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September 7, 2011

Bruce Wallace
Director, Electronic Commerce Policy, Electronic Commerce Branch
Department of Industry
Jean Edmonds Tower North
18th Floor, Room 1891D
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Ottawa, ON K1A 0C8
Bruce.Wallace@ic.gc.ca

Dear Mr. Wallace:

**Re: Electronic Commerce Protection Regulations
Request for Comments in *Canada Gazette*, Part I, July 9, 2011**

Advocis, The Financial Advisors Association of Canada, welcomes the opportunity to provide its comments on the proposed Electronic Commerce Protection Regulations (the "Proposed Regulations"). We support the goals of the federal government of boosting confidence in the electronic marketplace and protecting Canadians from spam. However, we have serious concerns that the current Proposed Regulations will not achieve the identified policy outcomes. Rather, they will impose serious barriers for financial advisors pursuing legitimate business activities and frustrate other important federal government policy objects, namely the need for increased financial literacy and the need for Canadians to appropriately plan and prepare for their future financial needs. Neither the Proposed Regulations, nor the Anti-spam Legislation (the "Act"), will stop those bent on abusing electronic communications. The only effective method of dissuading those abusing the existing system is strong, aggressive, enforcement and prosecution. Casting the regulatory net too broadly will not only catch legitimate business activities and saddle already compliant and highly regulated businesses (as is the case for financial advisors who are regulated at both the federal and provincial level), but will add to the cost of doing business without achieving the corresponding identified policy outcome of removing bad actors from the marketplace.

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.

Discussion

The financial services industry is already 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 the professional financial advisors' business. 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 federal government must consider the impact of the Proposed Regulations on legitimate business activity and make certain changes to them to ensure that the correct balance is struck.

Industry Canada identifies the objective of the Act as follows: "to encourage the growth of electronic commerce by ensuring business confidence and consumer trust in the online marketplace." Advocis fully supports this objective. Industry Canada goes on to state that the Act "prohibits damaging and deceptive spam, spyware, malicious code, botnets, and other related network threats." However, in reviewing the Act and Proposed Regulations, Advocis is very concerned that, in its attempt to address these legitimate concerns, Industry Canada's Proposed Regulations will stifle the legitimate use of the internet by many legitimate businesses, financial advisors included, and this will result in added costs to do business. It will also mean that many small businesses in Canada will not be able to take full advantage of technological developments in electronic communications that would allow them to expand their business and create jobs for Canadians. Accordingly, we cannot agree with Industry Canada when they say, "there will be negligible impacts on business and consumers related specifically to these Regulations".

Advocis members, and financial advisors in general, support the enhanced use of e-commerce. We are one of a number of stakeholders working with the Canadian Council of Insurance Regulators (CCIR) in developing a consultation paper with respect to adapting current business practices so that industry can benefit from an increased reliance on e-commerce. If the overall purpose of the Act, as stated by Industry Canada, is to "promote the efficiency and adaptability of the Canadian economy by regulating commercial conduct that discourages the use of e-commerce", then we are concerned by the broad nature of the Proposed Regulations, as they do not provide adequate definitions or exemptions for legitimate business people to pursue legitimate business practices. The Proposed Regulations will negatively impact legitimate businesses, but will not stop those who are intent on misusing electronic communications.

Rather than casting such a wide net that will have negative implications, greater consideration should be given to the use of principles-based regulations that are supported by an aggressive enforcement mechanism that will punish those who violate the spirit of the Act and its regulations. This will result in providing a very serious deterrent that is more likely to achieve the federal government's true policy objectives with the least disruption to legitimate business activities.

Such an approach would also support other public policy objectives identified by the federal government – specifically, issues with respect to financial literacy and the preparedness of Canadians for their future financial needs through proper saving, investing and planning.

The Value of Advice and Financial Literacy

Financial literacy has been recognized by the federal government as a priority. Advocis strongly believes 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 financial advisors and planners. However, if the Proposed Regulations make it more difficult to contact consumers who have been referred to the professional financial advisor, consumers will receive less financial advice. Professional financial advisors who are licensed and operate in a highly regulated environment should not be prevented from contacting consumers by sending individual emails.

