



## Compliance and Enforcement Decision CRTC 2017-65

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Ottawa, 9 March 2017

*File numbers: 9094-2014-00313-001 and 9102-2014-00313-008*

### William Rapanos – Violations of Canada’s Anti-Spam Legislation

*The Commission imposes an administrative monetary penalty of \$15,000 on William Rapanos for 10 violations of section 6 of Canada’s Anti-Spam Legislation. Specifically, Mr. Rapanos sent commercial electronic messages (i) that did not identify the sender, (ii) that did not include information that enables the recipient to readily contact the sender, (iii) without prior consent from the recipients, and (iv) that, in certain cases, did not include a functioning unsubscribe mechanism.*

#### Introduction

1. Between 8 July and 16 October 2014, the Commission received numerous submissions through the Spam Reporting Centre<sup>1</sup> in relation to unsolicited commercial electronic messages (CEMs), in the form of emails, that appeared to have been sent by William Rapanos. These messages advertised a design, printing, and distribution service for commercial flyers.
2. These submissions were investigated and, on 22 April 2016, a notice of violation was issued to Mr. Rapanos pursuant to section 22 of *An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act* (the Act or Canada’s Anti-Spam Legislation [CASL]) by a person designated for this purpose under section 14 of the Act.<sup>2</sup> The notice identified three messaging campaigns in which the designated person had reasonable grounds to believe that the following 10 violations were committed between 7 July and 15 October 2014:

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<sup>1</sup> The Spam Reporting Centre is managed by the Commission and gathers information from various sources, including individual Canadians, on spam and other electronic threats to support the enforcement activities of the federal agencies responsible for enforcing compliance with Canada’s Anti-Spam Legislation.

<sup>2</sup> Section 14 of the Act provides that the Commission may designate persons to exercise various investigative powers and enforcement functions set out in sections 15 through 46. For example, persons may be designated to issue preservation demands and notices to produce, to apply for and execute warrants, and to enter into undertakings or issue notices of violation with respect to alleged violations of the Act.

- three violations of paragraph 6(1)(a) of the Act, for sending a CEM to an electronic address without the consent of the person to whom the message was sent;
  - three violations of paragraph 6(2)(a) of the Act, for sending a CEM that did not set out the prescribed information that identified the sender of the message;
  - three violations of paragraph 6(2)(b) of the Act, for sending a CEM that did not set out information to enable the person to whom the message was sent to readily contact the person who sent it; and
  - one violation of paragraph 6(2)(c) of the Act, for sending a CEM that did not include an unsubscribe mechanism, in accordance with subsection 11(1) of the Act, that enabled the person to whom the message was sent to indicate the wish to no longer receive any CEMs from the person who sent the message.
3. The notice of violation set out an administrative monetary penalty (AMP) of \$15,000.
  4. Mr. Rapanos was given until 24 May 2016, subsequently amended to 31 May 2016, to pay the AMP set out in the notice of violation or to make representations to the Commission regarding the violations or the amount of the penalty. The Commission received representations from Mr. Rapanos dated 30 May 2016.
  5. Pursuant to subsection 25(1) of the Act, the Commission must decide, on a balance of probabilities, whether Mr. Rapanos committed the violations and, if so, it may impose, reduce, or waive the penalty set out in the notice of violation. The Commission may also suspend payment of the penalty subject to any conditions that it considers necessary to ensure compliance with the Act.
  6. Based on the record of this proceeding, the Commission has identified the following issues to be addressed in this decision:
    - Did the messages at issue fall within the scope of the Act?
    - Did Mr. Rapanos commit the violations at issue?
    - If yes, is the amount of the AMP appropriate?

