



Marketing Research and Intelligence Association

Submission to the House of Commons Standing Committee on Industry, Natural Resources, Science and Technology

Statutory 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 – more commonly known as the “Canadian Anti-Spam Legislation” (CASL).

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Introduction: The Marketing Research and Intelligence Association (MRIA) is pleased to submit this Brief to the House of Commons Standing Committee on Industry, Natural Resources, Science and Technology, outlining our industry's position on the *Canadian Anti-Spam Legislation* (hereafter, CASL).

MRIA is the national self-regulatory body representing all sectors of the market and survey research industry. Our members include over 1,200 individual professionals and over 150 corporate members, comprised of small to large research agencies, and many buyers of research services, such as financial institutions, major retailers, insurance companies, telecommunications firms, and manufacturers.

Corporate and government decision-makers rely on accurate and reliable research data to make the right decisions. One of the pillars of MRIA is to protect the good relationship, based on trust and goodwill, that exists between survey researchers and the general public. This requires that members adhere to a robust industry-led regulatory regime and internationally-acclaimed standards. There are two key characteristics that define market and survey research and differentiate our work from that of other industries, such as marketing, sales and fundraising:

- i) legitimate survey researchers never attempt to sell anything; in fact, solicitation violates the industry's rigorous Code of Conduct and Ethical Practices; and
- ii) research serves a valuable societal purpose by giving Canadians an opportunity to voice their opinions and to have influence on important issues related to policy, products and services.

Industry Position Regarding CASL – Generally: MRIA has a long history of working closely with the federal Government on policy initiatives that enhance consumer and privacy protection. For example, MRIA appeared before this same committee in 2009 to provide input into Bill C-27, known at the time as ECPA, the *Electronic Commerce Protection Act*, which was the precursor to CASL.

Our industry was supportive then, and remains supportive of CASL today. We note, however, that the same concerns we raised in 2009 in relation to ECPA still apply today in the legislation's current form. At the time, we requested clarity with respect to the circular definition of 'commercial activity' included at Section 1(1) of the Act, so that we could better understand the scope of the legislation and its application to our industry:

“commercial activity means any particular transaction, act or conduct or any regular course of conduct that is of a commercial character...” (CASL, Section 1(1)) (Emphasis added)

Unfortunately, Parliament opted not to bring the clarifications we were requesting, and the term 'commercial activity' and how it is to be read in the definition of 'commercial electronic message' remains ambiguous. While Industry Canada's Regulatory Impact Analysis Statement (RIAS) that accompanied the Act's regulations helped reduce ambiguity, further clarity is still necessary.

Eight years after our appearance before this Committee, we're not surprised to read the testimony of witnesses that have appeared before you to find that ours is not the only industry that is still challenged with how to interpret CASL.

We therefore urge this Committee to act on the opportunity before it and to take the required steps to bring clarity and clear direction with respect to the law's application and how legitimate businesses can comply.

Industry Position Regarding CASL – Specifically: By way of context, the Government of Canada has expressly stated that CASL does not apply to online research when there is no attempt to solicit:

“...**surveys, polling**, newsletters, and messages soliciting charitable donations, political contributions, or other political activities **that do not encourage participation in a commercial activity would not be included in the definition [of commercial electronic message].**” (Emphasis added)

Regulatory Impact Analysis Statement, Electronic Commerce Protection Regulations (January 5, 2013)

It is important to reaffirm here that legitimate survey researchers are forbidden from attempting to sell anything. Clearly, CASL creates a better environment for online research because it prohibits a deceptive practice we refer to as ‘Mugging’ and ‘Sugging’ (Marketing/Soliciting Under the Guise of research), whereby deceptive marketers or fundraisers conduct a false survey which in reality is an attempt to sell or solicit.

While RIAS’s explicit mention of surveys helped quell concerns about CASL’s application to online research, there is still significant confusion with respect to the offer of incentives by electronic means to potential respondents to increase participation in a research study. We therefore request clear direction from Parliament that CASL does not apply to any component of a legitimate research study, including incentives.

It is important not to confuse an incentive to participate in research with solicitation. Incentives are used by our industry solely to increase participation rates. They are essential when engaging hard-to-reach groups such as low- and high-income earners, Indigenous peoples, rural inhabitants, newcomers to Canada, some ethnic minorities, "busy" people (such as professionals or working parents), shift workers, etc.

A driving scientific objective at play is to ensure that research data accurately reflect the views of the population being studied. This provides a scientific foundation to validate that the study findings are accurate and a true reflection of public opinion at a particular moment in time. Results that are not properly reflective of a targeted audience could be misleading, thereby potentially biasing decisions.

The academic literature¹ is clear and consistent that incentives are part-and-parcel a component of research – they are strictly a research tool to encourage participation in a study and avoid failure in a study due to a lack of interest or adequate representation. As such, our members take great care to ensure that incentives are always proportionate to what is being asked, and who it is being asked of. The appropriateness of what is offered is dependent on the nature of the study, the supply of respondents, and type of incentive that would attract the target population to participate.

Ambiguity in CASL has led to confusion around legitimate incentives by electronic means, and this review presents an opportunity to finally address what many industry sectors have been requesting since 2009.

To be clear, we do not believe that it is or has ever been the intent of legislators and regulators that CASL would apply to the offer of legitimate incentives. We point, for example, to the exemption in the *Telecommunications Act* that carves out marketing and survey research from the National Do Not Call List, precisely because researchers do not engage in solicitation:

“[the] national do not call list does not apply in respect of a telecommunication... made for the sole purpose of collecting information for a survey of members of the public.”

