



## Telecom Regulatory Policy CRTC 2012-183

PDF version

Route reference: Telecom Notice of Consultation 2011-400, as amended

Ottawa, 28 March 2012

### Electronic Commerce Protection Regulations (CRTC)

File number: 8665-C12-201109851

*The Commission announces that, following a public process, it has made the Electronic Commerce Protection Regulations (CRTC) (the Regulations) set out in the Appendix to this decision. The Regulations prescribe the form and certain information to be included in commercial electronic messages (CEMs), and requests for consent with respect to the sending of CEMs, the alteration of transmission data in electronic messages, and the installation of computer programs. The Regulations are made pursuant to legislation which gives the Commission the power to regulate certain forms of electronic contact. The Regulations will come into force on the day on which sections 6 to 11 and subsection 64(2) of the Act<sup>1</sup> come into force.*

*The Regulations will be published in the Canada Gazette, Part II, Vol. 146, No. 7 on 28 March 2012.*

#### Introduction

1. On 15 December 2010, royal assent was given to *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*, S.C. 2010, c. 23 (the Act).
2. The Act gives the Commission the authority to regulate certain forms of electronic contact consisting of the sending of commercial electronic messages (CEMs), the alteration of transmission data in electronic messages, and the installation of computer programs on another person's computer system, in the course of a commercial activity. The fundamental underlying principle is that such activities can only be carried out with consent.

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<sup>1</sup> *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*, S.C. 2010, c. 23 (the Act).

3. Under subsection 64(2) of the Act, the Commission may make regulations, among other things, prescribing the form and certain information to be included in CEMs, and requests for consent with respect to the sending of CEMs, the alteration of transmission data in electronic messages, and the installation of computer programs.
4. In Telecom Notice of Consultation 2011-400, the Commission called for comments on draft regulations<sup>2</sup> with respect to the form and certain information to be included in CEMs, and with respect to requests for consent for the sending of CEMs, the alteration of transmission data in electronic messages, and the installation of computer programs.

### **Comments on the draft regulations**

5. The Commission received comments in response to Telecom Notice of Consultation 2011-400 from approximately 60 associations, companies, and organizations, as well as from 10 individuals. The public record of this proceeding, which closed on 7 September 2011, is available on the Commission's website at [www.crtc.gc.ca](http://www.crtc.gc.ca) under "Public Proceedings" or by using the file number provided above.
6. The major issues identified by parties during this proceeding are set out below.

### **Information to be included in a CEM**

7. Many parties submitted that subsection 2(1) of the draft regulations, which addressed the information to be included in CEMs, was unduly onerous. More specifically, parties argued that the draft provision prescribed too much contact information, which would be confusing to consumers and burdensome, both financially and otherwise, on businesses. Further, parties submitted that the requirements would be particularly onerous for small and Internet businesses, which may not have all the forms of requisite contact information and channels of communication required by the draft regulations. Parties also argued that the extent of the contact information contemplated by the draft regulations for CEMs was unnecessary.
8. Only one party submitted that the full suite of contact information contemplated by the draft regulations for CEMs was not onerous and, hence, should be maintained.
9. Several parties submitted that subsection 2(2) of the draft regulations pertaining to the manner in which the information contemplated by subsection 2(1) of the draft regulations may be accessed on certain devices was impracticable and not sufficiently technology neutral, noting, among other things, that many devices do not operate with 'clicks.' In addition, many devices do not have the web browsing capability contemplated by the draft regulations, which would result in users not having the means of accessing the information on those particular devices.

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<sup>2</sup> A copy of the draft regulations can be found in the Appendix of Telecom Notice of Consultation 2011-400.

10. Only one party submitted that the one-click requirement set out in subsection 2(2) of the draft regulations should be maintained and that the information should be accessible with minimal consumer effort. This party suggested that a toll-free number could be added as an alternative to a link to a website and that the method of equivalent efficiency would be access to a live agent or dedicated voice mail.

#### **Form of electronic message (unsubscribe mechanism)**

11. Many parties submitted that the two-click requirement in the unsubscribe mechanism contemplated in subsection 3(2) of the draft regulations is not sufficiently technology neutral. These parties submitted that many devices and platforms do not operate with clicks, not all communication devices or mediums are web-enabled, and mobile devices frequently do not have a mouse or trackpad that allow for clicking on a link.
12. Several parties submitted that the two-click requirement in the unsubscribe mechanism is unduly prescriptive and that it could preclude reasonable and widely used industry practices (such as user authentication or signing oneself in), as well as review and selection by the consumer of additional options or preferences related to the unsubscribe request. Parties also submitted that it was not clear when the 'clicks' began.
13. Only one party submitted that the Commission should retain the two-click requirement contemplated by subsection 3(2) of the draft regulations.
14. Some parties submitted that the regulations should require that the unsubscribe mechanism be accessible to recipients of CEMs at no cost and include a prohibition on charging a fee to unsubscribe.