### **Did the messages at issue fall within the scope of the Act?**

7. CASL prohibits the sending of CEMs to electronic addresses in certain circumstances. For instance, the alleged violations at issue concern paragraphs 6(1)(a), 6(2)(a), 6(2)(b), and 6(2)(c) of the Act, which relate to whether CEMs were sent to electronic addresses
  - without the recipients' consent;

- without identifying the sender;
  - without setting out information to enable the recipient to readily contact the sender; and
  - without including an unsubscribe mechanism.
8. “Electronic address” and “electronic message” are defined in subsection 1(1) of the Act as “an address used in connection with the transmission of an electronic message to (a) an electronic mail account; (b) an instant messaging account; (c) a telephone account; or (d) any similar account” and “a message sent by any means of telecommunication, including a text, sound, voice or image message,” respectively.
9. “Commercial activity” is defined in subsection 1(1) of the Act as “any particular transaction, act or conduct or any regular course of conduct that is of a commercial character, whether or not the person who carries it out does so in the expectation of profit.” While the definition sets out several types of excluded transactions, none of the exclusions are applicable in the circumstances.
10. “Commercial electronic message” is defined in subsection 1(2) of the Act, which provides the following:

For the purposes of this Act, a commercial electronic message is an electronic message that, having regard to the content of the message, the hyperlinks in the message to content on a website or other database, or the contact information contained in the message, it would be reasonable to conclude has as its purpose, or one of its purposes, to encourage participation in a commercial activity, including an electronic message that

- (a) offers to purchase, sell, barter, or lease a product, goods, a service, land or an interest or right in land;
  - (b) offers to provide a business, investment or gaming opportunity;
  - (c) advertises or promotes anything referred to in paragraph (a) or (b); or
  - (d) promotes a person, including the public image of a person, as being a person who does anything referred to in any of paragraphs (a) to (c) or who intends to do so.
11. In the present case, 50 individuals filed a total of 58 submissions with the Spam Reporting Centre regarding the messages at issue. These submissions included the messages that advertised flyer design, printing, and delivery through Canada Post. For example, the content of one of the submitted messages consisted of the following:

*Subject: Canada Post flyer delivery - Art Design and Printing included starting at only \$599 for 25,000 homes!*

*Do you need to send out flyers? Like any direct marketing flyers work by repetition. Statistics say that the average person must see an ad at least 3 times before they react to it. In fact this is why many companies that send out a flyer once and then give up will fail with their direct marketing efforts. For this reason we are offering the following package:*

- You choose an area that's local to your business*
- We will select 25,000 homes in those postal codes*
- We will professionally design an ad for your business*
- We will print your ad on a full colour glossy 8X5 double sided flyer*
- We will deliver it with Canada Post 3 times over the next 3 months TO THE SAME AREA*

*Total cost: \$599 per month for 3 months*

*Result: Your phone will ring all summer long!*

*Get more information by visiting this page:*

*<http://postalflyers.club/>*

12. Each of the messages used identical or similar language, offering and promoting marketing design and commercial services, providing price quotes for different volume increments, and directing recipients to a website for further information. The messages were sent to each of the complainants' electronic mail accounts without their consent. The Commission therefore considers that these messages are within the scope of the Act: they were CEMs within the meaning of the Act, and were sent to electronic addresses, as indicated by the complainants.

### **Did Mr. Rapanos commit the violations at issue?**

#### **Investigation report**

13. The notice of violation was supported by an investigation report that contained the evidence, which was gathered by a designated person (the investigator), upon which the notice was based, as well as a description of the grounds for the notice and the application of the factors that were considered to determine the amount of the penalty. The investigation report also included copies of submissions made to the Spam Reporting Centre, as well as witness statements from two individuals who stated that they had received unsolicited CEMs at business email addresses managed solely by them. These individuals confirmed that they had never consented to receiving CEMs from the sender.

