services. **That is to say that hundreds of thousands of Canadian companies use the telephone for marketing.** It is these hundreds of thousands of individuals or organizations who are offering goods or services or soliciting donations (the sellers[4]) that will be required to use the DNCL regardless of whether they contract the work to a third-party call centre, or do it internally. While some sellers will contract the services of an independent third-party call centre, many will conduct

[2] In consultation of suggestions from other stakeholders, particularly The Companies, the final definition that the CMA has recommended be adopted for **telemarketing** covered by the DNCL is the following: **"the use of telecommunications facilities to make unsolicited calls or to leave unsolicited voice messages to residential consumers for the purpose of solicitation where solicitation is defined as the selling or promoting of a product or service, or the soliciting of money or money's worth (not including volunteer time), whether directly or indirectly and whether on behalf of another party. This includes solicitation of donations by or on behalf of charitable organizations."**

[3] Outbound telemarketing is where the seller or agent of the seller (such as a representative of a third party call centre) **initiates calls** to prospective or existing customers for the purposes of solicitation.

[4] As detailed in paragraph 58 of CMA's June 1 Undertakings submission, the final definition CMA recommends be adopted for **seller** is the following: **"often referred to as "the marketer", includes any person or business who, in connection with a telemarketing transaction, provides, offers to provide, or arranges for others to provide goods or services to a residential customer in exchange for consideration. This includes charitable organizations who solicit donations or arrange for others to solicit donations on their behalf, via telemarketing. A Seller may also be a Telemarketer, if calling on its own behalf."**

their telemarketing in-house (when the seller would also be the telemarketer[5]). In-house telemarketing can be as sophisticated as an in-house contact centre to acquire new business, or as simple as employees making calls from their desk.

5. Of all channels available to those individuals and organizations that market products or services or solicit donations, telemarketing remains the most effective direct marketing medium in getting people to respond. For the past three years the U.S. Direct Marketing Association (DMA) has conducted a study on marketing response rates[6]. All three years the study has found that outbound telemarketing had the both best response rate, and the best return on marketing investment[7]. In terms of sales results, outbound telemarketing appears to be the most effective method in getting people to respond to marketing pitches. This in turn generates economic activity and jobs.

6. Despite the fact that telemarketing offers organizations the best return on investment, when the American Do Not Call Service was introduced, the share of telemarketing in overall U.S. marketing expenditures declined[8]. This is to say that DNCL regulations have a direct impact on the business and potential profitability of hundreds of thousands of organizations and those they employ.

7. In developing the rules surrounding the national Do Not Call List (DNCL) and determining overall telemarketing regulatory framework we encourage the Commissioners to proceed cautiously and to keep in mind the significant economic contribution of telemarketing, the constitutional right of commercial free speech and the effect that such regulation will have on the many Canadian organizations that use

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[5] As detailed in paragraph 57 of CMA's June 1 Undertakings submission, the final definition CMA recommends be adopted for **telemarketer** is the following: **"any person or business who, in connection with telemarketing places telephone calls, voice messages or faxes to a residential consumer for the purposes of telemarketing"**.

[6] DMA's 2004 Response Rate Report, evaluated 1,406 marketing campaigns from 25 industries using 12 direct response media including direct mail, catalogues, email, inserts, coupons, newspapers, magazines, direct response radio and direct response television.

[7] Media release regarding 2005 DMA Response Rate Report: http://www.the-dma.org/cgi/dispannouncements?article=383

[8] Direct Marketing Association, *DMA Quarterly Business Review*, varions issues. Cited in Contact Centre Canada's April 2006 study *Customer Contact Centres in Canada: The Impact of Offshoring, Technology and Regulation on Human Resources.*

the telephone to market their products and services or to solicit donations. Every element of telemarketing regulation has the potential to threaten the economic viability of businesses' continued use of telecommunications services as part of their marketing programs. This in turn has direct economic consequences for those businesses and the Canadian economy.

8. The CMA is committed to contributing to the creation of a list model that will provide a simple and effective means for consumers to avoid unwanted calls, will enable Canadian businesses to share the costs of database operations, and will strive for a uniform approach to Do Not Call administration in the North American marketplace.

1.0 Scope of CRTC Telemarketing Regulation

9. Bill C-37 amended the *Telecommunications Act* to create a legislative framework for a national DNCL. The legislation was brought forward following the stay of the CRTC decision 2004-35, as an alternative to certain provisions in that decision. The CMA's concerns about the negative impacts of certain parts of Decision 2004-35 were documented in both our **Application to Review and Vary Telecom Decision CRTC 2004-35** dated August 6, 2004, and CMA's **Petition to Her Excellency the Governor in Council Pursuant to Section 12(1) of the *Telecommunications Act* In The Matter of Telecom Decision CRTC 2004-35** filed on August 19, 2004[9].

10. The advantage of a national DNCL is that it offers consumers the choice of whether or not they wish to be generally open to receiving consumer marketing offers through the telephone. A national DNCL is also a relatively efficient alternative to encumbering telemarketers with regulatory requirements that would be difficult, and expensive to implement and next to impossible to police. However, while a national do not call program is a very effective and efficient way to address telemarketing complaints[10], particularly when backed by effective tools of enforcement[11], it is also

[9] CMA attaches a copy of both documents in support of this submission.

[10] As demonstrated by the CMA's DNC program over the past 17 years and the more recent experience in the U.S.

[11] Which have been provided to the CRTC through Bill C-37.

beneficial to situate that program within a regulatory framework that sets out important minimum standards for telemarketing.

11. The CRTC telemarketing rules that are currently in effect include requirements designed to ensure that a caller and purpose of a call are clearly identified, and that consumers can be added to seller-specific internal DNCLs (where listings remain active for 3 years). While currently there are fax calling rules that restrict calling hours, voice calls for the purposes of telemarketing should also be restricted to the hours of 9:00 a.m. – 9:30 p.m. weekdays and 10:00 a.m. – 6:00 p.m. on weekends and not on statutory holidays. As well, to support the goal that abandoned or "hang up" calls should be kept as close to 0% as possible, a maximum 5% abandonment rate should be established for telemarketing calls placed by Predictive Dialling Devices (PDDs) [12]. Adding these two rules to the CRTC's existing telemarketing framework, in combination with a national DNCL, would specifically address the most prevalent consumer complaints about telemarketing; namely, untimely calls and answering a call and getting "dead air".

12. Thus far the CRTC has retained ultimate responsibility for investigation and enforcement of existing telemarketing rules. CMA believes that this should continue after the implementation of the new national DNCL. Bill C-37 clearly contemplated that the CRTC would contract-out the operation of the DNCL database; indeed, the Industry Minister's announcements on the subject stated that marketers would pay to support the database operations, but from the tabling of the legislation through to its passage, there was no call for or any indication that the burden of enforcement would fall outside of the CRTC. The CMA believes that for telemarketing regulation, as with other laws and regulations, the costs and responsibility of enforcement and adjudication should be assumed by the Government. To have it otherwise would be to unfairly burden law-abiding organizations with the costs of pursuing and penalizing the rule-breakers. Consumer groups also make the argument that they have greater confidence in a regulatory regime where government has the responsibility for enforcement of regulations. Finally, the fact that administrative monetary penalties (AMP's) applied under the Telecommunications Act will constitute a debt to the Crown and are to "be remitted to the Receiver General" is consistent with a view that

[12] With 5% of dialed calls as measured for any calendar month.