#### **Information to be included in a request for consent**

15. Parties submitted that the requirement to obtain consent in writing, as contemplated in section 4 of the draft regulations, was unduly onerous, and that oral consent should be permitted. Parties submitted that the inclusion of oral consent would be consistent with the *Personal Information Protection and Electronic Documents Act* and the Commission's Unsolicited Telecommunications Rules. Parties also submitted that the exclusion of oral consent would be inconsistent with widely used and accepted business practices (e.g. call centres and point of sale purchases) and would impose additional costs and burdens on businesses and result in consumer inconvenience.
16. Many parties submitted that section 4 of the draft regulations prescribed an unwarranted amount of contact information, generally relying on the same arguments they used with respect to the subsection 2(2) requirements.
17. Several parties submitted that the requirement to obtain a separate consent for each act described in sections 6 to 8 of the Act, as contemplated in section 4 of the draft regulations, was unreasonable and an unnecessary burden on the sender and the

recipient. Parties submitted that consent should be applicable to more than one of the activities captured by sections 6 to 8 of the Act, and that a single consent should be allowed with respect to these activities.

### **Specified functions of invasive computer programs**

18. Several parties submitted that the requirement contemplated by section 5 of the draft regulations that the material elements of computer programs that perform certain functions identified in the Act be identified separately from the request for consent, and that the person seeking consent obtain a written acknowledgement with respect to these functions, is excessive, unclear, and not practicable.

### **Commission's analysis and decisions**

19. As a preliminary matter, the Commission notes that certain parties questioned the Commission's legal authority to make one or more of the regulations that are the subject of this decision. The Commission is of the view that the Act confers on the Commission the necessary jurisdiction to make the regulations that are the subject of this decision.

### **Information to be included in a CEM**

20. The Commission notes the submissions of those parties who submitted that section 2 of the draft regulations contemplates the prescription of too much contact information. The Commission is of the view that the purpose of the regulation, which is to ensure that sufficient information is made available to allow recipients to contact senders, can be achieved with less prescribed contact information. Specifically, the Commission is persuaded that the requirement to include only the mailing address, instead of both physical and mailing addresses, together with only one of the types of contact information contemplated by the regulation, is sufficient. Accordingly, the Commission has revised subsection 2(1) of the proposed Regulations by reducing the amount of prescribed contact information.
21. The Commission also notes the submissions of those parties who submitted that the mechanism to access the contact information of the sender of the CEM is not sufficiently technology neutral. The Commission is of the view that more technology neutral wording is appropriate to accommodate the different technology platforms available currently and in the future. Accordingly, the Commission has revised subsection 2(2) of the proposed Regulations by including more technology neutral language.

### **Form of electronic message (unsubscribe mechanism)**

22. Consistent with its view with respect to subsection 2(2), and for the same reasons, the Commission accepts the submissions of those parties that the two-click requirement contemplated in subsection 3(2) of the draft regulations is not

sufficiently technology neutral and is unduly prescriptive. Accordingly, the Commission has revised subsection 3(2) of the proposed Regulations by including more technology neutral and less prescriptive language.

23. In creating an unsubscribe mechanism that is less prescriptive and more technology neutral, the Commission was also mindful of the requirement that the mechanism should be consumer-friendly. In adopting the language ‘readily performed,’ the Commission expects that any unsubscribe mechanism should be accessed without difficulty or delay, and should be simple, quick, and easy for the consumer to use.
24. The Commission also notes the submissions of parties that the unsubscribe mechanism in section 3 of the draft regulations should be accessible to the recipient of the CEM at no cost and/or that a fee should not be charged as a condition for unsubscribing. The Commission notes that this issue is addressed in subsection 11(1) of the Act which provides that the unsubscribe mechanism must enable the person to whom the CEM is sent to indicate, at no cost to them, that they wish to no longer receive CEMs.

#### **Information to be included in a request for consent**

25. The Commission accepts the submissions of those parties that oral consent should be permitted as a mechanism to obtain consent. The Commission notes that oral consent is a commonly used and accepted industry practice (e.g. call centres, personal and direct contact, and point of sale purchases) and is persuaded that reliance solely on written consent could result in additional costs for businesses and consumer frustration. Further, the Commission notes that the *Personal Information Protection and Electronic Documents Act* and its Unsolicited Telecommunications Rules provide for oral consent. The Commission also notes that obtaining consent ‘in writing’ includes electronic forms. Accordingly, the Commission has revised section 4 of the proposed Regulations so that a request for consent, for the purposes of subsections 10(1) and (3) of the Act, may be obtained either orally or in writing.
26. The Commission notes the submissions of parties that section 4 of the draft regulations prescribes too much contact information. Consistent with its view regarding the changes made to section 2, and essentially for the same reasons, the Commission is of the view that the objective of the regulation can be achieved with less required contact information. Accordingly, the Commission has revised section 4 of the proposed Regulations by reducing the amount of requisite contact information.
27. With respect to the submissions that obtaining a separate consent for each act described in sections 6 to 8 of the Act is unnecessary and unreasonable, the Commission considers that the activities captured by each of these sections of the Act are distinct. In the Commission’s view, the harm that could potentially result from these activities is significant. The Commission considers that consumers should be given the benefit of having their consent sought on a separate basis so that they are in a position to make an informed decision as to whether to consent. Accordingly, the Commission is of the view that it is reasonable and appropriate to retain the

requirement in section 4 of the proposed Regulations, that for the purposes of subsections 10(1) and (3) of the Act, a request for consent must be sought separately for each act described in sections 6 to 8 of the Act.