14. The investigation report contended that the CEMs in question all contained links that redirected to one central website, <http://firstunitedpartners.com>, and that all listed the same domain protection service to block their registration information, indicating that there was one single sender for all the CEMs. Pursuant to a notice to produce dated 13 February 2015 and issued under section 17 of the Act, the investigator obtained the server logs from the domain host of this central website and in the logs found the Internet Protocol (IP) addresses used to access and manage the website. These IP addresses were registered to Mr. Rapanos' home address through Bell Canada. Similarly, two phone numbers were found on the website's mail server and listed as contact information. Both phone numbers were confirmed to be registered to Mr. Rapanos through notices to produce issued to WIND Mobile Corp., dated 12 May 2015, and to 7-Eleven Canada, dated 22 May 2015.
15. The investigator issued a notice to produce to Mr. Rapanos on 29 September 2015 that included a requirement to produce a list of everyone who had access to the Internet connection at the address at which Mr. Rapanos resides. In his response in October 2015, Mr. Rapanos stated that boarders resided at his home address, both previously and presently, and as such, he could not know exactly who accessed his unsecured Wi-Fi connection. He provided names for two of these individuals, but no other information. In a follow-up interview with an investigator in November 2015, Mr. Rapanos referenced only one of these names, claiming the individual had resided there for a period of four years, but had moved out a few weeks earlier. Mr. Rapanos did not provide any further information with respect to that person's whereabouts, occupation, or the terms of his tenancy.
16. The owner of the house where Mr. Rapanos resides was also issued a notice to produce and was requested to submit information regarding all the tenants of her home. She was specifically asked about the names of boarders that Mr. Rapanos had given, but only provided information regarding Mr. Rapanos and his family, and did not acknowledge whether any other individuals or boarders were staying there.
17. Despite the investigator's request for supporting information regarding the identities of these boarders from Mr. Rapanos, his wife, and the owner of the house where the Rapanos reside, no further information was provided. The investigator concluded that based on the record, the individuals named as boarders did not exist and that the names provided were aliases used by Mr. Rapanos.

## **Representations**

18. In his representations in response to the notice of violation, Mr. Rapanos claimed that someone other than himself had sent the CEMs and that he was potentially the victim of a personal vendetta or of identity theft. He also stated that there was no way to confirm that he had personally registered the website <http://firstunitedpartners.com> since there was no identity verification during the registration process with the domain registrar.

19. Because his Wi-Fi network was unsecured and there were no passwords on his home computers, Mr. Rapanos stated that anyone could have gained access to his personal information and used his Internet connection to commit the violations under his name.
20. Mr. Rapanos argued that the investigator did not prove the case against him beyond a reasonable doubt, which was a violation of the *Canadian Charter of Rights and Freedoms* (the Charter).

### **Commission's analysis and determinations**

21. Between 8 July and 16 October 2014, the Spam Reporting Centre received 58 submissions. These submissions reflected three distinct email campaigns:
  - 35 CEMs sent on 7 and 16 July 2014: four violations of the Act
  - 15 CEMs sent on 22 September 2014: three violations of the Act
  - 8 CEMs sent on 15 October 2014: three violations of the Act
22. In his representations, Mr. Rapanos did not challenge the designated person's conclusions with respect to the violations of paragraphs 6(2)(a), 6(2)(b), and 6(2)(c) of the Act. The Commission has reviewed the content of the 58 submissions, which included CEMs such as the one noted in paragraph 11 above, and determines that they do not contain the prescribed sender identification and contact information, and, in the case of the CEMs associated with the first campaign, do not provide the required unsubscribe mechanism.
23. The Commission has also reviewed the investigation report, which included two signed statements from individuals. They both attested to receiving CEMs on 22 September 2014 (the date of the second campaign) that advertised flyer distribution services at business email addresses managed solely by them, and confirmed that they had never consented to receiving CEMs from the sender.
24. In addition, some of the individuals who made submissions to the Spam Reporting Centre provided additional comments that indicated that the CEMs were considered spam or were sent without consent. For example, one individual who received a CEM on 7 July 2014 (the date of the first campaign) stated, "I have never done business with nor have I consent [*sic*] to the email below." Another individual who received a CEM on 15 October 2014 (the date of the third campaign) similarly confirmed that they had no business relationship with the sender and believed that no exemption would apply.
25. The comments submitted to the Spam Reporting Centre and the signed statements support the designated person's conclusion that the CEMs were sent without consent in all three campaigns.
26. The suggestions that Mr. Rapanos was potentially the victim of identity theft or that someone unknown to him accessed his unsecured home Internet connection are not

persuasive, since they were not supported by any other indicators of fraud or of evidence that his identity had otherwise been used for malicious purposes. Neither Mr. Rapanos, nor any of the other individuals who were asked to do so through notices to produce, provided to the investigator any documentation to support the claim that boarders had resided in Mr. Rapanos' house or accessed his Internet connection.