Telemarketing and DNCL enforcement is a responsibility and cost that should be assumed by government.

13. Accordingly, the CMA is strongly of the view that the DNCL service to be contracted-out to a “List Operator” should be restricted to the operation of the DNCL database and the related subscription service. CMA also believes that it is very important to control costs and streamline operations of the DNCL in order to make the list “subscription fees” as affordable as possible for all telemarketing operations in Canada, thereby protecting telemarketing as a viable marketing channel. A CRTC-sponsored working group of stakeholder representatives is currently looking at operational options with an eye to efficiency and effectiveness, but it is equally important to ensure that efforts and expenditures focus on the principle goal of Bill C-37: to alleviate consumer annoyance with telemarketing. CMA therefore submits that we must avoid unwarranted distraction, added DNCL costs, and burden to the economy by ensuring that the new DNCL focuses on consumer telemarketing, and does not interfere with business to business communications.

2.0 PN 2006-4 Process

2.1 Responsibility for DNCL Costs

14. Consistently the CMA has expressed its support of a government mandated, centrally administered national DNCL which must be downloaded regularly and respected by companies engaging in consumer telemarketing (beyond limited exemptions). In our April 24, 2001 submission in response to Telecom Public Order CRTC 2001-193, while expressing our support of the principle of establishing of such a system, we raised some serious questions which needed to be addressed before a national DNCL could be successfully be implemented in Canada: particularly how such a system would be funded while remaining accessible and affordable to business. Even at that time, we cautioned that, as a whole, a national DNCL is an expensive undertaking. While we encouraged the CRTC to consider a national

DNCL, we cautioned that first it would be necessary to determine how it could be effectively financed[13].

15. In creating a national DNCL the Government clearly believed that the merits of the service for consumers was worthwhile both in terms of the regulatory burden to the telemarketing industry, and the costs that would be incurred to establish and maintain such a service at a national level.

16. In passing Bill C-37, it stands to reason that the Government considered both the Commission's concerns as expressed in Telecom Decision CRTC 2004-35 that "implementing a national do not call list in Canada without appropriate start-up funding… would be counter productive" and the Commission's assertion that "the establishment and maintenance of a national registry would be expensive"[14].

17. In his presentation to the House of Commons Standing Committee on Industry, Natural Resources, Science and Technology on Bill C-37, CRTC Vice-Chair of Telecommunications Richard French stated:

> *"I would note that there are some implementation issues, in particular the recovery of the start-up costs, and I'd underline that at the moment there is no clear indication of what the government's intentions might be with respect to recovering the costs of just under $2 million, which we estimate would be one-time start-up costs."*[15]

18. When asked what the CRTC wanted the committee to provide for in the Bill in terms of cost recovery, Mr. French responded that *"We would like an amendment or a regulation that would enable us to recover the implementation costs from the telemarketing companies themselves."*[16]

19. In his statements, Mr. French acknowledged that while the Bill, as it stood, did not specify that the telemarketing industry would be responsible for the implementation

[13] Canadian Marketing Association April 21, 2001 submission regarding Telecom Public Order CRTC 2001-193, pages 3 and 4, paragraphs 10, 12 and 13.

[14] Telecom Decision CRTC 2004-35, Ottawa, 21, May 2004, *Review of Telemarketing Rules* paragraph 92.

[15] Standing Committee on Industry, Natural Resources, Science and Technology, April 20, 2005. http://www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=114451

[16] Ibid.

costs of the list. He stated that the CRTC recognized that *"the way the Bill stands now… it would be impossible to recover these [non-operations] costs [from telemarketers]."*[17]

20. Despite further MP discussion on the issue of cost recovery, Bill C-37 was never amended to allocate cost recovery specifically to the telemarketing industry. **It is clear that the government refrained from asking the telemarketing industry to assume the burden of all setup and ongoing costs of a DNCL.** Indeed, in announcing the legislation the Minister of Industry stated that funding for ***the operation*** of the list would be obtained from telemarketers.[18]

21. **In fact, the CMA submits that the text of the legislation (*Telecommunications Act*, 41.4) is not specific with regard to whether costs would necessarily be covered, who may be "charged rates", and what costs any charges would defray.**

22. The CMA remains supportive both of a DNCL whereby organizations that use the telephone to market their products or services[19] can access the list for a reasonable and non-prohibitive fee to defray transactional costs model and of the goal consumers being able to register their telephone numbers free of charge. **Having said that, the CMA believes that it is incumbent on the government to fund the costs beyond those directly tied to the operation of the DNCL database and subscription.**

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[17] Ibid

[18] Industry Canada media release, December 13, 2004 "Minister of Industry Tables Legislation for National Do Not Call List".

[19] In our March 27 submission regarding Telecom Public Notice CRTC 2006-4 and again in our June 1 response to CRTC Undertakings, CMA differentiated between "sellers" and "telemarketers". By our suggested definitions, sellers are the companies who market their product or service by telephone (marketers) and telemarketers are the individuals or businesses placing the calls to residential customers for the purposes of telemarketing (including call centres and sellers who make the calls themselves). We believe that a clear understanding of this distinction is important going forward. While it may be intuitive to believe that DNCL regulations and costs will only affect call centres or those actually placing the telemarketing calls, they will in fact affect hundreds of thousands of businesses across Canada: any business that uses the telephone to market their product or service.

23. The CMA submits that to burden organizations that use the telephone to market their products or services with costs beyond access fees would have serious consequences for the on-going ability of many Canadian businesses and not-for-profits to make use of telecommunications to market their products and services. It would pose a significant threat to a $16 billion industry that generates over 270,000 jobs[20]. DNCL fees are not only going to be borne by large businesses and marketing agents, but also by small businesses and not-for-profits that rely on the telephone to market their products or services or to raise money. **We do not believe that the government intended to additionally burden the telemarketing industry with the set-up, management and enforcement costs for a regulatory system in which telemarketers will be assuming database usage fees.**

24. Further, it is CMA's position that in enacting legislation to create a DNCL, it was not the government's intention to burden telecom carriers with the responsibility of covering the regulatory costs to run this consumer service, despite the fact that responsibility for DNCL regulation was placed with the CRTC.

25. CMA recognizes that the CRTC traditionally does not receive large government appropriations but rather covers its costs of regulating Canada's broadcasting and telecommunications systems through tariff fees.

26. While CMA is calling on the regulator rather than the List Operator to assume costs beyond reasonable access fee to cover database operations, we believe that this revenue should be sourced through government appropriations, rather than through the CRTC's traditional way of charging telecom carriers (or broadcasters).

27. In paragraph 51 of Telecom Public Notice CRTC 2006-4 the Commission noted that *"as a result of new statutory responsibilities associated with the national DNCL, it will require additional resources."* It goes on to state that *"The Commission will use its normal budgetary and cost recovery processes to fund this requirement. Under that process, the Commission collects fees under the authority of section 68 of the Act and the regulations made pursuant to the Act, namely the Telecommunications Fee*

[20] Canadian Marketing Association 2001 Fact Book: A report on the economic impact of Direct Response Advertising in Canada.