### **Specified functions of invasive computer programs**

28. With respect to parties' submissions that the requirements contemplated by section 5 of the draft regulations are excessive, unclear, and not practicable, the Commission is of the view that the invasive nature of the computer programs in question warrant the requirement to identify the material elements of the computer programs separately from the request for consent and to seek written acknowledgement of the programs' functions. Accordingly, the Commission is not persuaded that it would be appropriate to amend the requirement contemplated in section 5 of the proposed Regulations.

### **Conclusion**

29. In light of the above, the Commission has **made** the *Electronic Commerce Protection Regulations (CRTC)* (the Regulations). The Regulations were registered on 7 March 2012 and published in the *Canada Gazette*, Part II, Vol. 146, No. 7 on 28 March 2012 (SOR/2012-36). A copy of the Regulations is attached to this decision.

Secretary General

### **Related document**

- *Call for comments on draft Electronic Commerce Protection Regulations (CRTC)*, Telecom Notice of Consultation CRTC 2011-400, 30 June 2011, as amended by Telecom Notice of Consultation CRTC 2011-400-1, 15 August 2011

## **Appendix to Telecom Regulatory Policy CRTC 2012-183**

### **ELECTRONIC COMMERCE PROTECTION REGULATIONS (CRTC)**

#### **DEFINITION**

1. In these Regulations, “Act” means *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.*

#### **INFORMATION TO BE INCLUDED IN COMMERCIAL ELECTRONIC MESSAGES**

2. (1) For the purposes of subsection 6(2) of the Act, the following information must be set out in any commercial electronic message:
  - (a) the name by which the person sending the message carries on business, if different from their name, if not, the name of the person;
  - (b) if the message is sent on behalf of another person, the name by which the person on whose behalf the message is sent carries on business, if different from their name, if not, the name of the person on whose behalf the message is sent;
  - (c) if the message is sent on behalf of another person, a statement indicating which person is sending the message and which person on whose behalf the message is sent; and
  - (d) the mailing address, and either a telephone number providing access to an agent or a voice messaging system, an email address or a web address of the person sending the message or, if different, the person on whose behalf the message is sent.
- (2) If it is not practicable to include the information referred to in subsection (1) and the unsubscribe mechanism referred to in paragraph 6(2)(c) of the Act in a commercial electronic message, that information may be posted on a page on the World Wide Web that is readily accessible by the person to whom the message is sent at no cost to them by means of a link that is clearly and prominently set out in the message.

#### **FORM OF COMMERCIAL ELECTRONIC MESSAGES**

3. (1) The information referred to in section 2 and the unsubscribe mechanism referred to in paragraph 6(2)(c) of the Act must be set out clearly and prominently.
- (2) The unsubscribe mechanism referred to in paragraph 6(2)(c) of the Act must be able to be readily performed.

## INFORMATION TO BE INCLUDED IN A REQUEST FOR CONSENT

4. For the purposes of subsections 10(1) and (3) of the Act, a request for consent may be obtained orally or in writing and must be sought separately for each act described in sections 6 to 8 of the Act and must include
  - (a) the name by which the person seeking consent carries on business, if different from their name, if not, the name of the person seeking consent;
  - (b) if the consent is sought on behalf of another person, the name by which the person on whose behalf consent is sought carries on business, if different from their name, if not, the name of the person on whose behalf consent is sought;
  - (c) if consent is sought on behalf of another person, a statement indicating which person is seeking consent and which person on whose behalf consent is sought; and
  - (d) the mailing address, and either a telephone number providing access to an agent or a voice messaging system, an email address or a web address of the person seeking consent or, if different, the person on whose behalf consent is sought; and
  - (e) a statement indicating that the person whose consent is sought can withdraw their consent.

## SPECIFIED FUNCTIONS OF COMPUTER PROGRAMS

5. A computer program's material elements that perform one or more of the functions listed in subsection 10(5) of the Act must be brought to the attention of the person from whom consent is being sought separately from any other information provided in a request for consent and the person seeking consent must obtain an acknowledgement in writing from the person from whom consent is being sought that they understand and agree that the program performs the specified functions.

## COMING INTO FORCE

6. These Regulations come into force on the day on which sections 6 to 11 and subsection 64(2) 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*, chapter 23 of the Statutes of Canada, 2010, come into force, but if they are registered after that day, they come into force on the day on which they are registered.