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Director

Michelle Tittley
Clerk of Standing Committee on Industry, Science and Technology
House of Commons
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August 12, 2009

Dear Ms. Tittley:

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

The Investment Industry Association of Canada (IIAC or the Association) appreciates the opportunity to comment on the ECPA. IIAC is the professional association for the securities industry, representing over 200 investment dealers in Canada. Our mandate is to promote efficient, fair and competitive capital markets for Canada and assist our member firms across the country.

The Association supports the primary objectives of the ECPA, as stated in section 3 of the proposed legislation. E-mail spam and other potentially harmful on-line activities such as "phishing" and installation of "spyware" on computers are not merely an annoyance for recipients, but impede commerce by compromising technology, data integrity and security of computer systems and information stored in electronic format. Regulating electronic business communications that can lead to such activities is important to protect both businesses and consumers.

While preventing such harmful activities is a laudable goal, the range of activities that are captured in the legislation is unnecessarily broad, and goes beyond the express purpose of the ECPA as set out in section 3:

> ***3.*** *The purpose of this Act is to promote the efficiency and adaptability of the Canadian economy by regulating commercial conduct that discourages the use of electronic means to carry out commercial activities, because that conduct:*
>
> *(a) impairs the availability, reliability, efficiency and optimal use of electronic means to carry out commercial activities;*
>
> *(b) imposes additional costs on businesses and consumers;*
>
> *(c) compromises privacy and the security of confidential information; and*
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> *(d) undermines the confidence of Canadians in the use of electronic means of communication to carry out their commercial activities in Canada and abroad.*

Scope of ECPA

Under the ECPA, the limited means of obtaining consent, the absence of appropriate exemptions and limitations on the scope of the application of the legislation, combined with the broad definition of commercial activity, result in circumstances where legitimate and desirable business activities that do not meet the criteria in section 3 are captured by the legislation.

The over-reach of this legislation can be attributed to fact that it is based on an "opt-in" model, which requires the recipient to have consented to the receipt of a message prior to it having been sent. While this certainly would prevent potential recipients from receiving unwanted e-mail, it also prevents individuals and businesses from receiving potentially beneficial communication about products and services of interest to them.

While we are supportive of the principle of requiring consent for email solicitation, the allowable means of obtaining express or implied consent are so narrow as to restrict any efficient means of informing potential and properly targeted clients of potentially useful products and services. In particular, the restrictions create unnecessary impediments to legitimate business where such clients are properly served, and business is generated through referrals from existing clients, friends, family and business associates.

Under the ECPA, consent is implied only when the sender has an existing business or non-business relationship with the recipient. This provision, combined with the

restrictions on telecommunication in the Do Not Call Legislation (DNCL) effectively foreclose the ability of investment advisors (or other professionals) to offer their services to potential clients that have been referred to them by existing clients or other individuals. Such referrals are the means by which many people find an investment advisor, and are the primary source of new business for most retail investment advisors.

Communication from advisors to such individuals is clearly distinguishable from the email spam that the ECPA seeks to address, both by the nature of the sender and the recipients. Advisors and other professionals acting on a referral are not sending out mass emails to unknown recipients who may or may not be interested in the services they offer, rather they are communicating with individual prospects who have been specifically identified as being interested in obtaining their specific expertise. The referred parties are generally friends, family or business associates of the advisors' existing clients, and have expressed an interest in finding an investment advisor. In fact, the regulatory agencies overseeing the financial industries encourage the public to choose their advisors by undertaking research and seeking out references from others who have had positive experiences with their advisors. As such, contact, either by email or telephone does not constitute an unwelcome intrusion for the referred party, nor would it fit into any of the elements of the offending conduct described in section 3 of the ECPA.

The combined restrictions on email and telephone communication (through the DNCL) would create significant obstacles not only to offering services to such persons, but to obtaining consent to contact the interested parties. It is surely not the intention of the proposed legislation to effectively prevent parties with a common interest from communicating to advance their interests. The current restrictions make it virtually impossible for a professional to proactively obtain explicit consent to communicate with a referred party. Putting the onus on the referred party to contact the advisor is inefficient, and impractical, as it relies on the third party referrer to provide contact information in a timely and accurate manner, which is often not possible or practical. As a result, the interests of both the investment advisor and the referred party seeking his or her services are prejudiced.