27. Mr. Rapanos stated that the investigator's conclusion that he had sent the CEMs in question appears to rely on the fact that the four websites cited in the CEMs and the fifth site to which they all redirected, <http://firstunitedpartners.com>, all used the same domain protection service to block their registration information. He provided his understanding that this service is a default service offered to all customers for one year free upon registering or renewing a website to help prevent identity theft. Mr. Rapanos did not clearly state how this demonstrated that he was not the owner of the websites, or by extension the sender of the CEMs, though it does establish that having the same domain privacy service on all five websites does not indicate that the same individual registered or owns the websites, which the investigator argued.
28. However, the other evidence of the telephone numbers found on the server logs indicate that the website was registered to Mr. Rapanos. Similarly, the IP addresses found on the access connections to manage the website were confirmed by Bell Canada as being registered to Mr. Rapanos' residence.
29. It is highly improbable, given the evidence on the record, that Mr. Rapanos was the victim of an identity theft orchestrated solely for the purpose of sending unsolicited CEMs advertising a flyer distribution business.
30. With regard to Mr. Rapanos' claim that this case was not proven beyond a reasonable doubt and is a violation of his Charter rights, such a level of proof is not required under the Act.<sup>3</sup> The designated person must have reasonable grounds to believe that the violations were committed by the person or entity named in the notice of violation in order to issue such a notice. If that person or entity applies to the Commission for a review, the Commission reviews the designated person's materials, namely the notice of violation, the investigation report, and the evidence that underpins them, in order to determine whether they are sufficient to establish on a balance of probabilities that the violations occurred. If they are sufficient, the Commission considers whether the representations of the person seeking the review call the designated person's evidence into question or raise and substantiate a defence.
31. In the present case, on a balance of probabilities, the Commission finds that Mr. Rapanos committed the 10 violations set out in the notice of violation. The evidence establishes that the CEMs at issue were sent without consent, did not conform to the prescribed requirements respecting sender identification or contact information and, in the case of messages from one campaign, did not conform to the

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<sup>3</sup> In general, the Charter right to be presumed innocent until proven guilty beyond a reasonable doubt does not apply to CASL proceedings, since they are not criminal proceedings.

unsubscribe requirements. Further, the evidence establishes that the CEMs originated from Mr. Rapanos' home Internet connection. Given that Mr. Rapanos did not raise a credible challenge to this evidence, the Commission finds that he sent the messages in question.

**Is the amount of the AMP appropriate?**

32. The notice of violation set out an AMP of \$15,000.
33. Subsection 20(3) of the Act sets out the following factors, which must be taken into consideration when determining the amount of an AMP:
  - (a) the purpose of the penalty (which is to promote compliance and not to punish);
  - (b) the nature and scope of the violation;
  - (c) the person's previous history with respect to any previous violation under the Act, or any previous contravention of section 74.011 of the *Competition Act* or any previous contravention of section 5 of the *Personal Information Protection and Electronic Documents Act*;
  - (d) the person's history with respect to any previous undertaking entered into under section 21(1) of the Act, and any previous consent agreement signed under section 74.12(1) of the *Competition Act* relating to conduct reviewable under section 74.011 of that Act;
  - (e) any financial benefit that the person obtained from the commission of the violation;
  - (f) the person's ability to pay the penalty;
  - (g) whether the person has voluntarily paid compensation to a person affected by the violation;
  - (h) the factors established by the regulations; and
  - (i) any other relevant factor.
34. Mr. Rapanos had no history of violations or undertakings under the relevant acts. There was no information on the record of the proceeding to indicate that he had paid compensation to any persons affected by the violations, and there are no applicable additional factors established by the regulations.
35. The investigation report considered the factors listed above and identified the following as particularly relevant to the determination of the AMP amount:

- that compliance with the Act can be promoted through the general deterrence associated with the AMP;
  - that the non-compliant conduct spanned three separate campaigns over several months;
  - that Mr. Rapanos ability to pay could not be assessed because he did not provide financial information as required; and
  - that a fourth campaign occurred during the course of the investigation, suggesting a lower likelihood of self-correction.
36. Mr. Rapanos objected to the amount of the AMP, which he stated he could never afford to pay because he has never been employed for any significant amount of time due to health issues. The Commission has taken into account Mr. Rapanos' representations concerning the amount of the AMP to the greatest extent possible; however, without supporting financial documentation having been submitted by Mr. Rapanos, these submissions were generally not of great assistance in determining an appropriate AMP.
37. In the analysis that follows, the Commission will assess each of the prescribed factors to the extent that the record before it allows.

