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

Reply Comments from the Canadian Bankers Association to the Canadian Radio-Television and Telecommunications Commission

June 6, 2006

INTRODUCTION

1. This submission sets out the reply comments of the Canadian Bankers Association (CBA) as provided for in Telecom Public Notice CRTC 2006-4, Proceeding to establish a national do not call list framework and to review the telemarketing rules.

2. These comments relate specifically to issues raised in the written comments filed with the Commission and the issues raised at the public consultation held in May. Unless otherwise noted the banking industry continues to advocate for the positions set out in the CBA's submission dated March 27th, our speaking notes to the May 2 public consultations (submitted in writing to the Secretary on May 17), and our response to the Undertakings (dated May 19), as well as our input to the DNCL Consortium CISC Subcommittee tasks and the DNCL Operations CISC Subcommittee tasks (both dated April 10).

DEFINITION OF TELEMARKETING

3. The Commission broadly defined telemarketing in Decision 2004-35 as:

> *"the use of telecommunications facilities to make unsolicited calls for the purpose of solicitation where solicitation is defined as the selling or promoting a product or service or the soliciting of money or money's worth, whether directly or indirectly and whether on behalf of another party".*

4. We submit that the definition of telemarketing needs to be more precise so that telemarketing rules only apply to appropriate telecommunications. In particular, as outlined below, we believe that certain types of calls should be excluded from the definition to avoid unnecessary and unintended application of the rules that apply to telemarketing, both generally and with respect to the operation of the national do not call list (DNCL). Furthermore, it may be beneficial to have a definition of "unsolicited" to ensure clarity.

Business to Business Calls

5. The national DNCL is a consumer protection initiative meant to give individual consumers the ability to stop unwanted telemarketing calls to their homes. We do not believe that the policy intent was to stop businesses from calling other businesses to promote their business-use products and services. The marketing of business products to businesses via telecommunications facilities is an accepted practice with few objections from targeted businesses. The banking industry is strongly of the view that telemarketing should be defined to limit it to the solicitation by a business to a consumer and not to include calls by businesses to other businesses for the sale of business-related products and services.

6. During the public consultation, there was some concern about small businesses/home businesses wanting to be able to avoid unwanted marketing calls. We recommend that the definition of telemarketing include the concept of the nature of the product being promoted. Thus businesses using telecommunications to market business-use products and services would not need to scrub against the DNCL; and only those promoting consumer-use products would need to do so. Therefore, any business could place its number on the DNCL and the listing of business telephone numbers on the national DNCL would be to restrict consumer-product marketing to those businesses. Under this scenario, since any number could be listed on the national DNCL, it would be a defence to show that the number was a business number and that the product being telemarketing was a business-use product. Lastly, the distinction should be made that if a business number is listed on the national DNCL, this should not impede the use of that number for calls made in reliance on an exemption (i.e. the existing

business relationship exemption) or to reach an individual who has supplied the number for personal use contact during the day (i.e., has given consent).

Consent

7. Several parties felt that the existing business relationship exception should be limited to separate legal entities and that it should not apply to an entire corporate group. We strongly submit that, if the customer has been asked if their personal information may be shared among the members of the entire corporate group, and has also consented to receive marketing material, such a telecommunication should not be seen as "unsolicited" and therefore, would not fall under the rubric of the DNCL. Such an approach gives the consumer the choice with respect to which calls they wish to receive.

8. A concern was voiced that such consent should not be a condition for obtaining the goods or services. We note that section 4.3.3 of Schedule I of the *Personal Information Protection and Electronic Documents Act* prohibits an organization from, as a condition of the supply of a product or service, requiring an individual to consent to such marketing across a corporate group. Furthermore, customers have the ability at any time during their relationship with a bank to opt out of receiving future marketing. This provides consumers with the necessary protection to address this concern.

9. The issue of how such consent should be evidenced was also discussed at the hearing. We submit that the framework should be technologically neutral and therefore, consent should be able to be provided in writing, electronically and verbally, provided that there is a record of the consent.

FUNDING

10. The banking industry fully supports the submission of the Canadian Marketing Association dated May 10, 2006 regarding the funding of a national DNCL.

