November 9, 2017

Danielle Widmer
Clerk of the Standing Committee on Industry, Science and Technology
House of Commons

SENT BY EMAIL: indu@parl.qc.ca

Dear Ms. Widmer,

The Canadian Life and Health Insurance Association (CLHIA) is pleased to have the opportunity to contribute to the deliberations of the Standing Committee on Industry, Science and Technology on its review 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* (Act).

The CLHIA is a voluntary association whose member companies account for 99 per cent of Canada's life and health insurance business. The industry, which provides employment to nearly 155,000 Canadians and has assets in Canada of more than $810 billion, protects over 28 million Canadians through products such as life insurance, annuities, registered retirement savings plans, disability insurance and supplementary health plans. It pays benefits of $88 billion a year to Canadians and manages about 70% of Canada's pension plans.

CLHIA has provided comments to this Standing Committee in 2009 on bill C-27 (ECPA), and to Industry Canada in 2011 and 2013 on the proposed regulations under the Act. The life and health insurance industry continues to support the Act's objective of promoting "the efficiency and adaptability of the Canadian economy by regulating commercial conduct that discourages the use of electronic means to carry out commercial activities" (section 3 of the Act). However, we believe that the Act is too broad and certain definitions and exclusions still raise questions. Consequently, the Act has the unintended effect of hindering the growth of electronic commerce rather than encouraging it.

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This review is the perfect opportunity to make amendments that will bring the right balance between protecting consumers from spam, and other unwanted electronic communications, while still supporting legitimate commercial activities including allowing businesses to communicate electronically with their clients or prospective clients.

Scope of the Act and the Definition of Commercial Electronic Message: Central to all concerns is that the Act is too broad. It applies to communications that a reasonable person would not consider to be "spam" or nefarious. This stems mainly from the fact that the definition of a CEM is too broad. For example, merely linking to a company's website, even if that website contains sales information, should not turn an otherwise exempt informational email into a CEM.

There should be no need to exclude electronic messages that solely provide notification of factual information, whether it relates to the ongoing use of a product, product updates or upgrades or benefit plans as these messages should not be caught by the definition of a CEM. They are not representations of a conduct that would discourage the use of electronic means to carry out commercial activities. Quite the contrary, they contain invaluable information for consumers. Consequently, the definition of CEM should be streamlined, and the exceptions found in subsection 6(6) of the Act clarified to ensure such important messages can reach consumers by their chosen means of communication without constraints. The Act's approach misses the mark by complicating the understanding of its application and in certain circumstances, has forced companies to resort to less efficient and less environmentally-friendly media to contact existing or new customers. The Act must focus on the harm it is meant to combat, nefarious or unwanted mass emails.

Consent Requirement: The requirements surrounding consent are too onerous. The tracking of consent involves substantial electronic resources which we fear, not all companies have. Even companies that have access to such resources, because of the complexity of managing both express consents received and applying the appropriate retention periods for implied consents, cannot guarantee continuous reliability. Consequently, we suggest that situations described in subsection 10(9) of the Act, where an implied consent exists, should be expanded to recognize consents received under PIPEDA. Alternatively, we suggest the deletion of subsection 1(3) of the Act which considers an electronic message containing a request for consent to be a CEM.

Private Right of Action: although the intention for the introduction of the private right of action may have been good, the risks of opening the flood gates to mass litigation will cause more harm to businesses than necessary to protect consumers. The combination of the private right of action and the uncertainty that results from the broadness of the Act will result in companies facing the costs of class action lawsuits for sending electronic messages they genuinely understood to be exempt from the Act. Such litigation risks will have a chilling effect on companies' innovation in how they reach customers.

Ultimately, we believe CRTC oversight of the Act is sufficient and penalties are by far severe enough to deter companies from sending unwanted commercial electronic messages. Consequently, the private right of action must be withdrawn from the Act.

Penalties: when considering the risks to companies in attempting to apply an Act that is too broad and contains overly complex and technical exclusions, we believe the penalties are very high. The risk of misinterpreting the Act in good faith are real and failure to comply, despite reasonable efforts, should be at the forefront of the CRTC's consideration to ensure the penalty provisions of the Act are used to promote compliance rather than to punish. Otherwise, the price to pay both monetarily and from a reputational perspective is too high.

In summary, the life and health insurance industry supports the objectives of the Act. However, we are concerned, with how broad the Act is, particularly given the uncertainties created by the exemptions which create a real risk of compromising the Act's stated objectives. We consequently suggest a streamlining of the definition of CEM, that exemptions and penalties be adjusted accordingly and that the private right of action be withdrawn.

The industry greatly appreciates this opportunity to contribute to the Committee's review of the Act and would be pleased to provide any further required information.

Yours very truly,

"Anny Duval"

Anny Duval
Counsel