#### **The purpose of the penalty**

38. The purpose of the penalty is to promote compliance and not to punish. The quantum of the AMP must therefore be commensurate with the nature of the non-compliance and must serve as a deterrent for future non-compliance. The investigation report took the purpose of the penalty into account and concluded that, in this case, compliance could be promoted through general deterrence and that the proposed AMP was not disproportionate to the non-compliance observed.
39. In the case of Mr. Rapanos, the proposed AMP is equivalent to \$1,500 per violation and is well below the maximum allowable penalty of \$1,000,000 per violation.
40. The Commission considers that the proposed AMP is large enough to promote a change in behaviour in Mr. Rapanos; however, it is not of an order of magnitude that would preclude him from continuing to market services online in a manner that conforms with the Act.

#### **The nature and scope of the violations**

41. Between 8 July and 16 October 2014, the Spam Reporting Centre received 58 submissions. These submissions reflected three distinct campaigns:
- 35 CEMs sent on 7 and 16 July 2014, sent without the consent of the recipients, missing the required identification and contact information, and failing to set out an unsubscribe mechanism.

- 15 CEMs sent on 22 September 2014, sent without the consent of the recipients and missing the required identification and contact information.
  - 8 CEMs sent on 15 October 2014, sent without the consent of the recipients and missing the required identification and contact information.
42. In its assessment of the facts under review, the Commission determined above that multiple violations occurred in each campaign. The Commission considers that the volume of submissions is indicative of a problem that caused disruption to the recipients.
43. Canadians have a reasonable expectation that they will not receive unsolicited CEMs that lack prescribed information. The violations described above, many of which were repeated on multiple occasions, exhibited a disregard for four core elements of the Act. This suggests that Mr. Rapanos was indifferent as to whether his marketing activities were undertaken in compliance with the Act and to the nuisance they posed to Canadians. The Commission therefore considers that the imposition of the proposed AMP of \$15,000 is appropriate, given the nature and scope of Mr. Rapanos' non-compliance.

#### **Ability to pay**

44. In Compliance and Enforcement Regulatory Policy 2015-109, the Commission stated that when applying for a review of a notice of violation, it is insufficient for a party to claim the inability to pay an AMP without providing detailed documentation to support that claim.
45. While this guidance was provided in the context of notice of violation proceedings under the Voter Contact Registry, the Commission considers that, consistent with past practice, it would be appropriate to apply these general principles in the present case as well.<sup>4</sup>
46. The investigation report noted multiple attempts to obtain evidence that would have allowed for the evaluation of Mr. Rapanos' financial standing. For instance, both the notice to produce issued to Mr. Rapanos under section 17 of the Act and the notice of violation served upon him indicated that he was to provide supporting documentation regarding his financial position. Mr. Rapanos did not provide relevant information in response to any of these requests, even when required to do so under the Act.
47. Rather, in his representations filed in response to the notice of violation, Mr. Rapanos simply asserted that the AMP was too high because he is in a difficult financial situation and could not afford to pay an AMP of any amount. Mr. Rapanos stated that he has never had a career due to health issues and that he and his wife subsist solely on social assistance.

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<sup>4</sup> The Commission previously applied this guidance in the context of the review of a notice of violation issued under CASL in Compliance and Enforcement Decision 2016-428.

48. The Commission cannot fully assess Mr. Rapanos' claim regarding his inability to pay since he provided no documentation or other evidence that would enable the Commission to confirm or evaluate this claim. The Commission has therefore given it little weight. Under these circumstances, the Commission is unable to conclude that an AMP of \$15,000 would be inappropriate by reason of being beyond Mr. Rapanos' ability to pay.