11. During the consultations, the question was often asked as to why the taxpayers should pay for the national DNCL oversight and enforcement, rather than the telemarketers and telecommunications companies. We contend that there is a strong likelihood that those telemarketers that generate the most complaints about telemarketing are the least likely to become shareholders of a consortium overseeing compliance and enforcement and whose shareholders, charged with funding its operation, are the more responsible industry players. In general, we submit that oversight and enforcement costs should be funded by the government and not by the industry through membership in a consortium or fees charged by the DNCL operator.

EDUCATION

12. The issue of how to mount and fund an education campaign was widely discussed at the public consultation. The banking industry agrees that it is extremely important that a public awareness campaign fully explain the national DNCL framework including grace periods and exemptions in order to manage expectations and minimize consumer frustration. The banking industry is willing to do its part in educating customers regarding the national DNCL framework such as by providing information on members' and the CBA's websites and by other means as appropriate. However, we believe that it is primarily the role of the government to ensure that the public is properly informed.

GRACE PERIOD

13. During the public consultations, a range of grace periods were suggested. As previously relayed, we believe that callers should be permitted a grace period during which calls made to persons on the national DNCL list would not constitute a violation. We submit that an appropriate grace period from the registration of a person should be 60 days. Given the administrative difficulties of having to scrub against both an internal and national DNCL list, we submit that this would be an appropriate time period.

14. In addition to the administrative requirements and resources necessary to scrub against various lists and the resulting time and cost in complying with a shorter period, a 60 day period also allows time for greater certainty in ensuring that individuals who have so requested will not receive any future solicitation. Limiting the grace period to 30 days may not allow enough time, resulting in errors and the continued inclusion of individuals who do not wish to be solicited for a certain time period.

CONFIRMATION OF PLACEMENT ON INTERNAL DNCL

15. Decision 2004-35 provided that a caller must give a unique registration number for confirmation purposes to all persons who request to be added to their internal DNCL. We believe that a unique registration number requirement for the legislatively required internal DNCL is not necessary and would be expensive and cumbersome for businesses.

16. We continue to be concerned that a confirmation number obligation would be an expensive and unnecessary system build for financial institutions. Customers are able to make note of the staff person's name and the date and time of call and this normally provides sufficient reference to follow up a customer's contention that communication took place. Moreover we do not believe, given our communications with our customers, that there is evidence of complaints to warrant an expensive system rebuild. A large organization such as a financial institution has many different client interfaces which would require system updates, new processes and procedures for each channel in order to collect and store the information. There are numerous products, sales forces and channels that interact with the customer that would need to be able to update the customer request (real time), store the information in a central database and provide the customer with a confirmation number that is not repeated. Such an undertaking would be extremely time consuming and expensive. Expensive new notification procedures or unique identification lists are not necessary in light of existing safeguards already implemented by companies. We note that a customer's marketing preference is information that the customer can confirm at any time.

17. If such a requirement is implemented, such a process is more efficient if the confirmation is automated (whether by unique registration number, email or letter). It would be beneficial if each institution was given a reasonable period of time to determine and implement the most viable solution for its structure. As long as the customer has been provided with confirmation of his/her placement on the internal DNCL, the form of the confirmation should not be mandated. Automated solutions are costly and require input and time from systems and technical specialists. Therefore, requiring this confirmation immediately upon implementation of the new rules would be problematic. A delay in the enforcement of this requirement in order to permit companies to set up a viable solution would be needed.

VIOLATIONS

18. We have the following general comments regarding violations:

- All violations need applicable provisions regarding grace periods and safe harbours.
- It may be necessary to make distinctions as to different types of contraventions of the law in determining what is considered to be a violation -- a one-time instance of a telemarketer inadvertently contacting a customer on the list due to human error should not be seen as the same situation as a repeat offender who is knowingly flouting the provisions of the law.
- Taking into consideration the above, it may be necessary for the CRTC to establish a lesser sanction that can be imposed in instances where issuing a violation may not be warranted (e.g. for inadvertent calls made to persons on the list or for mistakes made in keeping records). Other regulators will use a "letter of concern" where a technical contravention of the law has taken place that is not considered to be a serious violation.
- Care should be taken to avoid treating certain actions as violations (e.g. storage of information) if the consequences of failure to comply are minimal and if the obligation to comply is difficult and not clearly set out in the legislation or guidelines. For something to be considered a violation, it is critically important that the obligations/responsibilities /expectations of those attempting to comply with the rules be very clearly set out so that there is no ambiguity as to when a violation has occurred. This may be impossible in the case of a vague obligation to store information.
- Violations should only be used as a last resort in instances of clear and demonstrable actions that are contrary to the intent of the law. (There are those who would use the provisions of the law to launch frivolous lawsuits against those making legitimate attempts to comply with its provisions.)