Permitting consent through an affirmative response to an email seeking consent would provide an effective balance to restricting unwanted email solicitations and allowing consumers to obtain information that is of interest to them. If no express consent to the request is provided, no further solicitations could take place.

Under this modified "opt-in" model, the requirement to obtain consent prior to sending a "commercial electronic message" would be retained, however, the characterization of an electronic message sent to obtain consent as a "commercial electronic message" in section 2(3) would be deleted.

In order to ensure the e-mail seeking consent does not become a de-facto "commercial electronic message", the content requirements in sections 10(1) and (2) could be tightened to require that the message include:

- An identification of the subject matter (including a clear and simple heading) in addition to the identification of the sender or agent being used for this purpose;
- A valid physical postal address and/or telephone number;
- A functioning email address where the recipient can contact the sender to opt out of any future emails (including consent seeking emails) from that source; and
- A statement that no future emails respecting the subject matter will be sent unless the recipient provides explicit consent through a return email, telephone call or other prescribed means of communication.

This approach would ensure legitimate messages would reach their target, while allowing recipients to opt out of unwanted communications.

Alternatively, the regulatory over-reach of the ECPA could be rectified without compromising the intent of the proposed legislation by creating an exemption for referrals. In order to properly limit the use of the exemption, and prevent abuse by mass marketers, the term "referral" must be clearly and narrowly defined. For example, referrals could be restricted to situations involving individual persons referring other individual persons with whom they have a family, friend or business relationship. Where

a referral has been established, consent may be sought via email. Alternatively, the definition of implied consent could be expanded to allow such consent to be obtained through the referring party (ie: the individual potential client or other individual) with a requirement that the referred party must have received express assurance from the referrer that the referee has provided consent to be contacted, and it was reasonable for the person sending the communication to rely on that assurance.

Business to Business Communication

If the modified opt-out model is not accepted, we support the provision permitting consent by conspicuous publication contained in the Australian Anti Spam Act in respect of business to business communications. Under that provision, consent can be inferred where the intended business recipient's electronic address is published conspicuously and not accompanied by a statement that commercial messages are not wanted. In addition the subject matter of the message must be directly related to the type of business carried on by the business recipient; for example if the target is a dental office, it would be appropriate to send them a business communication relating to dental office software, but not, for instance travel services. Providing such an exemption would facilitate legitimate and reasonable commercial activity, while ensuring that solicitations are relevant and appropriately targeted.

Enforcement / Penalties

It is unclear from the legislation how the Act will be enforced, whether through proactive audits or, like the Do Not Call legislation, as a result of complaints made to the CRTC. Given the broad scope of the ECPA, we advocate a similar enforcement model to the DNCL. We believe this is the most efficient means of ensuring that resources are focused on those that violate the true purpose of the legislation rather than inadvertent, or one-off technical violations that do not fall under section 3 or inconvenience the public.

We are concerned with the provisions of the proposed ECPA would allow the CRTC and the Competition Bureau to charge offenders with administrative monetary penalties of up to $1 million for individuals, and $10 million for all other offenders, and that officers, directors, agents of a corporation that violate the prohibitions could also be held liable for such actions. While we assume such large penalties would be reserved for egregious

and prolific offenders, we are concerned about the imposition of disproportionate fines in situations not involving situations described in the purpose of the legislation. The due diligence defence does not provide any indication of the types of action that would constitute due diligence.

We are also concerned about the inclusion of a private right of action for persons who allege that they have been affected by a contravention of the anti-spam, anti-phishing and anti-spyware provisions of the ECPA. If such a provision is retained, it should be considerably narrowed to prevent nuisance claims.

Thank you for considering our comments.

Yours sincerely,

Susan Copland
Director, Investment Industry Association of Canada