In 2009, the Minister of Finance established a Task Force on Financial Literacy, of which our President and CEO, Greg Pollock, was a member. The federal government's goal was to establish new vehicles to promote increased savings for future needs, including retirement. These goals can be achieved today through Tax-Free Savings Accounts (TFSAs) and, in the future, through Pooled Registered Pension Plans (PRPPs). Financial advisors are a key element in the successful implementation of these federal government initiatives, as financial advisors help Canadians make the best educated financial decisions for their future.

We believe that the Proposed Regulations must be looked at in terms of the desired policy outcomes of this initiative as well as other broader policy objectives of the federal government. What is currently being proposed will not remove the "bad apples" from conducting their "business as usual", but it will hamper legitimate business practices and the livelihood of financial advisors. The end result, absent appropriate amendments or exemptions for legitimate business activities of financial advisors, will be that the current proposal will not achieve its desired goal, will prove harmful to financial advisors, and will be harmful to consumers who will find it increasingly difficult to find a financial advisor at a time when the federal government has clearly identified the benefits of consumers saving and planning for their financial futures. Canadians need the advice provided by professional financial advisors. The unintended consequence of the Act and Proposed Regulations will frustrate legitimate business activities and other important federal government policy objectives.

Advocis Recommendations

1. Referrals

We are particularly concerned that the Proposed Regulations do not include any provisions regarding advisors' ability to pursue individual referrals by email. Financial advisors develop their client base through personal referrals, and rely on these to generate new business. It is through referrals that most consumers are able to identify professionals who are trusted by people they already know and deal with. We strongly recommend that individuals who are licensed by an insurance regulatory body or a securities commission should be permitted to pursue referrals by this medium. 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 opt out of receiving any further emails by unsubscribing in accordance with Section 6(2)(c) and Section 11(1) of the Act.

2. Consent

a) Implied Consent

The Act is an opt-in regime, in which a message cannot be sent unless a person takes the step to opt-in to receiving the email. This regime limits implied consent to an “existing business relationship”, which excludes legitimate communications that reasonably should be permitted.

We believe that the wording of implied consent should be broadened to allow financial advisors to communicate with potential clients via email. In its previous submissions, Advocis has recommended that the Act take the Australian approach to implied or inferred consent which is more principles-based as its provisions are more broadly worded. We submit that the same approach should be taken into consideration in developing the Proposed Regulations.

b) Express Consent

Express consent should be obtainable 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, the following should constitute express consent: where the referee (potential new client) indicates to the referrer that the referrer can provide the referee’s email address to the financial advisor or other business person, so that the financial advisor or other business person can contact the referee by email – *i.e.*, 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).

3. Sale of a Book of Business

The Proposed Regulations 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.

Conclusion

Although your regulatory impact analysis statement indicates that the impact of the Proposed Regulations will be minimal to businesses, the Proposed Regulations do not include any provisions that will allow for exempting referrals; broadening the concept of implied consent, or allowing advisors buying a book of business to introduce themselves to their new clients, as recommended in Advocis’ past submissions.

We realize that the Proposed Regulations are administrative in nature. Nevertheless, to achieve the best desired outcomes, all players involved must be part of the solution, taking into consideration that flexibility is required.

Advocis appreciates this opportunity to provide comments on the Proposed Regulations and would be pleased to address any concerns or answer any questions. Please feel free to contact the undersigned or Ed Skwarek, Vice President, Regulatory and Public Affairs, at 416-342-9837 or eskwarek@advocis.ca.

Sincerely,

A handwritten signature in black ink, appearing to be 'G. Pollock', with a long horizontal flourish extending to the right.

Greg Pollock, M.Ed., LL.M., C.Dir., CFP
President and CEO

A handwritten signature in black ink, appearing to be 'Robert McCullagh', with a large, stylized initial 'R' and a long horizontal flourish extending to the right.

Robert McCullagh, CFP, CLU, CH.F.C., RHU
Chair, National Board of Directors