

Bill C-27, The Electronic Commerce Protection Act

Submission to the

Standing Committee on Industry, Science and

Technology



390 Queens Quay Street West, Suite 209
Toronto, ON M5V 3A2

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Advocis 's Brief on the Proposed Electronic Commerce Protection Act

Advocis, the Financial Advisors Association of Canada, welcomes the ability to provide the Standing Committee on Industry, Science and Technology Committee with our comments on the proposed Electronic Commerce Protection Act ("ECPA") or Bill C-27. We support the goals of the ECPA, to boost confidence in the electronic marketplace and protect Canadians from spam. However, we have serious concerns that the proposed legislation will prevent financial advisors from conducting business and that it will capture and prevent legitimate business activities.

Advocis is the country's largest and oldest voluntary professional membership association of financial advisors and planners in Canada. Our association was founded in 1906 as the Life Underwriters Association of Canada. Our over 10,000 members are provincially licensed to sell life and health insurance, mutual funds and other securities, and are primarily owners and operators of their own small businesses who create thousands of jobs across Canada. Many of our members are dually licensed to sell both life and health insurance and mutual funds and other securities.

The financial services industry is heavily regulated. Our members are licensed and regulated by provincial securities commissions, self-regulatory organizations such as the Mutual Fund Dealers Association (MFDA), the Investment Industry Regulatory Organization of Canada (IIROC), as well as by insurance councils and financial services commissions overseeing insurance regulation. Our members also are subject to federal (and in some cases provincial) privacy legislation and the Unsolicited Telecommunications Rules.

Personal communication, whether by telephone, in person or by email (or other electronic means) is an important part of professional financial advisors' business. Advocis is interested in ensuring that the ECPA achieve its objectives. An appropriate balance must be struck between preventing unwanted and harmful spam with its associated economic costs and irritations and encouraging legitimate business activities to occur through electronic commerce. The government must consider the impact of the proposed legislation on legitimate business activity and make certain changes to the proposed legislation to ensure that the correct balance is struck.

To achieve this, Advocis proposed the following changes:

1. Referrals

Advocis strongly recommends that individuals who are licensed by an insurance regulatory body or securities commission should be permitted to pursue referrals by email.

Personal referrals are the foundation upon which professional financial advisors develop their client base. Virtually all professional financial advisors rely on referrals as a way to generate new business and most new business for established advisors comes from referrals. It is through referrals that most consumers are able to identify professionals who are trusted by people they know and deal with.

We believe it is essential that the ECPA should accommodate legitimate personal referrals and permit financial advisors to send individual e-mails to individuals to whom they are referred. This can be done while continuing to protect consumers from "spam."

A personal referral occurs only when there is a bridge of trust between an advisor and an existing client. The existing client ("referrer") believes the financial advisor can help a person he or she knows (the "referee") who needs financial advise.

Ideally the referrer will introduce the referee to the financial advisor in the course of a face-to-face meeting. Or a referrer may telephone or e-mail the financial advisor to tell them about the referee. It is common industry practice for the financial advisor to call or email the referee, to introduce themselves and the services they offer.

Pursuant to the Unsolicited Telecommunications Rules (the "Do Not Call List Regime"), the advisor cannot call a referee who has registered on the National Do Not Call List. An Advocis Best Practice, based on the Do Not Call List Regime, provides that the advisor may send the referee an email or a letter.

However, the proposed ECPA would prohibit contacting the referee by email, in the absence of express consent. As a result, the advisor will have to send a postal letter or attend at the referee's home or place of employment to speak with them in person. Given existing business realities, this is a more time consuming and, therefore, more costly way to do business. Potential clients demand instant communication and access to professionals and the proposed ECPA imposes an unacceptable limiting option given client's expectations. Clients and potential clients will become frustrated.

Financial Literacy

Improving the financial literacy of Canadians has been recognized by the federal government as a priority and, as a result, it has established the Financial Literacy Task Force. Advocis is actively participating in the Task Force. Advocis believes strongly in improving the financial literacy of Canadians. Probably no one spends more time explaining financial planning, products and services, and educating consumers about financial matters, than do financial advisors and planners. However, if it is made more difficult to contact consumers who have been referred to the professional financial advisor, then less financial advice will be provided rather than more. This is an unintended consequence of the ECPA and is contrary to the government's objective of improving the financial literacy of Canadians.

We strongly recommend that individuals who are licensed by an insurance regulatory body or securities commission be permitted to pursue referrals by email. If the referee does not wish to pursue the discussion with the financial advisor, he or she can simply ignore or delete the email, and/or can opt out of receiving any further emails by unsubscribing in accordance with Section 6(2)(c) and Section 11 (1) of the ECPA.

2. Business to Business Exemption

Advocis strongly recommends that a commercial electronic message sent to a business consumer that is not (i) false or misleading; (ii) sent with an "intent to deceive or mislead; (iii) sent in bulk or (iv) sent to addresses that were gathered using "automated means", should be exempt from the requirement to obtain prior consent.

