INVESTMENT INDUSTRY ASSOCIATION OF CANADA
ASSOCIATION CANADIENNE DU COMMERCE DES VALEURS MOBILIÉRES

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Dear Sirs/Mesdames:

Re: IIAC Comments on the *Electronic Commerce Protection Regulations* (the "Regulations")

Thank you for providing the opportunity to comment on the Regulations. The Investment Industry Association of Canada ("IIAC" or the "Association") is a member-based professional association representing investment dealers in Canada. IIAC advances the growth and development of the Canadian investment industry, acting as a strong, proactive voice to represent the interests of our members and the investing public.

The Association supports the objective of the Anti-Spam Legislation (the "Act") to "encourage the growth of online electronic commerce by ensuring business confidence and consumer trust in the online marketplace", by prohibiting "damaging and deceptive spam, spyware, malicious code, botnets and other related network threats." In this submission, we also include our comments relating to the proposed regulations to the Act published by the CRTC (the "CRTC Regulations"), as the combination of the Act, the Regulations and the CRTC Regulations (the "Regulatory Framework") are interdependent and must be addressed as a whole.

In general, it appears that the Regulatory Framework will achieve the objectives of limiting the damaging and unwanted electronic messages. We are concerned, however, that the provisions designed to curtail certain electronic commercial communications are drafted so broadly so as

to discourage, and even preclude the growth of legitimate and desirable online commercial activities. Such activities are necessary for the efficient functioning of many professional and commercial enterprises not in the business of electronic marketing per se.

Specifically we note the following issues with the Regulatory Framework that have emerged as potential unintended negative consequences of this broad based regulatory scheme.

Process for Obtaining Consent

We support the principle of requiring consent to receive commercial electronic messages; however, the process for obtaining express consent to receive such messages under the Regulatory Framework is extremely problematic and is inconsistent with the reality of the almost universal use of electronic communication in business and personal matters. The Regulatory Framework seems to require that express consent be obtained in written form, but not through electronic means. This precludes verbal consent and appears, by default, to require the use of traditional mail as a means of requesting consent. This places the onus on the recipient to undertake an action that is more labour intensive than hitting the reply button, to confirm their consent. The cumbersome nature of this process will discourage and reduce the granting of consent, even if it is desired. The process is highly impractical in both its inconvenience and the time required to send and receive the consent. Given the speed at which commerce is conducted, and the global nature of business, using the postal service to establish contact with potential clients is a step backward, and is impractical and unsustainable. The process for obtaining consent must work within the current business realities of how communication is conducted, and must strike the appropriate balance between limiting unwanted electronic communication and facilitating legitimate and necessary business communications. We recommend that the Regulations provide an alternative means of obtaining consent through electronic means

In addition, the Regulatory Framework should contain a mechanism that recognizes verbal consent. It is unclear if verbal consent (by telephone or in person) will fulfill the express consent requirements. If such consent is provided, requiring further written consent is unnecessary and inconvenient to both the sender and prospective recipient, and does not provide any additional regulatory benefit.

Effect on Referral Based Business

We are extremely concerned that the Regulatory Framework contains impediments to the critical industry practice of acting on client and other personal referrals to reach individuals seeking financial and investment advice, and provide alternatives to clients of existing professionals that may be searching for a new advisor.

The investment industry, like other skilled professions (eg. lawyers, accountants, health care professionals, etc.) relies heavily on referrals from existing clients and other individuals with whom they have a relationship, to develop their business. The referrals are not random, mass or indiscriminate solicitations of business. They are specific and targeted, arising from a contact

that has knowledge of the advisor's ability to deliver services, and the potential recipient's interest in obtaining such services.

Potential consumers of such services are often leery of enlisting the services of professionals without a personal reference. Providing a connection through a common contact is an important mechanism for both the customer and the service provider, and does not represent a threat to the integrity of the online marketplace, as such communication is based on an expressed interest, and does not fall into the categories of damaging or nuisance electronic communication.

Individually targeted referral communication is not characterized by high volume, anonymous, non-specific communication blasts from persons or companies with no specific knowledge of the needs of the recipient. It is, rather, one-to-one communication, undertaken only on the advice or request of a person who would have knowledge of the recipients' interest in receiving such a communication. Such communication also does not have the characteristic of inviting continuing unsolicited communications, as if the services of the sender are not required, there is no further need for communication, unless it is expressly requested. As such, it does not fall into the types of commercial conduct that discourage the use of e-commerce by:

1. impairing the ability, reliability, efficiency and optimal use of e-commerce;
2. imposing additional costs on businesses and consumers;
3. compromising the privacy and security of confidential information; and
4. undermining the confidence of Canadians using e-commerce for commercial activities at home and abroad.

In order to serve the interests of consumers, and allow professional service providers to offer their services to a properly targeted client base, we believe it is necessary to include provisions in the appropriate sections of the Regulatory Framework, that permit such individual referral based electronic communication where there is a common contact as between the sender and the receiver.

