



## Compliance and Enforcement Decision CRTC 2018-382

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Ottawa, 1 October 2018

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### **National Foods Ltd. – Violations of the Unsolicited Telecommunications Rules**

*The Commission imposes total administrative monetary penalties of \$25,000 on National Foods Ltd. for initiating telemarketing telecommunications to consumers whose telecommunications numbers were registered on the National Do Not Call List (DNCL), and for doing so while it was not registered with the National DNCL operator and was not a registered subscriber of the National DNCL, in violation of the Unsolicited Telecommunications Rules.*

#### **Introduction**

1. From 30 to 31 March 2015, the Commission received complaints in relation to telemarketing telecommunications that appeared to have been initiated by National Foods Ltd. (National Foods).
2. These complaints were investigated and, on 30 March 2017, a notice of violation was issued to National Foods pursuant to section 72.07 of the *Telecommunications Act* (the Act).<sup>1</sup> The notice informed National Foods that it had initiated 101 telemarketing telecommunications resulting in
  - 101 violations of Part II, section 4 of the Commission's Unsolicited Telecommunications Rules (the Rules)<sup>2</sup> for initiating telemarketing telecommunications to consumers whose numbers were registered on the National Do Not Call List (DNCL);
  - 101 violations of Part II, section 6 of the Rules<sup>3</sup> for initiating telemarketing telecommunications while not being a registered subscriber of the National DNCL and not paying the applicable fees to the National DNCL operator; and

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<sup>1</sup> Subsection 72.07(1) of the Act states that a person authorized to issue notices of violation who believes on reasonable grounds that a person has committed a violation may issue, and shall cause to be served on that person, a notice of violation.

<sup>2</sup> Part II, section 4 of the Rules states that a telemarketer shall not initiate, and a client of a telemarketer shall make all reasonable efforts to ensure that the telemarketer does not initiate, a telemarketing telecommunication to a consumer's telecommunications number that is on the National DNCL, unless express consent has been provided by such consumer to be contacted via a telemarketing telecommunication by that telemarketer or the client of that telemarketer.

<sup>3</sup> Part II, section 6 of the Rules states that a telemarketer shall not initiate a telemarketing telecommunication on its own behalf unless it is a registered subscriber of the National DNCL and has paid all applicable fees to the National DNCL operator.

- 101 violations of Part III, section 2 of the Rules<sup>4</sup> for initiating telemarketing telecommunications without having registered with, and without having provided information to, the National DNCL operator.
3. The notice of violation set out administrative monetary penalties (AMPs) for 303 violations at \$82.51 per violation, proposing a total penalty amount of \$25,000.<sup>5</sup>
  4. National Foods was given until 30 April 2017 to pay the total AMP amount set out in the notice of violation or to make representations to the Commission regarding the violations. The company did not respond to the notice of violation.

### **Did National Foods commit the violations?**

5. National Foods neither paid the AMP nor made representations in accordance with the notice of violation. Accordingly, pursuant to subsection 72.08(3) of the Act,<sup>6</sup> National Foods is deemed to have committed the violations outlined in the notice of violation dated 30 March 2017, and the Commission may impose the penalty.

### **Is the total amount of the AMP reasonable?**

6. The purpose of a penalty is to promote compliance, not to punish. The Commission has previously stated that the appropriate factors to be considered in determining the amount of an AMP for violations of the Rules include the nature of the violations, the number and frequency of complaints and violations, the potential for future violations, the person's ability to pay the penalty, and the relative disincentive of the measure.<sup>7</sup>
7. The making of unsolicited telemarketing telecommunications by a telemarketer to consumers whose numbers are registered on the National DNCL is a serious violation that causes significant inconvenience and nuisance to consumers, and violates the expectation of consumers expressed through their registrations on the National DNCL that they will receive fewer unsolicited telemarketing calls. Likewise, National Foods' failure to purchase a subscription to the National DNCL or register with the National DNCL operator reflects significant breaches of the Rules. Registering and subscribing are two of the core responsibilities of telemarketers under the National

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<sup>4</sup> Part III, section 2 of the Rules states that a telemarketer shall not initiate a telemarketing telecommunication on its own behalf unless it has registered with, and provided information to, the National DNCL operator, and has paid all applicable fees charged by the Complaints Investigator delegate.

<sup>5</sup> 303 multiplied by \$82.51 is \$25,000.53. The notice of violation rounded the proposed total AMP amount down to \$25,000.00.

<sup>6</sup> Subsection 72.08(3) of the Act states that a person who neither pays the penalty nor makes representations in accordance with the notice is deemed to have committed the violation and the Commission may impose the penalty.

<sup>7</sup> In Telecom Decision 2007-48, the Commission identified four factors: the nature of the violations, the number and frequency of complaints and violations, the relative disincentive of the measure, and the potential for future violations. In Compliance and Enforcement Regulatory Policy 2015-109, the Commission further identified ability to pay as a factor to be considered in determining the amount of an AMP.