Regulations 1995. These fees allow the Commission to recover one hundred percent of its costs related to its responsibilities under the Act. In this manner, Canadian carriers that file tariffs with the Commission and pay Commission telecommunications fees will ultimately be responsible for the increased costs resulting from the Commission's new statutory responsibilities in connection with the national DNCL".

28. Echoing CRTC Vice Chair French's comments to the House of Common's committee (see paragraph 19), CMA submits that, beyond it being legally uncertain whether the Commission can recover setup and ongoing costs of a DNCL through the telemarketing industry, it is also legally uncertain whether the CRTC can recover DNCL costs through its normal budgetary and cost recovery processes of carrier tariffs.

29. It is the CMA's concern that the option of recouping DNCL funding through carrier tariffs is both inappropriate and poor public policy. The national DNCL is designed to be a consumer choice measure for benefit of the general public. It is therefore appropriate that the CRTC should cover start-up and ongoing regulatory costs through government appropriations.

30. As Richard French further pointed out in his comments to the parliamentary committee, assuming "new statutory responsibility" for the DNCL consumer service represents a significant addition to the mandate and activity for the CRTC. CMA agrees that regulating a national DNCL consumer service is beyond the CRTC's traditional scope. We therefore support the Commission in working with Industry Canada to clarify how the government will fund the CRTC in relation to this new role; indeed CMA has already approached Industry Canada to add our voice on this matter.

31. **The CRTC does receive funding from the Government of Canada, to the extent of $5.8 million as set out in the 2006 – 2007 Main Estimates. Also, on occasion the CRTC has received additional government appropriations beyond to the**

fees collected from telecommunications and broadcasting fees. Part III "Report on Plans and Priorities" of the 2003-2004 CRTC Estimates[21] states:

"Over the past several years, the CRTC has been facing intense budget constraints as a result of inflationary pressures and workload increases . . . To address price and workload pressures over the four-year period 1999-2000 to 2002-2003, temporary appropriations totaling $11.9 million were provided to the CRTC. These appropriations were not recovered from broadcasting and telecommunications fee payers."

Also, CRTC resource requirements were discussed at a round-table discussion on CRTC fees and cost recovery on August 10, 1999[22]:

"Industry participants were briefed that the CRTC will be requesting approximately $3 million in new resources starting next fiscal year and continuing for a period of three years. It was indicated that of this total, approximately $1.5 million would be directed at the telecommunications activity. CRTC staff indicated that they would approach Treasury Board this Fall and request that these resources be funded from general government revenues as opposed to an increase in fees. It was indicated that the CRTC felt this is an appropriate approach to address a peak in the Commission workload and permit it to deal with the backlog of issues."

CMA believes that a request for funding their new DNCL responsibility is supported by this precedent.

32. Finally, while CMA acknowledges that the DNCL will represent a cost to government, we remind the Commission and its subcommittees that should the DNCL or other telemarketing rules be broken, administrative monetary penalties will apply, the collection of which will constitute a debt to Her Majesty in right of Canada (*Telecommunications Act,* 72.09). **This is to say that any regulatory costs incurred by government to establish and maintain a DNCL will be recovered in whole or in part by the revenue from administrative monetary penalties.**

33. If government funding is not available, there is a danger that DNCL access fees will become inaccessible to some marketers. In order to appropriately balance the interests of consumers and marketers, the CRTC may have to consider sourcing additional funds through a modest consumer fee.

[21] Link: http://www.crtc.gc.ca/eng/publications/reports/rpps/2003_04.htm#s6X
[22] Link: http://www.crtc.gc.ca/eng/GENERAL/Minutes/M990810.htm

2.2 Assigning the Cost of Telemarketing Regulation

34. Again, CMA believes that the costs of DNCL **database operations** should be offset or covered by fees from sellers who use the list. This is to say that we envision that sellers who access the list will be charged a reasonable and non-prohibitive fee to help defray the list operator's transactional costs.

35. At the same time, the CMA believes that it is incumbent on the government, through the CRTC, to invest in building and maintaining this new regulatory framework. To that end it follows that the government must provide funding or otherwise facilitate the following elements of the DNCL:

    a. Start-up, including:
        i. systems and application design
        ii. research to determine estimated size of the population (the number of entities) that will be paying to access the DNCL, hence contributing to the cost recovery efforts (this is essential to determine the appropriate user fee schedule)[23]
        iii. Marketing: consumer and list subscriber awareness of the DNCL[24]

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[23] Developing accurate estimates of the number of entities who will be contributing to the cost of database operations is essential in the short term. This data will be necessary for the proposal considerations of all potential List Operators. Accurate market size estimates are needed to develop accurate download fee estimates. Accuracy is important to avoid unnecessary overcharging, possible excessive profit to the List Operator, harm to telemarketing as a viable business channel and non-compliance as a result of inflated fees. Also, all efforts must be made to avoid overestimation of list fee revenue which would leave the List Operator at risk of not covering costs and incurring a loss. In fact, despite research, the United States DNCL was under-funded in the first year due to an overestimate of the number of paying telemarketers, resulting in lower than required fee levels and further implications to their business model. As a result, not only did the regulator have to step in and cover costs, but also in the second year of operation fee levels had to be re-set in order to ensure costs coverage in subsequent years. The consequences of inaccurately gauging market size data are significant to the List Operator, the CRTC and stakeholders. In fact, as stated in paragraph 18 of our June 1 "Undertakings" submission, CMA submits that it may be that the only way to accurately determine the number of paying users of the DNCL is by taking the service to market, with the government providing certain guarantees in the initial years.

[24] The Gottlieb Report, commissioned by the CRTC, estimates a cost of about $175k - $250k for a Canadian Consumer Education information campaign. This number was derived by taking the FTC $500,000 marketing expenditure and reducing it in a proportion reflective of the Canadian market size. Based on our research and Linda Miller's remarks to the DOWG on March 22, 2006, we understand that the FTC did not pay for any media placement (ad time or space) but that the $500k was completely allocated to production of Public Service Announcements (PSAs) for various media. All print and web space and radio and TV air time was donated, at no cost to the FTC. This being the case, it is reasonable to assume that design and production of the Canadian publicity will also cost approximately $500k, exclusive of any media buys. While certainly Canadian ad placement requirements would be less than in the US, development and production

b. Commission and/or Consortium (if applicable) governance costs, including:
    i. Contracting of the list operator
    ii. Ongoing management of the list operator

c. Enforcement and adjudication beyond basic complaint validation (which can be handled by the List Operator) including:
    i. Investigating valid complaints
    ii. Issuing notices of violation and, where necessary, setting appropriate fines
    iii. Providing mechanisms for telemarketer representations regarding alleged violation
    iv. Processing appeals and variance requests
    v. Court appeals of notices of violation and fines

d. Regulator (CRTC and/or government) mandated system modifications, including:
    i. Improvements
    ii. Upgrades

e. Regular scrubbing of the DNCL and removal of disconnected and reassigned numbers

f. Budget certainty for the list operator for an appropriate start-up period (e.g. two or three years)

36. CMA submits that it is necessary to determine – in the short term – which “operational costs” will be covered by DNCL usage fees. Not only will this clarify the costs that need to be accounted for through other sources of revenue, but it is necessary to allow for the development of an appropriate fee schedule for sellers accessing the DNCL list.