Advocis submits that the existing exception in the ECPA from the requirement to obtain prior consent before sending an email to a business is much too restrictive. Section 6(5)(b) of the ECPA provides as follows: "This section [6] does not apply to a commercial electronic message ... (b) that is sent to a person who is engaged in a commercial activity and consists solely of an *inquiry or application* related to that activity;...".

Section 6(5)(b) would prohibit many types of communications to businesses, that we believe are legitimate means of pursuing business opportunities or activities. For example, a professional organization that offers continuing education courses will not be able to send email solicitations to persons in that profession at their place of business if they are not existing clients or Company A will not be able to email Company B will a proposed business opportunity.

Under the Do Not Call List Regime, the National DNCL Rules do not apply to a telemarketing telecommunication made to a business consumer. We submit that a similar exemption should be provided in the ECPA so that a commercial electronic message sent to a business consumer that is: (i) not false or misleading; (ii) sent with an "intent to deceive or mislead; (iii) sent in bulk or (iv) sent to addresses that were gathered using "automated means" is exempt from the requirement to obtain prior consent. If the business consumer does not wish to receive the email, they can ignore or delete the email or unsubscribe to receiving any further emails in accordance with section 6(2) and Section 11(1) of the ECPA. This is the approach taken in the United States and in the United Kingdom.

In the alternative, if this approach is not adopted, Advocis recommends that implied consent be broadened in the manner suggested in the following section 3.

3. Implied Consent

(a) Implied Consent Needs to be Broader

Advocis recommends that the ECPA be amended to adopt a more broadly worded and more principles-based approach to implied or inferred consent similar to the Australian legislation.

Implied consent under the ECPA is restricted to those with whom the sender has an existing business relationship (section 10(4) of the ECPA) or existing non-business relationship (Section 10(6) of the ECPA). For the business relationship exemption to apply, the individual must have purchased a product, good or service within the last 18 months or have been party to a contract with the sender that has expired within the last 18 months, or have made an inquiry within the last 6 months.

This approach may have been appropriate for the Do Not Call List Regime, which is an *opt-out* regime and which specifically exempts all business-to-business calls. As an opt-out regime, the default under the Do Not Call List Regime is that the telemarketer may call the person unless they have opted out by registering on the Do Not Call List. The ECPA is an opt-in regime where the default is that the commercial electronic message *cannot* be sent unless the person takes the positive step of opting-in to receiving the email. The default is narrow under the ECPA and there is no exemption for business to business emails.

Accordingly, limiting implied consent to an “existing business relationship” in the ECPA is not workable and excludes legitimate communications that reasonably should be permitted.

Advocis recommends that the ECPA be amended to have a more broadly worded and more principles-based approach to implied or inferred consent similar to the Australian legislation. This would permit communications without regard to express time limits, in circumstances where consent can be reasonably inferred.

The Standing Committee has heard evidence from witnesses that the ECPA is based, to a great extent on anti-spam legislation from other countries, such as Australia¹. However, Australia’s consent provision is more broadly worded and less prescriptive than the ECPA. Australia’s consent provision is as follows:

- “For the purposes of this Act, consent means:
- (a) express consent; or
 - (b) consent that can reasonably be inferred from:**
 - i. the conduct; and**
 - ii. the business and other relationships; of the individual or organization concerned.**

The Australian Communications and Media Authority, Australia’s regulator for its *Spam Act 2003*, explains that inferred consent arises through an existing business or other relationship, where there is a reasonable expectation of receiving those commercial electronic messages. Australia’s definition would allow the following emails:

- Company A wants to email its customers who purchased the product more than 18 months ago about a product recall or with warranty related information.
- A financial advisor wishes to email its clients, including those who have not purchased any services or products in the last 18 months, that he or she has moved to a different dealer.
- A financial advisor is required by professional obligation to contact a “dormant” client in response to changing circumstances, or as required by regulation.

This would achieve a similar result to what was achieved under the Do Not Call List Regime through Telecom Circular CRTC 2008-3, which excluded “investment advisors” from the Unsolicited Telecommunications Rules including the Do Not Call List Rules in respect of any telecommunications to existing clients. As stated at paragraph 10 and 11 of Telecom Circular CRTC 2008-3:

“The Commission understands that *the nature of the service of providing investment and/or financial advice requires that the advisor communicate with the existing client on an ongoing basis in response to changing circumstances and that, in some circumstances, communication with an existing client is required by regulation.* For example, an existing client may be called about a change in the market or a change in the status of an investment fund. As such, the

Commission considers that clients would expect to be contacted on an ongoing basis by their investment or financial advisor.” [Italics added]

(b) *Advocis recommends that consent may be inferred from conspicuous publication of an electronic address.*

Advocis submits that consent to send an electronic message should be inferred, where a person who has conspicuously publicized their electronic address on the internet, in print advertising such as a brochure, or in a business directory as is the case in Australia’s and New Zealand’s spam legislation².