#### **Other relevant factors**

49. The investigation report identified two other considerations in addition to those prescribed by the Act: a lack of cooperation with respect to a notice to produce and a lack of any indicators of self-correction. The Commission considers that both of these factors are relevant to the determination of the amount of an AMP where they are present.
50. The investigation report cited several alleged instances of non-cooperation. Primarily, it noted that Mr. Rapanos' response to the notice to produce was incomplete because it failed to provide certain required documents and data but offered no explanation for this failure. It also noted that Mr. Rapanos tried to prevent the investigator from speaking with his wife, who had also received a notice to produce, as well as with the owner of the house in which he resides.
51. While Mr. Rapanos did respond to the notice to produce, the Commission considers that the production of information on Mr. Rapanos' part was incomplete. Specifically, despite the multiple opportunities he was afforded to do so, Mr. Rapanos did not fully cooperate with respect to the provision of relevant evidence regarding his ability to pay. This left the Commission unable to assess this prescribed factor and, consequently, impeded the administration of the Act.
52. With respect to the indicators of self-correction, Mr. Rapanos stated that he has taken steps to prevent future violations by securing his network and putting passwords on his home computers. He stated that no further violations would occur following this action on his part. However, no evidence beyond these assertions was provided to demonstrate these efforts. Further, since the Commission has determined that Mr. Rapanos sent the CEMs in question, it is unclear how his efforts would ensure future compliance with the Act.
53. The investigation report also stated that Mr. Rapanos was first made aware of the investigation on 8 June 2015, following the first issuance of a notice to produce to a person residing at his address. Between that date and 23 July 2015, the Commission received six additional complaints relating to flyer printing and distribution CEMs that appeared to have been sent by Mr. Rapanos.
54. While the submissions to the Spam Reporting Centre related to the campaigns in question appear to have ceased as of 23 July 2015, the Commission finds that Mr. Rapanos' continued denial of his involvement diminishes his likelihood of

self-correction should he resume his commercial online marketing campaigns in the future.

55. Accordingly, the factors of non-cooperation and likelihood of self-correction are relevant in the circumstances. The Commission considers that there is sufficient evidence of non-cooperation to justify the imposition of the AMP that was initially set out in the notice of violation. Similarly, the Commission further considers that self-correction and future compliance with the Act is unlikely because Mr. Rapanos did not clearly specify how this would occur. As such, the Commission finds that the AMP amount is appropriate to promote compliance in these circumstances.

## **Conclusion**

56. As stated in the Act, the purpose of a penalty is to promote compliance with the Act and not to punish. Having taken the investigation report and Mr. Rapanos' representations into consideration in its review of the prescribed factors, and for the reasons set out above, the Commission finds, on a balance of probabilities, that Mr. Rapanos committed the 10 violations set out in the notice of violation, and imposes a total penalty of \$15,000.
57. The Commission considers that a total penalty of \$15,000 is proportionate to the circumstances of the case, and is reasonable and necessary to promote compliance with the Act.
58. The Commission hereby notifies Mr. Rapanos of his right to appeal this decision by bringing an appeal in the Federal Court of Appeal within 30 days after having been served with a copy of this decision. An appeal on a question of fact may be brought only with the leave of the Federal Court of Appeal, an application for which must be made within 30 days after having been served this decision.
59. The amount of \$15,000 is due by **10 April 2017** and is to be paid in accordance with the instructions contained in the notice of violation. For any amount owing that is not paid by **10 April 2017**, interest calculated and compounded monthly at the average bank rate plus 3% will be payable on that amount and will accrue during the period beginning on the due date and ending on the day before the date on which payment is received.
60. If payment has not been received within **30 days** of the date of this decision, the Commission intends to take measures to collect the amount owing, which may include certifying the unpaid amount and registering the certificate with the Federal Court.

Secretary General

## **Related documents**

- *Blackstone Learning Corp. – Violations of Canada’s Anti-Spam Legislation*, Compliance and Enforcement Decision CRTC 2016-428, 26 October 2016
- *Administrative monetary penalties under the Voter Contact Registry*, Compliance and Enforcement Regulatory Policy CRTC 2015-109, 27 March 2015