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costs will be similar. CMA advises the CRTC to increase their estimates for spending on an education campaign to $500k, assuming that as in the US, it will be possible to secure free ad placement through various media.

2.3 List Operator Funding Model

37. CMA is concerned that the funding and risk assumption model currently being proposed by the CRTC for the Canadian DNCL – whereby the List Operator covers all costs, is responsible for all revenue and assumes all risks – is both unsupportable and unrealistic.

38. Particularly in light of uncertain demand[25], the requirement for the List Operator to be entirely self-funding *and* to cover costs normally borne by government when regulating, makes taking on DNCL list operation extremely risky.

39. To again reference the United States as an example, despite responsible efforts and research to determine accurate market size (research that was funded by the regulator, not the list operator), the number of organizations who ended up paying fees to access the American DNCL was far below the original estimates. This resulted in lower than expected fee revenue for the List Operator. Notwithstanding similar uncertainties in the Canadian context, PN 2006-4 proposes that 100% of the risk is to be borne by the List Operator.

40. In light of the risk of the proposed model, CMA questions whether it will be possible secure a List Operator under these circumstances, and calls on the Commission to provide some level of budget certainty for the List Operator in the early years of DNCL operation.

41. **We note that these issues will need to be resolved before the details of the DNCL operations model can be finalized, and before an RFP can be issued to secure a list operator.**

2.4 Consortium Model

42. According to the Gottlieb Group paper entitled "Canadian National Do Not Call List: Process Timing and Costs" (Gottlieb report) the decision to manage the DNCL with a

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[25] As mentioned in footnote 14, currently there are no accurate estimates of the number of entities who will be contributing to the cost of database operations. That is to say that currently there is no validated market size estimate of the number of organizations that will be paying fees to access the list.

consortium model is based on CRTC precedents for management of issues such as local number portability and Canadian numbering administration. While Gottlieb references the success of existing CRTC consortia of "industry participants" as a basis for suggesting the consortium model in this case, CMA believes that his analysis is inaccurately based on the *telecommunications* industry (telecom carriers) rather than an analysis of the *telemarketing* industry[26] (sellers and telemarketing agencies).[27] Unfortunately, some of the logic of establishing a (self-funding) management consortium does not hold up in face of this distinction.

43. In fact, telemarketing is only an "industry" in a very loose sense. The telemarketing activity that will be regulated by the DNCL is conducted by an extremely heterogeneous body of individuals and organizations. As outlined in paragraph 8 of CMA's June 1 "undertakings" submission, CMA forwards that it is probably more accurate to refer to telemarketing <u>not</u> as an industry, but as an "activity" or marketing "channel". Telemarketing is largely an ad hoc and ancillary activity for most of the individuals and organizations that undertake it as a marketing method, and many would not see themselves as "telemarketers". The difficulty in bringing these interests together, much less having them reach agreement on anything other than very basic matters has already been demonstrated in the difficulty of PN 2006-4 stakeholders to reach consensus in either of the ongoing CISC sub-committee processes.

44. Indeed the Gottlieb study concludes that the consortium model is "unviable" for oversight of the DNCL[28]. To begin with, current CRTC consortia models have telecom carriers (which the CRTC can obligate to fund such initiatives) as both interested parties and funders. Second, while the issues covered by existing CRTC consortia address business enabling issues of interest to the participants the same can not be said for a DNCL Management Consortium. In fact, in the DNCL case the business of many of the affected entities is not enhanced, but rather curtailed. Third,

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[26] In paragraph 8 of CMA's June 1 "undertakings" submission, CMA forwarded that it is probably more accurate to refer to telemarketing <u>not</u> as an industry, but as an "activity" or marketing "channel".

[27] It is interesting to note that in no existing CRTC consortium do consumer's representatives formally participate as members of the Consortium, nor, when considering "industry participants" is it common to include consumers as an influencer.

[28] Gottlieb Report, Page 17

in the case of current CRTC consortia models, overall, the interested parties have convergent interests. The interests of the interested players in this process vary widely, and points of consensus are rare.

45. While CMA recognizes that the CRTC sees participation in a consortium as a way to ensure that affected parties have input into the process and management of the DNCL and applauds this sentiment, at this point we are not confident that a consortium process is the most effective way to ensure that costs to the telemarketing industry are minimized. Certainly those who use the telephone to market their products and services or to solicit donations are interested in contributing to the process and providing input to DNCL management, but we do not think that it is appropriate to ask stakeholders to assume the costs of this type of "governance" activity.

46. Given that the CRTC will have final authority over the DNCL operating guidelines, the funding model, the selection of the List Operator, and the database access fees, and that it will inevitably be engaged in the consortium process (and has been encouraged to do so by Gottlieb[29]) CMA believes that it may be necessary to forgo the additional layer of a consortium, and invest the CRTC directly with these management functions.

47. As will be expressed in the first DNCL Consortium Working Group (DCWG) consensus report, the CMA finds that consensus on the Consortium model risks becoming bogged down in the absence of government clarification that can satisfy stakeholders on three levels: regarding first the division of responsibilities relating to the DNCL; second the funding of various costs; and third the assumption of risks.

48. As outlined in PN 2006-4 there are many related initiatives proceeding in tandem including: the development of DNCL and other telemarketing regulations; determination of the DNCL operating model; and design and implementation of DNCL governance/management responsibility. Timelines are extremely short and parallel and overlapping initiatives designed to address key outstanding issues mean

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[29] Gottlieb Report, Page 33.

that there are significant information gaps. Until the key issues are addressed, CMA believes that there are a number of critical unknowns that have a bearing on the operational and economic viability of the DNCL and the feasibility of the Consortium management model.

49. The critical unknowns as of this date include:
    a. What are the regulations specific to the DNCL?
    b. Beyond the DNCL, what regulations will be included in the new telemarketing regime?
    c. What is the mandate of the DNCL operator, as distinct from CRTC's role as regulator? **(determinations of points a – c will have major impact on costs)**
    d. How many marketers will subscribe to the new DNCL service **(in other words, what are projected revenues?)**
    e. Who will pay for what costs? All stakeholders (and government) agree that marketers should cover operation costs of the database, and most stakeholders believe that government should also cover costs of start-up, regulatory oversight (including Consortium expenses), complaint investigation, enforcement and adjudication.

50. Given all of the unknowns, the financial and reputation risks for both the legally incorporated management consortium and potential DNCL List Operators are very high. Before the CMA commits to the Consortium management model, we would like clarity on how the government will address these concerns so that potential Consortium members are not assuming all risks.

51. Further, there are many issues to be managed, and stakeholder – including CMA's – resources are limited. Unless the CRTC and/or the government takes the lead in this planning and set-up phase, or until the Consortium has reasonable funding allocated to it, the CMA doubts that there will be timely progress in relation to key requirements. This includes, for example, research as to the number of paying subscribers to the DNCL, essential to the work of the DNCL Operations Working Group (DOWG).