In Australia and New Zealand, it is possible to infer consent through conspicuous publication if the following are met:

- The electronic address is published conspicuously – it is accessible to the public, or a section of the public
- The address is not accompanied by a statement that commercial messages are not wanted (non-commercial ads on Craigslist, for example, commonly include such statements);
- The subject matter of your message is related to the role or function of the recipient; and
- There is a link between what the sender is offering or promoting or inquiring about and the recipient’s role or line of business.

In this way, people will be able to send an electronic message to a person that is relevant to that the recipient’s business, functions or duties or their office or position concerned.

4. Express Consent

The ECPA should provide that express consent may be obtained from: ticking a box agreeing to receive email communications; a completed application form signed by the consumer giving consent to be contacted by email; filling in a form agreeing to be contacted by email; and swapping or providing business cards with the email address on the business card.

In addition, if referrals are not exempted from the ECPA, the following should constitute express consent: where the referee (potential new client) indicates to the referrer that he or she can provide the referee’s email address to the financial advisor or real estate agent or other business person so that the financial advisor or other type of business person can contact the referee by email - ie the express consent does not need to be communicated directly between the financial advisor and the referee (potential new client) but can be between the two people who know each other (the referee and referrer).

5. Sale of a Book of Business

Advocis recommends that an email by the financial advisor so as to introduce him or herself to the new set of clients should, in a similar fashion, not be considered a “commercial electronic message” and therefore, not fall within the ambit of the ECPA.

The legislation should be revised to accommodate the situation where a financial advisor sells his or her book of business to another advisor. It is a common practice for the selling advisor to inform the clients about their new advisor, and for the new advisor to introduce themselves, by phone or email, to the new set of clients.

The CRTC has determined under the *Telecommunications Act* that an introductory telecommunication to a consumer to provide information about a transfer of business does not fall under the definition of telemarketing, as no solicitation is involved.

6. The ECPA and the Unsolicited Telecommunications Rules

Should the Government decide in the future to enact the provisions which would abolish the Unsolicited Telecommunications Rules (including the National Do Not Call List Rules) and expand the ECPA to include telephone and fax communications, ***Advocis strongly recommends the Government should***

only do so after consultation with all relevant stakeholders and after considering the full consequences of such a decision given the more restrictive nature of the ECPA. Such a restrictive regime for all forms of communication involving technology could severely hamper business activity and have severely negative economic consequences.

7. Mandated Review of the Legislation

Advocis strongly recommends that given the breadth of the ECPA, there should be an initial mandated review of the legislation after 2 years and, subsequent to this, a mandated 5 year review period as with many other federal statutes.

This will allow the legislation to be reviewed to determine the impact of its provisions, refine those provisions if necessary to deal with unintended consequences or developments in new technologies. The *Telecommunications Act*, S.C. 1993, c.38 had a three year initial mandated review (a review is required as of June 30, 2009). Given the pace of technological change involving the internet, a two year review would be appropriate for the ECPA.

Summary of Recommendations

1. Advocis strongly recommends that individuals who are licensed by an insurance regulatory body or securities commission be permitted to pursue referrals by email.
2. Advocis recommends that a commercial electronic message sent to a business consumer that is not (i) false or misleading; (ii) sent with an "intent to deceive or mislead; (iii) sent in bulk or (iv) sent to addresses that were gathered using "automated means", should be exempt from the requirement to obtain prior consent.
3. If the approach in number 2 above is not adopted, Advocis recommends that implied consent be broadened in the following manner: the ECPA should be amended to have a more broadly worded and more principles-based approach to implied or inferred consent similar to the Australian legislation. Consent should also be inferred from conspicuous publication of an electronic address.
4. The ECPA should provide that express consent can be obtained from a number of actions as described above.
5. Advocis recommends that an email by the financial advisor so as to introduce him or herself to the new set of clients, in a similar fashion to the CRTC's ruling under the *Telecommunications Act*, should not be considered a "commercial electronic message" and therefore, not fall within the ambit of the ECPA.
6. Advocis strongly recommends that should the Government should enact the provisions which repeal the Unsolicited Telecommunications Rules and expand the ECPA to include telephone and fax communications, it do so only after consultation with all relevant stakeholders and after considering the full consequences of such a decision given the more restrictive nature of the ECPA.
7. Advocis strongly recommends that given the breadth of the ECPA, there should be an initial mandated review of the legislation after 2 years and, subsequent to this, a mandated 5 year review period as with many other federal statutes.

Endnotes

¹ New Zealand has similar wording in its Unsolicited Electronic Messages Act 2007. See Appendix A attached hereto.

² Australia and New Zealand's provisions on conspicuous publication of an electronic address are attached hereto at Appendix B.