Section 41.7(1) and (1)(f) of the *Telecommunications Act*

While the exemption is quite explicit when it comes to a survey, there was, until recently, confusion as to whether the offer of an incentive by phone could be perceived as a solicitation, thereby triggering the Do

¹ For brevity’s sake, we have removed excerpts of academic literature that shows that the offer of an incentive is a necessary step in a research study, and not to be regarded as a salary, honorarium, or solicitation. MRIA can provide more detailed references upon request.

Not Call List's application. Thankfully, the CRTC resolved this question in a recent Decision issued in 2016. In Compliance and Enforcement Decision 2016-107, Commissioners made a clear determination that:

"...the offering of incentives is a legitimate practice used by the market research industry when conducting surveys to increase response rates." (Paragraph 15) (Emphasis added)

Commissioners also noted that incentives were not per se solicitation, but that in some circumstances, could be construed as such:

"Persons who offer incentives to increase survey response rates must therefore ensure that their calls are made for the sole purpose of collecting information for a survey of members of the public, and that any incentives are presented in a manner that will not be perceived as solicitation." (Preamble to Decision 2016-107) (Emphasis added)

With said statement, Decision 2016-107 therefore established a test to determine whether an incentive is part of a legitimate research study or whether it has other purposes – in essence, **the incentive must be made for the sole purpose of collecting information for a survey of members of the public and contain no other purpose**. Commissioners were clear that with this test, they were trying to prevent a loophole whereby marketers could MUG and SUG, by relying on the exemptions for survey researchers in the *Telecommunications Act* and associated regulations².

This Decision was critically important for our industry because it brought clarity to the question of whether incentives offered as part of a legitimate research study were solicitation. Of course, read narrowly, the exemption in the *Telecommunications Act* and the test set out in Decision 2016-107 only apply to communications with Canadians by way of a phone call.

The law is not so explicit when it comes to offering incentives by way of electronic means, such as email or text messaging, although we note that a similar reasoning is contained in the CASL RIAs, as follows:

"The mere fact that a message involves commercial activity, hyperlinks to a person's website, or business related electronic addressing information does not make it a CEM under the Act if none of its purposes is to encourage the recipient in additional commercial activity." (Emphasis added)

*Regulatory Impact Analysis Statement
Electronic Commerce Protection Regulations (January 5, 2013)*

MRIA submits that Parliament, by way of this review, should confirm that the legal reasoning outlined above for phone calls applies in the context of electronic messages, in that **the offer of an incentive does not constitute a 'commercial electronic message' if the sole purpose is to collect information for a survey of members of the public**. The fact that the CRTC is the body that is responsible for the compliance and enforcement of both the *Telecommunications Act* as well as CASL strengthens the argument that consistent rules should apply to incentives, regardless of the means by which it is offered (by call or electronically).

We further submit that the 'sole purpose' test outlined in Decision 2016-107 should be incorporated into a future amended version of CASL, in an expanded definition of 'commercial electronic message' found at Section 1(2) of the Act. Specifically, we propose that a modified version of the language used at Paragraph 16 of Decision 2016-107 should be added to Section 1 of CASL, following the exclusion provision set out at sub-section 1(4), as follows (proposed text in Italics):

² See Paragraph 13 of CRTC Compliance and Enforcement Decision 2016-107

[Existing Provisions in CASL]**Meaning of commercial electronic message**

(2) For the purposes of this Act, a commercial electronic message is an electronic message that, having regard to the content of the message, the hyperlinks in the message to content on a website or other database, or the contact information contained in the message, it would be reasonable to conclude has as its purpose, or one of its purposes, to encourage participation in a commercial activity, including an electronic message that

- a) offers to purchase, sell, barter or lease a product, goods, a service, land or an interest or right in land;
- b) offers to provide a business, investment or gaming opportunity;
- c) advertises or promotes anything referred to in paragraph (a) or (b); or
- d) promotes a person, including the public image of a person, as being a person who does anything referred to in any of paragraphs (a) to (c), or who intends to do so.

...

Exclusion

(4) An electronic message described in subsection (2) or (3) that is sent for the purposes of law enforcement, public safety, the protection of Canada, the conduct of international affairs or the defence of Canada is not considered to be a commercial electronic message.

[Proposed Amendment]

(5) An electronic message described in subsection (2) that contains an incentive to participate in a legitimate research study is not considered to be a commercial electronic message if the incentive is made for the sole purpose of collecting information for a survey of members of the public.

Such a provision would provide members of our industry explicit assurances that they can continue to offer incentives for legitimate research purposes. The test would also satisfy legislators and the Canadian public that a loophole has not been created for deceptive MUGgers and SUGgers.

Other Concerns – Business-to-Business Communications: As a member-based industry association that organizes several professional development and continuing education activities, we submit that CASL also needs greater clarity with respect to business-to-business (B2B) practices. Currently Industry Canada’s Electronic Commerce Protection Regulations (which stem from CASL) permits some B2B activities under certain conditions, but a lack of clarity around those provisions makes it challenging to understand what is permissible or not – thereby stifling our ability to reach out to professionals within our industry. Specifically, we refer to Section 6 of the Regulations and the ambiguity in the definition of the words ‘relationship’ and ‘activities’ makes it difficult to ascertain which business-to-business practices are permissible under the Act. Clarity is required to permit legitimate e-commerce practices between commercial organizations.

Conclusion: The Marketing Research and Intelligence Association appreciates this opportunity to present the views of our industry. We hope that Committee members will acknowledge the societal benefits of marketing and survey research, and will favourably consider our recommendations with respect to amending and clarifying CASL.

We note that we may not be the only sector that shares our concerns regarding the offer of incentives and that other researchers from the academic, social sciences and statistical communities would also likely benefit from added clarity on this point.