52. Based on consultations with other stakeholders through the DCWG process, the CMA believes that the CRTC and the government would facilitate forward progress by taking the following steps:

    a. Clarify that as a starting assumption, costs of operating the database and subscription service should be borne by marketers paying user fees (through DNCL subscription or DNCL usage fees) and that government should assume the costs for start up, managing the DNCL operator (including Consortium costs) and regulatory functions such as investigation, enforcement adjudication.
    b. Clarify the division of DNCL responsibilities such that the DNCL operator will run the database, subscription service and initial complaint validation with the CRTC handling investigation, enforcement and adjudication.
    c. Indicate that the government is prepared to assume the risks associated with the uncertainties and unknowns and to provide budget certainty for the List Operator, at least for an appropriate start-up period (e.g. two or three years).
    d. Take the lead in the RFP process and in commissioning research to answer key questions bearing on the economic an operational viability of the DNCL.
    e. Move as soon as possible to issue draft telemarketing and DNCL regulations for comment.

53. Moving forward in this way will lead to progress toward establishing a viable DNCL, while keeping the Consortium model on the table as a potential model to manage the DNCL program on an ongoing basis.

54. At this point, particularly in view of the large number of critical unknowns, CMA is not confident that a consortium of interested parties is necessary or the most desirable model to contract and manage a DNCL operator.

55. As an alternative to the CRTC consortium, the government could consider a more traditional voluntary advisory council composed of interested stakeholders to secure the desired stakeholder input.

56. **Again, regardless of whether a consortium management model is pursued, the CMA believes that any and all incurred costs of the governance structure and enforcement should be covered by the government through appropriations.**

3.0 DNCL Specific Regulations

3.1 Applicability of DNCL to Business-to-Business (B2B) Communications

57. All discussion of the legislation that created the DNCL was framed by the general assumption that it will protect Canadian **consumers** from the annoyance of telemarketing calls[30]. That being the case, CMA believes that it is reasonable to expect that B2B telecommunications will not be captured by DNCL regulations, as is the case in the U.S. model.

58. Indeed, in its observations to the report to the Senate on its deliberations on Bill C-37, the Standing Senate Committee on Transport and Communications commented that as part of the CRTC's exercise to engage in consultations in preparation for the implementation of the DNCL, the Commission "should gather information and prepare recommendations for ways in which the [DNCL] could accommodate… business-to-business calls"[31].

59. The CMA agrees with the Senate Committee that B2B calls should be accommodated clearly in DNCL regulations. In order to avoid unintended economic costs and interference in day-to-day commerce, the CMA urges the CRTC make it clear that the DNCL is limited to the central issue of protecting the interests of consumers, and that B2B marketing is not intended to be covered by DNCL regulation.

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[30] Also throughout Telecom Decision CRTC 2004-35 the CRTC referred to protecting the interests of "consumers".

[31] Observations to the Ninth Report of the Standing Senate Committee on Transport and Communications, Tuesday, November 22, 2005

60. Further to Commissioners' comments during the Public Hearings[32] CMA believes that the intended application of the DNCL can be clarified through the definitions of key terms. This approach would negate any requirement for an additional DNCL exemption.

61. As mentioned in CMA's June 1 "Undertakings" submission related to PN 2006-4, CMA submits that the text of the **Key DNCL Rule** can be worded to clarify that it is not the intention of DNCL regulations to capture B2B marketing. **We suggest the following wording for the key DNCL rule :**

    "No person or organization shall initiate a telemarketing call **for the purposes of consumer marketing** to a person or organization who is validly listed in the national do not call database unless the person or organization from whom the telemarketing call originates is exempt pursuant to section 41.7 (1) of the amended *Telemarketing Act*".[33]

62. CMA believes that this proposal for the wording of the Key Rule would clarify that B2B communications are unaffected by DNCL regulation. Further, this Key Rule wording for the DNCL regulations would mean that B2B marketing could still be captured by any other telemarketing regulations, such as calling hours and the requirement to keep seller-specific internal DNCL lists.

63. For a number of reasons the CMA is recommending that the requirement for sellers to keep internal DNCLs be maintained[34]. First, requiring internal DNCLs improves consumer choice. While some consumers are interested in limiting all telemarketing calls there are many who are only interested in limiting calls from certain callers. Requiring marketers to maintain seller-specific internal DNCLs allows for this

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[32] See comment from Chairman French, May 2, 2006 transcript paragraph 2137: "what we really need from you is a form of words, preferably not in the form of an exemption, that would ensure that the goods and services being offered had to be consumer-oriented, and, therefore, that if the goods and services being offered were transparently intended for a business -- and I don't think this is a trivial problem -- transparently intended for a business, they would not be defined as "telemarketing", or something along those lines, or would not be defined as "telemarketing", as the act applies enforcement measures to it."

[33] Please see paragraph 80 of this submission for a small modification to this definition that CMA proposes further to our "undertakings" suggestion.

[34] CMA's Code of Ethics and Standards of Practice requires that CMA members keep internal DNCLs for every channel by which they market.

consumer choice. Second, seller-specific internal DNCLs are a second line of protection beyond the DNCL whereby consumers can limit calls from those telemarketers who are exempted from the DNCL. Requiring that sellers – both those that undertake B2B telemarketing and those that engage in Business to Consumer (B2C) telemarketing – maintain seller-specific internal DNCLs, allows for consumer choice as it relates to telemarketing not covered by the DNCL. (Please see section 4.1 of this document for further discussion of internal DNCLs.)

64. A requirement for marketers to maintain seller-specific internal DNCLs is consistent with the *Personal Information Protection and Electronic Documents Act* (PIPEDA) which provides that consumers may withdraw consent for the use of their personal information at any time. It is also worth noting that in PIPEDA, as it relates to information requiring privacy protection, business contact information has been treated differently than consumer contact information. Through PIPEDA's definition of personal information, business contact information is specifically excluded from privacy protection. PIPEDA defines "personal information" as applying to information about an identifiable individual, but not including the name, title, business address or **business telephone number** of an employee of an organization[35]. In drafting PIPEDA, **the government recognized that contacting individuals in a business context is a different issue than selling to consumers at home.**

65. Accordingly, the CMA urges the CRTC to treat B2B communications in a manner that is consistent with Canada's privacy legislation.

66. If the DNCL regulations make it clear that B2B marketing is not captured by DNCL requirements, question has been raised about whether or not businesses should be allowed to register on the DNCL. Beyond being virtually impossible to prevent such registrations, we suggest that there would be little if any harm in permitting businesses to register their numbers. But to mitigate confusion, CMA recommends that the DNCL registration and all related information websites clearly indicate that registration on the DNCL is only **designed to limit telemarketing calls for the purpose of consumer marketing**: that is the telemarketing of products or services

[35] *Personal Information Protection and Electronic Documents Act*, Section 2(1).

to individuals when they are purchasing for personal or household use[36]. This is to say that small or home based offices, for example, could register their telephone numbers on the DNCL, and they would cease receiving any consumer telemarketing to the registered number. But as a telephone number potentially identified as relating to a business, it is possible that it may be subject to B2B telemarketing: that is marketing of products or service for business use.

67. Again, it is the CMA's suggestion that only those telemarketers who are engaging in consumer marketing will be required to scrub their marketing lists against the DNCL and that those individuals or organizations who are engaging in B2B marketing will not be required to scrub their lists against the DNCL. In effect DNCL use would therefore be determined by the **use** of the products or services being marketed. A home based business registered on the DNCL would not receive any telemarketing calls for the purposes of consumer marketing, but could conceivably receive telemarketing calls for the purposes of B2B marketing.