DNCL regime, and engaging in unsolicited telemarketing without a subscription increases the likelihood that unwanted calls will be made to consumers whose numbers are registered on the National DNCL.

8. Call records and other information obtained from National Foods during the investigation confirm that the company was routinely engaged in telemarketing activity and placed many calls.
9. National Foods was uncooperative with the investigation. The company failed to respond to two request for information (RFI) letters issued during the investigation and provided incomplete or inaccurate responses to two other RFI letters, including denying that it engaged in any telemarketing activity. Call records later obtained from the company demonstrated that this claim was not true, and the company's director later admitted to investigators that it was not true.
10. National Foods also demonstrated no efforts toward self-correction. The company received a citation in 2012 for previous contraventions of the same sections of the Rules. Additionally, each of the RFI letters sent to the company during the investigation included Internet links to the Rules, and to a webpage providing information about the registration and subscription process. Despite this, National Foods never registered with the National DNCL operator or purchased a subscription. By failing to cooperate with or change its behaviour in response to the investigation or the citation, National Foods has demonstrated that simple warnings will not result in a change in its behaviour. There is a significant potential for future violations, which justifies the imposition of a monetary penalty.
11. Regarding ability to pay, investigators did not require National Foods to produce financial information during the course of the investigation. National Foods had an opportunity to produce financial information in representations to the Commission, but did not file representations.
12. In Compliance and Enforcement Regulatory Policy 2015-109, the Commission noted that analysis of this factor was not limited to direct financial information, and could proceed based on other indicia of a company's revenue-generating capabilities, including the size of a business, the scope of its operations, and the number of people it employs. An interview between investigators and the director of National Foods during the investigation revealed that the company has operated locally in the Greater Toronto Area since 2007, and employs a small number of employees. Based on the limited information available, the Commission considers that the proposed penalty would not exceed National Foods' ability to pay.
13. Regarding the relative disincentive of the measure, the Commission must strive to ensure that the AMPs it imposes serve as an incentive to comply with the Rules, and that they are not so low as to be financially advantageous for a telemarketer or a client of a telemarketer to pay the amount as a cost of doing business. In light of the above considerations, as well as the subscription fees that National Foods avoided paying to the National DNCL operator during the relevant period, the Commission considers that the total penalty amount of \$25,000 is reasonable and necessary to promote compliance with the Rules.

## Conclusions

14. Pursuant to subsection 72.08(3) of the Act, National Foods is deemed to have committed the 303 violations of the Rules set out in the notice of violation.
15. In the circumstances of this case, the penalty amount proposed in the notice of violation is appropriate. The Commission therefore imposes a total AMP of \$25,000 on National Foods.
16. The Commission hereby notifies National Foods of its right to apply to the Commission to review and rescind or vary this decision under section 62 of the Act, and to seek leave of the Federal Court of Appeal to appeal this decision before that court under section 64 of the Act. Any review and vary application under section 62 of the Act must be made within 90 days of the date of this decision, and the Commission will place all related documentation on its website.<sup>8</sup> In accordance with section 64 of the Act, an application for leave to appeal must be made to the Federal Court of Appeal within 30 days of the date of this decision or within such further time as a judge of the Court grants in exceptional circumstances.
17. The Commission reminds National Foods that, should it initiate telemarketing telecommunications in the future, it is required to comply with the Rules. Examples of measures that National Foods should adopt to ensure compliance with the Rules include the following:
  - registering with the National DNCL operator;
  - subscribing to the National DNCL;
  - downloading the National DNCL at least once every 31 days prior to the date of a telemarketing telecommunication; and
  - establishing and implementing adequate written policies and procedures to comply with the Rules, which include documenting a process to (i) prevent the initiation of telemarketing telecommunications to any telecommunications number that has been registered for more than 31 days on the National DNCL, and (ii) honour consumers' requests that they not be contacted by way of telemarketing telecommunications.
18. The Commission advises National Foods that to ensure compliance with the Rules, the Commission may impose larger AMPs for subsequent violations.
19. The amount of \$25,000 is due by **1 November 2018** 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 **1 November 2018**, interest calculated and compounded monthly at the

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<sup>8</sup> In Telecom Information Bulletin 2011-214, the Commission issued, pursuant to the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure*, revised guidelines for review and vary applications to reflect the modified time limit in which such applications must be made.

average bank rate plus 3% will be payable on the 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.

20. If payment has not been received with 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**

- *Administrative monetary penalties under the Voter Contact Registry*, Compliance and Enforcement Regulatory Policy CRTC 2015-109, 27 March 2015
- *Revised guidelines for review and vary applications*, Telecom Information Bulletin CRTC 2011-214, 25 March 2011
- *Unsolicited Telecommunications Rules framework and the National Do Not Call List*, Telecom Decision CRTC 2007-48, 3 July 2007; as amended by Telecom Decision CRTC 2007-48-1, 19 July 2007