PENALTIES

Graduated penalty scale

19. The banking industry supports the concept of a graduated penalty scale, ranging from no penalty for first offences and inadvertent mistakes, through moderate penalties for repeat offenders to the maximum penalty and publication for deliberate contraventions or blatant disregard of the rules. Proportionality of penalty to violation is critical to the credibility of an enforcement regime. It is also important to strive for the objective – that being compliance with the rules. To what extent are penalties needed in certain circumstances to bring about compliance?

20. When an organization is identified publicly as not complying with applicable laws, that organization's reputation suffers and ultimately the public imposes the greatest penalty on the organization – loss of business that affects the bottom line. The threat of publication of an organization's failure to comply is thus one of the harshest penalties that can be meted out. Since banks set great store by their reputations, the industry established the publication penalty for the Canadian Banking Ombudsman (now Ombudsman for Banking Services and Investments) to provide the incentive for members to accept its recommendations. That is one of the reasons for the success of the industry ombudsman service to date.

21. While publication is viewed as a harsh penalty, the public and media are astute enough to assess the nature of violations being published. If the Commission publishes each and every violation, no matter how minor, the public will soon learn to discount the information and disregard the warning that such publication should provide. The Commission should be able to use its discretion to judge whether, in each set of circumstances, meting out the harshest

possible penalty is warranted either to warn consumers, to further compliance or to penalize the telemarketer that committed the violation and to publish the names of violators only for the most egregious violations where a harsh penalty is justified and consumer protection requires that consumers be aware of the name of the telemarketer violating the law.

22. With any punishment, the banks are strongly of the view that, in the interest of fairness and due process, the compliance procedures should allow the telemarketer the opportunity to take full advantage of all rights of appeal, and for any Court's decision to be rendered before the Commission exercises its discretion to make public any or all of the information related to a violation.

23. Publication prior to the completion of any appeal process imposes the penalty on the telemarketer and in effect removes the right to appeal. The damage to the telemarketer's reputation has been done and no court decision setting aside or varying the Commission's decision can remove the damage. There is no real appeal recourse if the major penalty is imposed before the appeal can be heard. Moreover, the imposition of the major penalty pre-empts the court's power to confirm, set aside or vary the decision of the Commissioner.

Potential Criteria

24. We suggest the following possible criteria in determining penalties:

- (degree of harm) Was it only one or a few names that were missed? How many complaints were received about this particular campaign?
- (degree of intent or negligence) Was the failure to scrub the list a condoned practice or policy of the telemarketer, or an error or oversight?
- (history of compliance) How many complaints have been received about this particular telemarketer/seller?
- (intent to correct) Did the telemarketer respond positively with action to correct the problem, and meet any timing commitments for doing those corrections, or did it allow further infractions to happen?

Initial implementation timing

25. It will be important to allow time initially for telemarketers to become aware of the requirements and to implement the processes to scrub their telemarketing lists against the national DNCL. Issuance of penalties, particularly severe penalties, in the first months to year of implementation would not be fair to those unaware of, or taking steps to implement, the rules, particularly if they appeared willing to take action when informed.

ENFORCEMENT

26. As previously stated, we submit that the Commission itself should be responsible for investigating complaints, enforcing the rules and levying any penalties rather than delegating this responsibility to the common carriers and/or to the operator of the DNCL.

PREDICTIVE DIALING DEVICES

27. The CBA supports the CMA's recommendation that the Commission adopt a maximum 5% abandonment rate for calls placed by a PDD [predictive dialing device] for solicitation. We also

support the CMA's position that telemarketers using PDDs should maintain records regarding their compliance with the PDD abandonment rule for a period of 6 months. Furthermore, we submit that the requirements for the maintenance of records must permit records to be maintained at any location and in any form (including electronic) as per usual business practice.

CONCLUSION

28. In closing, we appreciate the opportunity to comment on this initiative. We would ask that you take into consideration the suggestions we have raised.

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