68. While in paragraph 66 CMA suggested that business telephone number could be listed on the DNCL, we are not suggesting, and are against any provision being made for the DNCL to collect business names or extension numbers.

69. Indeed, PIPEDA recommends collecting and maintaining as little information as possible for the stated purpose: in this case limiting consumer telemarketing calls. At this point it is not yet clear what information will be kept on the national DNCL: this is a question currently being considered by the DOWG CISC subcommittee. It has been suggested that only telephone numbers be collected without any other identifying information. This would reduce the risk of marrying too much information together in one place and decrease the possibility that the list may be used for unintended purposes.

70. While business telephone numbers could be listed on the DNCL, the CMA submits that beyond home based businesses aiming to reduce consumer telemarketing, the practice should be discouraged. To include the telephone number of a business

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[36] CMA defined consumer marketing and business-to-business (B2B) marketing in section 3.4 of our PN 2006-4 submission dated March 27, 2006.

using a main switchboard would mean that registration on the DNCL by any individual within that company would automatically eliminate telemarketing calls to everyone within the organization. Implementing a choice for every employee of an organization is not the intended purpose of the listing and inadvertently creates a circumstance where bulk listing of telephone numbers has essentially occurred. To avoid this bulk listing effect would require also capturing contact name information which not only is against the principles of PIPEDA, but also would result in higher operating costs for the DNCL as a greater amount of data would need to be captured and stored. It would also increase the costs for marketers using the DNCL as the scrubbing process would become more complex.

71. But these increased costs are not necessary since, unlike calls to consumers, there has been limited, if any, demand for the DNCL to limit telemarketing to business. B2B marketing calls are a part of the fabric of daily business affairs and capturing these calls in the DNCL could have significant economic consequences for the business sector. Capturing B2B communication would result in undue interference in day-to-day commerce, and may indeed be a restraint of trade. Further, the CMA submits that it may be an unjustified infringement on the constitutional right to commercial free speech.

72. The question was raised at the PN 2006-4 Public Hearings "why *wouldn't* the CRTC regulate B2B telemarketing?" First, the CMA submits that the public policy purpose of excluding B2B telemarketing from DNCL regulation is to reduce regulatory burden on businesses. The CMA believes that the best public policy is that which to the greatest extent possible permits the market to self-regulate and that government regulation should be a final solution, rather than the default position. Second, protection from business telemarketing has not been requested by business, making this costly, burdensome, trade-restraining regulation unnecessary.

73. The issue of including business numbers on a national DNCL seems to have been raised largely in terms of protecting small and home-based business. Again, these businesses could register on the DNCL to limit consumer marketing, and the use of seller-specific internal do not call lists would provide protection from unwanted calls from businesses and from all of those who are exempted from DNCL rules. The

protection of seller-specific internal DNCLs is available to all businesses, large and small.

74. Forced use of the DNCL for all B2B telemarketing would be a significant burden impacting all businesses in favour of protecting of those small businesses that are home-based. The cost of protecting these few businesses would likely be passed on to all consumers of the product or service through higher prices.

75. Again, CMA would like to avoid unintended economic costs and interference in day-to-day commerce by clearly limiting the application of the DNCL to the central issue of protecting consumers. The national DNCL should be focused on the issue that preoccupied parliamentarians, namely consumer protection. The issue of any irritant to businesses from B2B telemarketing can be taken care of with seller-specific internal DNCLs.

76. A final reason the CMA does not want DNCL regulation to encompass B2B marketing relates to our belief in striving for a uniform approach to DNCL administration in the North American marketplace, to avoid a competitive disadvantage to Canadian industry. In the U.S. B2B marketing is specifically exempted from its National Do Not Call Service.

3.2 Consumer Choice is Paramount

77. Based on discussion at the Public Hearings related to PN 2006-4, the CMA would like to reemphasize our position that the principle of consumer choice – the principle around which the DNCL legislation was developed – should be respected as it relates to all telemarketing regulation.

78. First the CMA would like to reiterate its position that **consumer consent** to receive telemarketing calls should override DNCL and other telemarketing regulations. This is to say that a seller should be permitted to call a consumer, even if the consumer was registered on the DNCL, if that consumer had **consented** to receive calls from that seller. This is an entirely probable scenario. To go a step further, the CMA believes that if the seller can adequately prove that it has the consumer's consent to

receive telemarketing calls at midnight it should not be a violation of telemarketing rules to place a call to that consumer at that time[37].

79. At the Public Hearings, it seemed that there may be concern on the part of the Commission that permitting for a "consumer consent" override to DNCL regulations would be paramount to adding a new exemption where none had been established by parliament. The CMA believes that the very principle upon which parliament established the DNCL service for consumers was that consumer choice should be paramount. The CMA submits that it is totally consistent with the intentions of parliament and Canadian privacy legislation to allow for a consumer to give specific sellers consent which overrides their registration on the DNCL and/or other telemarketing rules.

80. CMA submits that the text of the **Key DNCL Rule** should be further re-worded[38] to clarify that consumer consent overrides DNCL regulations:

"No person or organization shall initiate a telemarketing call for the purposes of consumer marketing to a person or organization who is validly listed in the national do not call database **without the called party's permission** unless the person or organization from whom the telemarketing call originates is exempt pursuant to section 41.7 (1) of the amended *Telemarketing Act*".

81. The CMA recognizes that it will be the burden of the seller to prove consumer consent in the case of a complaint.

82. Further in relation to consumer choice being paramount, the CMA repeats its belief that the CRTC should ensure that there are mechanisms in place that operationally permit consumers, once registered on the DNCL, to change their minds, and remove their telephone number from the registry. Experience running the CMA Do Not Contact Service indicates that consumers have changed their minds about having their number on the DNCL, particularly when consumers realize the extent of the

[37] Assuming that the CRTC adopts the CMA's recommendation to establish parameters around the hours during which telemarketing is permitted, including a weeknight telemarketing restriction beyond 9:30 p.m.

[38] This wording is a revision from the wording suggested in paragraph 61.

offers they will not longer be receiving by telephone, and/or that they have the choice to register on the internal seller-specific DNCL lists.

3.3 Length of Time Information Maintained on the DNCL

83. In response to questions at the Public Hearings related to PN 2006-4, and as a result of CMA's experience operating a do not contact program, the CMA would like to reiterate its belief that telephone numbers should remain on the national DNCL for a period of three years.

84. Given that the DNCL will impose a significant restraint of trade and restriction on marketers' freedom to communicate, the CMA believes that it is very reasonable to ask that consumers reconsider their DNCL registration after three years.

85. The fact is that the composition and/or consumer preferences of a household may change considerably over a three year period.

86. A three year registration has been the practice for the CMA's Do Not Contact service as it applies to marketing by telephone, fax and mail, and it is a requirement that generates very few complaints.

87. Also, three years is the period that the CRTC currently prescribes that organizations must maintain telephone numbers on seller-specific internal DNCLs. The CMA would be strongly opposed to changing this standard and is in favour of consistency between these two time requirements.