Clarification – "Person sending the message"

We seek clarification regarding the intended reach of those who are caught by the phrase "person who sent the message" where it differs from the "person on whose behalf a message is sent". It is unclear whether the pure service providers that merely facilitate the distribution of electronic communications, without reference to content or determining the recipients will be deemed to be a "person who sends the message", and thus subject to the identification and unsubscribe requirements in the Regulatory Framework. Providing information to recipients about these providers is irrelevant and cumbersome, and requiring dual processes for the unsubscribe mechanism as between the sender and the service provider is duplicative and inefficient. The Regulatory Framework should mandate that the sender and the service provider have adequate procedures to ensure consent is obtained, and unsubscribe requests

are processed, and permit the parties involved to determine where the responsibility falls for those functions.

Business to Business Communication

We are also concerned that the Regulatory Framework does not differentiate business to business communication from communications to individuals outside of the business context. The practices and expectations inherent in business to business communications are significantly different than in business to individual communications, and should be taken into account so as not to impede necessary and useful business communications.

There are a number of issues that require clarification and may need to be addressed specifically in the Regulatory Framework.

It is unclear how messages from an employee of one company to an employee of another company where the companies have an existing business relationship, are regulated under the Regulatory Framework. It is important that messages sent in the course of legitimate business activities between businesses that have an existing business relationship should not be subjected to all of the requirements applicable to commercial electronic messages under the Regulatory Framework.

When two businesses have an existing business relationship, employees of one business often communicate with employees of the other business in a variety of ways, including telephone, email, and instant messaging. The content of these messages may fall under the meaning of a commercial electronic message under section 1(2) of the Act.

With respect of the unsubscribe requirements, it is important to understand that by entering into a business relationship with another business, each business consents to the sending of commercial electronic messages to the electronic business addresses of all of its employees who are engaged in the business activity by the employees of the other business. Under these circumstances, business would not generally permit any of its employees involved in the business activity to unsubscribe from receiving commercial electronic messages from an employee of the other business. In some cases unsubscribing to messages may violate existing contracts between the companies. The Regulatory Framework must make allowances to apply this provision on a corporate rather and individual basis.

In respect to obtaining consent, when businesses with any significant number of staff members are involved, it is impractical and inefficient to require express consent on an individual basis, as the recipient company is responsible for determining the type of business communications that it wishes its employees to receive. Changes in staffing of one of the business also make it impractical to obtain consent before a message is sent to a new employee as part of the continuing the ongoing relationship between the two businesses. In addition, as noted above, the process for obtaining consent under the Regulatory Framework is extremely cumbersome and not consistent with existing business practices and modes of communication. As with the unsubscribe function, this should not be applied at the individual employee level.

By way of background, most of the messages in the business to business category are not SPAM in the traditional sense of the word, but are part of a larger continuing relationship between the two businesses. An example of this in the investment industry is illustrated on the institutional trading floor, where traders communicate on a regular basis by Instant Message these messages include:

- Quotes on products both solicited and unsolicited
- Confirmations of trades
- Discussions about market news and market data
- Trade execution via Instant Message
- Sharing of information via Bloomberg news and other news services

While some of these types of messages may not require consent under section 6(6) of the Act, the problem is section 6(6) does not apply to all of the types of messages listed above. In addition to the requirement to provide an unsubscribe mechanism, the requirements concerning the content of these messages pose problems in respect of their practical application. The message may be part of an Instant Message chain where part of the chain would fall under a section 6(6) exemption, but the rest of the chain may not. In would be very difficult for an employee to know if the Act applies to a particular message, and as such whether the unsubscribe and the signature requirements must be embedded in the message or series of messages.

In many respects the exchange is similar in nature to a telephone call between businesses. The clients in these cases are not individuals as such, but representatives or employees of significant financial institutions. Financial institutions do not require the protection of the Act regarding communications received by their employee from an employee of another inancial institution with which they have an existing business relationship. If the Act applies to this type of communication the cost of both compliance and the impediment to normal business relations will be significant for financial institutions, impairing Canada's ability to compete in the global financial markets.

In particular, in respect of institutional and capital markets clients (business to business transactions primarily) the means to distribute research to clients and interested parties is undertaken in a very sophisticated and complex manner, depending on the interests and activities of such clients. It is impractical and not beneficial to treat such business clients in the same way as an individual retail client.

Many of these considerations were taken into account in creating a carve-out for business to business communication which is included in the Do-Not-Call registry and similar anti-SPAM legislation in other countries. Business to business communications of the type described above should be exempt from the Act, or specific carve-outs should be created in the Regulatory Framework to allow for consent and unsubscribe functions to take place at a corporate rather than individual level. Businesses should be permitted to address electronic

communication received by their employees in the course of their employment duties in corporate agreements.