3.4 DNCL Access Model

88. While noted in our original PN 2006-4 submission dated March 27, 2006, and detailed in our June 1, 2005 "Undertakings" submission, CMA would like to re-state our recommendation that it should be the responsibility of individual **sellers** to secure a licence to access the DNCL, regardless of whether they access the database directly or through an agent (such as a third party call centre).

89. Having said this, there are a number of different possible DNCL access models, which are currently being considered by the DOWG. For example, based on the assumption that it will be the responsibility of the **seller** to purchase a DNCL licence, it is possible that sellers will purchase a DNCL subscription either directly from the List Operator or through a licensed service provider. Regardless of the list access model(s) and subscription options established, CMA believes that it should always be the responsibility of sellers to purchase access to the DNCL.

90. CMA does not recommend an access model whereby third party service providers – such as call centres and/or list-scrubbing agents – purchase a subscription to the DNCL which they then could access on the behalf of any number of sellers. Such a model would significantly diminish the total number of individuals or organizations who will contribute access fees to cover the expense of DNCL database operations.

91. Beyond the access channels to the list, CMA maintains its position that the CRTC should consider permitting both for annual subscriptions and one-off or shorter subscriptions and permitting access to the list in its entirety or access just to parts of the list (by province, area code etc.). Further, in paragraph 73 of our March 27, 2006 PN 2006-4 submission, CMA encouraged the CRTC to consider a free or low cost access model to protect those sellers who are undertaking small, localized telemarketing campaigns from undue expense.

4.0 Other Telemarketing Rules

4.1 Seller-Specific Internal Do Not Call Lists

92. The CMA maintains its recommendation that it is necessary and appropriate for all individuals or organizations that use the telephone to market (sellers) to continue to be required to maintain their own internal DNCLs[39].

[39] In CMA's March 27, 2006 submission related to PN 2006-4, recommended that seller-specific internal do not contact list be defined as: **a list of current customer, prospect consumer or business telephone and/or fax numbers of those persons or businesses who have requested that they not be contacted by the seller. It is used to cross-reference and purge that information from any list to be used for any telemarketing campaign by that seller.**

93. Further, we support the requirement that if, during a call, the called party asks to be put on the seller's internal DNCL, the request must be processed without requiring the called party to do anything further.

94. Seller-specific internal DNCLs provide consumers with an additional layer of choice. Seller-specific internal DNCLs permit a consumer to withdraw their consent to be contacted by a specific seller at any time, at the consumer's request. Any consumer, including an existing customer, upon being contacted be a marketer or by contacting a marketer, may express his or her desire not to be notified of such offers in the future by requesting his or her name be added to the marketer's internal DNCL.

95. Some consumers will not feel it necessary or want to list themselves on the national DNCL, as such a registration preclude them from receiving *any* prospect telemarketing calls. It is common, in fact, that a consumer will only believe that calls from certain sellers are a nuisance. Seller-specific internal DNCLs allow a consumer to individually choose the marketers from which they no longer wish to receive calls for solicitation, and permits consumers to continue to receive calls from remaining marketers.

96. Further, seller-specific internal DNCLs give consumers the power to control the telemarketing they receive from individuals and organizations that are not affected by DNCL rules. For example, seller-specific internal DNCLs permit a consumer to choose not to receive telemarketing from individuals or organizations with whom they have an existing business relationship, from newspapers or other DNCL exempted groups. Many individuals do not wish to receive calls from charities, for example, and yet an exemption was granted, partly because of the expectation of a continued use of internal do not call lists. Also, assuming that B2B calls are not within the scope of DNCL regulations, the requirement for businesses to maintain seller-specific internal DNCLs gives choice and permits businesses to limit their exposure to telemarketing.

97. It should be noted that a requirement for marketers to maintain seller-specific internal DNCLs is consistent with PIPEDA which provides that consumers may withdraw their consent for the use of their personal information at any time.

4.1.1 Enforcement Window

98. Balancing consumer interest and business burden, the CMA repeats its recommendation that, consistent with CRTC rules currently in effect, telemarketers should be permitted 31 days to ensure that consumers who request to be added to seller-specific internal DNCLs are not contacted again.

4.1.2 Length of Time Information Maintained on Seller-Specific Internal DNCLs

99. The CMA reiterates its belief that sellers should be required to maintain information on seller-specific internal DNCLs for three years, as is the current CRTC requirement. Again, CMA believes that it is not onerous to ask consumers or businesses to reconsider their seller-specific DNCL registration after three years.

4.1.3 No Requirement for Unique Registration Numbers

100. As outlined in CMA's Application to Review and Vary Telecom Decision CRTC 2004-35 dated August 6, 2004, and CMA's Petition to Her Excellency The Governor In Council Pursuant to Section 12(1) of the *Telecommunications Act* In The Matter of Telecom Decision CRTC 2004-35 filed on August 19, 2004, the CMA is opposed to any requirement requiring a unique registration number for confirmation purposes for any person who requests to be added to an internal DNCL.

101. The CMA believes that such a requirement is unnecessarily onerous and costly for those who use the telephone to market. At the same time, it is unlikely to provide consumers with an effective means of following up on complaints or initiating enforcement procedures. Perhaps in considering such a requirement in 2004-35 the CRTC may not have been aware of the extent of the cost[40] and difficulty.

[40] In paragraph 70 of CMA's August 6, 2004 Application to Review and Vary Telecom Decision CRTC 2004-35, CMA detailed some cost implications of a unique registration number requirement: "The requirement for businesses to maintain a database of unique identification numbers for every consumer that wishes to go on their do not call list, is proving to be particularly expensive to implement. Regardless of whether the caller is representing a bank, a charitable organization or a small business, under the new rules, the organization will have to establish and administer a new database that contains the unique registration numbers of its customers. The cost to implement such a system is estimated to range from $5,000 to $15,000 for a small business, $1 million for a large telecommunications carrier and $3 million for a large financial institution. In

102. The requirement to provide a unique registration number to called parties who request to be put on a seller-specific internal DNCL is a costly measure that the CMA does not see as being rationally connected to the objective of reinforcing telemarketing rules and ensuring the protection of consumers from unwanted unsolicited telecommunications. Unique registration number do not provide consumers any better protection; legitimate sellers that use the telephone to market strive to ensure that their seller-specific internal DNCLs accurately reflect caller requests; less scrupulous telemarketers will not maintain proper lists. Unique registration numbers will do nothing to change this.

103. Further, the CMA submits that it is simply not credible that consumers who have requested inclusion on seller-specific internal DNCLs will maintain a list of organizations from which they have received telemarketing calls and corresponding unique registration numbers, and cross reference this list on future telemarketing calls. Worse still, the use of unique registration numbers will give consumers the impression that they are, in some way, better protected from unwanted unsolicited calls. Because the unique registration numbers do not increase protection, consumers who do not want to be contacted are bound to become frustrated and confused.

4.1.4 No Requirement for Agency-Specific Internal DNCLs

104. The CMA does not believe it is appropriate to require that agencies – third party service providers such as call centres – maintain internal DNCLs beyond those specific to the individual sellers they serve[41]. If the call is being made by an agent calling on behalf of a seller and the called party requests that he or she be added to the internal DNCL, it is the seller-specific DNCL to which he or she should be added: it is future calls from the specific seller that will cease, not all future calls from the agent performing the calls. It is entirely possible and probable that just because the called party was not interested in receiving calls from one of the sellers that use the

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addition, the on-going aggregate costs associated with administering thousands of such databases is expected to run to tens of millions of dollars per annum."

[41] Of course when agencies were selling their own service – acting as a seller – they would be required to keep a seller-specific internal DNCL of their own.

call centre, he or she would not mind receiving calls from other sellers that choose to use this agent.

105. Agency-specific internal DNCLs are punishing to agencies. The more campaigns a call centre performs the more requests they would receive to be listed on the agency's DNCL, the larger the agency-specific DNCL would grow, and hence the less attractive the agency would be to sellers looking to engage a call centre. A factor sellers would consider in choosing an agency would be the size of the agency's internal DNCL with which the seller's list would have to be scrubbed. Why should a future seller be limited to the calling preference dictated by the calling campaigns of previous sellers? And in any event, widespread coverage is the purpose of the national DNCL.

106. The CMA believes that the two options available to consumers, to register on the national DNCL and/or on seller-specific internal DNCLs adequately serve the needs of consumers to eliminate any nuisance from telemarketing.

4.2 Statute of Limitations on Consumer Complaints

107. As mentioned in our PN 2006-4 submission dated March 27, 2006 (section 9.5.1) CMA believes that a careful balance must be struck between the burden of record keeping and retention for business and consumer interests. As such, we emphasized our belief that it was necessary for the Commission to establish a limit to the amount of time a consumer has to submit a complaint (related either to DNCL or other telemarketing regulations) regarding a call received.

108. Based on consensus reached through the DOWG sub-committee of CISC, the CMA concurs with the DOWG that consumers should have 14 days from the date of the alleged violating call to file a complaint.

5.0 Additional 2004-35 Telemarketing Rules

109. In our PN 2006-4 submission dated March 27, 2006, CMA identified and discussed what we believe is an appropriate *complete* set of telemarketing

regulations. We did not comment on rules contained in Telecom Decision CRTC 2004-35 (2004-34) rules that we do not think are appropriate in light of the addition of the national DNCL and new telemarketing rule enforcement mechanisms to the regulatory regime.

110. At the Public Hearings surrounding PN 2006-4 the Commission asked for views on some of the rules established in 2004-35 beyond those already addressed by the CMA. In support of this submission, CMA attaches a copy of both our Application to Review and Vary Telecom Decision CRTC 2004-35 dated August 6, 2004, and CMA's Petition to Her Excellency the Governor in Council Pursuant to Section 12(1) of the *Telecommunications Act* In The Matter of Telecom Decision CRTC 2004-35 filed on August 19, 2004. In addition, unless specifically covered elsewhere in our submissions regarding PN 2006-4 CMA sets out below our specific positions in response to issues raised by the Commission at the PN 2006-4 Public Hearings relating to the 2004-35 Telemarketing Rules.

5.2 Identification Procedures

111. Under CRTC telemarketing rules currently in effect, telemarketers placing unsolicited live voice and/or facsimile calls to solicit must provide sufficient information to permit the called party to take any further action he or she considers necessary with respect to the call[42].

112. Currently in force, those placing fax calls to solicit must identify the person on whose behalf the fax is being sent and provide the caller's telephone, fax number and name and address of a responsible person to whom the called party can write.

113. Currently in force, those placing live voice calls to solicit must identify the person on behalf of whom the call is made and, upon request, the caller's telephone number and the name and address of a responsible person to whom the called party can write.

[42] Telecom Decision CRTC 1994-10.

114. Consistent with requirements of our members in our Code of Ethics and Standards of Practice, the CMA believes that these telemarketer identification and contact information requirements as stated are balanced and an acceptable telemarketing rules.

115. That this is an important regulation to be included in telemarketing rules as emphasized by the fact that in Section 41.7(3) of the amended *Telecommunications Act* requires those callers exempted from DNCL requirements to identify the purpose of their call and to state the person or organization on whose behalf the call is being made.

116. Previous deliberations on telemarketing rules have resulted in suggestions for stricter and more onerous identification requirements. However, many of these are impractical and costly and CMA feels that in light of the new DNCL and enforcement regime, more stringent requirements are not necessary for consumer protection.

117. The CMA believes that the 2004-35 requirement for the caller to identify him or herself, as well as the organization calling, and to provide a staffed toll-free telephone number for complaints **prior** to asking to speak to the intended recipient of the call is costly and counterproductive in several respects.

118. First, it breaches the privacy of the intended recipient of the call since it may impart to the person answering the telephone information that the indented recipient would like to keep private.

119. Secondly, it many prove to be totally ineffective if the person answering the phone turns out to be a child, a person who does not understand the language of the caller, or another member of the family (other than the intended call recipient) who is unlikely pass the information on to the person who actually ends up taking the call.

120. Third, even if the intended party answers the call in the first instance, the complaint information and telephone number would be more effectively conveyed, and more useful to the consumer, if it were provided at the called party's request when he or she knows what the call was about and how it was handled.

121. Finally, the CMA also believes that the Commission's 2004-35 decision to impose specific identification procedures at the beginning of each solicitation call prior to reaching the intended called party may be contrary to the freedom of expression guarantee in Section 2(b) of the *Canadian Charter of Rights and Freedoms*.

5.2.1 Agency Identification

122. CMA does not believe it is necessary or appropriate that beyond identifying the person or organization on behalf of which the call is being made it is additionally necessary to identify a third-party agency, if one is being used. This is superfluous information that has the potential to confuse the called party, and significantly weaken the success potential of the call. Considering the CMA's suggestion that it be required only for **sellers** to maintain internal DNCLs, if the identity of the seller is provided, this is sufficient identification to meet the needs of called parties (if, for example the called party wishes to register a complaint about the call).

5.3 No Toll-Free Telephone number or Live Agent Requirement

123. The CMA does not agree – particularly in light of the new consumer protection provided by the DNCL – that it should be a necessity to provide a staffed toll-free number for the called party to reach the seller. This would be both impractical and costly for businesses in Canada, particularly small, medium sized and not for profit organizations. Consumers will always have the opportunity to add themselves to the seller-specific internal DNCL at the time of the call, and upon request, will be provided with a telephone number and the name of a responsible individual with whom they can follow up. Facilities for further follow-up should be left to individual sellers to determine.

6.0 In Conclusion

124. Through our submissions, oral comments and participation in the CISC sub-committee processes CMA has suggested a set of telemarketing rules that we believe represent a fair, balanced **and complete** set of regulations for the

telemarketing industry. The CMA respectfully repeats its request that before final determination, **the CRTC releases a draft version** of their decision on telemarketing and DNCL regulations and permits an opportunity for comments from interested parties. We recognize that this opportunity for consideration will require additional time, but CMA is of the belief that both consumers and the telemarketing "industry" will benefit from carefully considered CRTC telemarketing regulation, regardless of the time required to achieve them.

125. The CMA thanks the Commission for the opportunity to participate in the PN 2006-4 process and encourages the Commission to seek any clarification it may need on this or any of our related submissions.

Sincerely,

Wally Hill
Vice President
Public Affairs and Communications

c.c. Interested Parties to Telecom Public Notice CRTC 2006-4