Instant Messaging, Social Media and Other Electronic Communications

The Act and Regulations appear to have been developed based on the use of email, and do not reflect the growing and common use of electronic messaging, social media and other means of electronic communication. For instance the advent of viral marketing through social media and "refer a friend" marketing have been growing and are now well established. These mechanisms are not conducive to the controls and requirements set out in the Regulatory Framework. Requiring communication through these channels to comply with the Regulatory Framework may have the unintended consequence of shutting down these emerging and important ways of doing business. Regulators must find a means to ascertain the specific risks in these types of marketing, and develop regulations that are applicable to the manner in which they operate.

In addition, we have concerns about section 2(2) and the "one click" provision. We note that the requirement for a single click to a web page is not clear and somewhat outdated. For example, the click requirement is not consistent with touch screens, other mobile internet connected devices, or voice activated systems. Using such technology specific terms can distort and constrain service to businesses and the consumers they serve. We recommend the terminology be replaced by technologically neutral language (eg: simply and easily accessible).

Definition of Personal Relationship - The definition is a problem as it does not recognize the changing nature of electronic communications and social media. The requirement that the parties in a "personal relationship" must have met in person, is no longer a relevant precondition to having a personal relationship, and is not realistic in the current environment where people commonly meet and interact electronically. In addition, although individuals may have initially met in person in a business context, they may have developed a personal relationship over the internet or telephone, thus precluding them from using this exemption. The need for an in person meeting could be replaced with a requirement for two-way communication or similar language which would accommodate these and future technologies.

We also suggest that the requirement that parties have communicated in the previous two years be extended. While we understand that it may not be appropriate to leave a communication timeline open ended, we recommend expanding this timeline to 5 years to more realistically accommodate the nature of relationships in a busy and geographically disparate world.

Cost of Compliance

The Regulatory Impact Analysis Statement, states that the incremental effects of the proposed Regulations, above and beyond the Act are expected to be minimal. In addition, the Statement indicates that there will be negligible impacts on business and consumers related specifically to the Regulations. The relevant paragraph indicates that there may be some initial and ongoing costs to comply with the definition of consent for third party email.

We believe this is a significant understatement of the costs that are likely to be incurred, both on an initial and ongoing basis. The development of compliance mechanisms to ensure the appropriate messaging and unsubscribe functions are developed for each specific business stream and individual, as well as the cost of monitoring, is expected to be extremely costly and cumbersome to develop and maintain. For large firms with many divisions, employees and departments, these costs may add up to millions of dollars. This is significantly out of proportion to the benefits for the financial industry, which sends commercial electronic messages not as a primary function of its business (like electronic marketers) but as an incidental way to conduct business to business functions and to reach existing and specifically referred clients.

If the regulation is implemented as anticipated, a longer implementation period should be granted to allow for the significant time and expense that will have to be undertaken by the industry in order to comply.

Content of Commercial Electronic Messages

Section 6(2) of the Act requires that the message must be in a form that conforms to the prescribed requirements. Section 2(1)(d) of the CRTC Regulations require that "the physical and mailing address, a telephone number providing access to an agent or voice messaging system, an email address and a web address of the person sending the information and the person on whose behalf the message is sent, and any other electronic address used by those persons, or a link thereto" be provided in any commercial electronic message. This is extremely impractical and in many cases irrelevant, particularly when the sending organization has many divisions, locations, offices etc. In addition, this problem is amplified when the sending organization is using a service provider to send out messages.

As noted previously, this requirement appears to have been developed within the e-mail context for individual, non business to business communication, and does not take into account business realities and other means of electronic communication such as texts, instant messages and social media.

Confidentiality of Information Disclosed to Regulators

Our members have expressed concerns about the confidentiality of information disclosed to the CRTC as part of an investigation. The Regulations do not provide express protection of information that may be disclosed in the event that the CRTC requests access to commercial messages for the purpose of an investigation. In order to maintain the confidence of clients and ensure protection of clients and firm information, it is critical that such information be kept confidential. In some cases, firms have material non-public information that is particularly sensitive. In certain cases, Canadian and international securities regulators require that such information be kept confidential. In addition, disclosure of certain information could be considered tipping and result in insider trading risks. If such information provided to the CRTC in the context of an investigation is not kept confidential, or is made available in response to an

Access to Information request, the damage to the business, its reputation and the public could be significant.

Grandfathering

We would like confirmation that firms will not be required to obtain express consent from those persons and organizations that are currently receiving commercial electronic messages from such firms. Existing recipients of such messages should be deemed to have provided consent, whether express or implied. The provision of an unsubscribe function on non business to business communication should be sufficient to ensure that recipients are afforded the opportunity to stop any unwanted communication.

Risk of Statutory Damages

It is critical that the intent and the scope of the Act are clear, as businesses whose electronic communication processes do not conform to the new requirements risk significant statutory damages under the private right of action provisions of the Act.

Thank you for providing the opportunity for us to comment on the Regulatory Framework. We would be pleased to provide further information and work with you to help ensure the regulatory objectives are met in a manner that does not impede legitimate business operations.

Yours sincerely,

Susan Copland