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Executive Summary

1.0 Introduction and relief sought

1. Probit Inc. (Probit) is filing this application under Part 1 of the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure (Rules)* to ask the CRTC to amend Parts 1 and IV of the *Unsolicited Telecommunications Rules*.
2. Specifically, Probit is asking the Commission to
 - a amend the definitions of 'telemarketing' and 'telemarketer' set out in Part I of the *Unsolicited Telecommunications Rules*, so as to exclude research undertaken to determine the views of members of the public, and to
 - b amend Part IV of the *Unsolicited Telecommunications Rules* to expressly exclude this Part's application to survey research.

2.0 Relevant facts

2.1 Probit is a survey research company

3. Probit is a company that specializes in survey research, and is a subsidiary of EKOS Research Associates Inc. Probit is a Gold Seal member in good standing, and abides by the standards and certification requirements, of Canada's Marketing Research and Intelligence Association (MRIA).
4. Like other survey researchers and MRIA members, Probit uses Canada's telecommunications system to contact members of the public to ask them to participate in quantitative and qualitative research studies. Some of Probit's calls are made using live agents, and others use interactive voice response (IVR) technology.

The answers we receive describe the opinions and attitudes of samples of the population and we use the results from these samples to derive estimates about the opinions and attitudes of larger populations.

5. As a general rule, quantitative survey research involves the administration of questionnaires to samples drawn from the population being studied, while qualitative survey researchers study the responses of smaller numbers of selected participants in greater detail, for example by guiding the format of discussions of people who participate in focus groups.
6. Probit's goal in contacting potential survey respondents through the telecommunications system is to invite them to complete survey questionnaires, or to invite them to participate in qualitative research studies.

2.2 The CRTC is treating survey research companies as telemarketers

7. In the last year and a half the CRTC has begun to accuse organizations conducting survey research of telemarketing offences. Eight organizations that conducted surveys or polls by telephone have been fined a total of \$409,500 for breaching the CRTC's *Unsolicited Telecommunications Rules*:

- 1 Wildrose Alliance Political Party - \$90,000 penalty for telecommunications made in polling campaigns (<http://www.crtc.gc.ca/eng/archive/2013/vt130524.htm>)
- 2 Alberta Federation of Labour - \$50,000 penalty for telecommunications made to conduct a poll (<http://www.crtc.gc.ca/eng/archive/2014/vt140813.htm>)
- 3 RackNine Inc. - \$60,000 penalty for telecommunications that included polling and surveys (<http://www.crtc.gc.ca/eng/com100/2013/r130529.htm>)

- 4 Progressive Conservative Party of Ontario - \$85,000 penalty for telecommunications that conducted a survey (<http://www.crtc.gc.ca/eng/archive/2013/vt130524a.htm>)
 - 5 Union Calling - \$65,000 penalty for telecommunications that included polling campaigns (<http://www.crtc.gc.ca/eng/archive/2013/vt130925.htm>)
 - 6 Canadian Union of Postal Workers - \$50,000 penalty for telecommunications made to conduct a poll (<http://www.crtc.gc.ca/eng/archive/2013/vt130814.htm>)
 - 7 Paul Dewar Leadership Campaign - \$7,000 penalty for telecommunications made to conduct a poll (<http://www.crtc.gc.ca/eng/archive/2013/vt130724.htm>)
 - 8 Marc Garneau Leadership Campaign - \$2,500 penalty for telecommunications made to conduct a poll (<http://www.crtc.gc.ca/eng/archive/2013/vt130521.htm>)
8. On September 10, 2014, the CRTC's staff told Probit that the Commission had received complaints about calls made by the company which included an offer to win a prize for participating in a survey. The 10 September 2014 letter from the CRTC's staff said that these calls breach eight sections of the CRTC's *Unsolicited Telecommunications Rules*, and constitute telemarketing:

Please note: The complaints we have received indicate that telecommunications made by your organization include an offer to win a monetary prize for participation in a survey.

The Rules define solicitation as the selling or promoting of a product or service, or the soliciting of money or money's worth, whether directly or indirectly and whether on behalf of another person.

Based on this definition, **Commission Staff have determined that your offer of a monetary prize is solicitation, and therefore all calls made that contain this offer are telemarketing in nature.**¹

[bold font added]

¹ 10 September 2014 letter, at 2. (We note that the pagination in this letter is incorrect.)

9. Probit has today asked the Commission in a separate application (available on Probit's website at: <http://www.probit.ca/CRTC/CRTC29Sept2014.pdf>) to review and vary the CRTC staff determination that Probit is telemarketing, on the grounds that the determination was made before Probit was given any opportunity to provide evidence or to respond to the allegation that Probit was soliciting or telemarketing.²
10. This Part 1 application is being made to ask the CRTC to initiate a public proceeding to review and amend the CRTC's *Unsolicited Telecommunications Rules* so as to comply with Parliament's desire that survey research companies be exempted from the regulation of telemarketing. We therefore join several other parties that have also applied to the CRTC to review and amend the *Unsolicited Telecommunications Rules*:

Application no.	Applicant	Date filed	Intervention deadline
8665-R53-201408303	Receivables Management Association of Canada	27 August 2014	26 September 2014
8665-T173-201407768	The Ontario Society of Collection Agencies	13 August 2014	12 September 2014
8665-C208-201407503	Coalition of Collection Agencies	6 August 2014	5 September 2014
8665-T170-201406835	Total Credit Recovery	21 July 2014	20 August 2014

² The application is made separately because *Guidelines on the CRTC Rules of Practice and Procedure*, Broadcasting and Information Bulletin CRTC 2010-959 (Ottawa, 23 December 2010), <http://www.crtc.gc.ca/eng/archive/2010/2010-959.htm>, state that the *Rules* for Part I applications do not apply when a matter concerns an *UTRs* violation:

8. The Rules of Procedure do not apply when the Commission is dealing with a violation of the *Unsolicited Telecommunications Rules* or the National Do Not Call List (section 2). The *Telecommunications Act* provides a detailed procedure for these types of proceedings in sections 72.01 to 72.15. For more information, you can read the Commission's web page called "Reduce telemarketing phone calls," which can be found on the Commission's website under "Consumers."

8662-G4-201406041 Government of Quebec 2 July 2014 1 August 2014

Source: CRTC website, Open and Closed Part I applications

11. These parties have all asked the CRTC to review and revise the *Unsolicited Telecommunications Rules* so that the *Rules* do not breach Canadian privacy laws.
12. Probit, however, is asking the CRTC to review and revise the *Unsolicited Telecommunications Rules*, because the CRTC's decision to apply the *Rules* to survey companies does not reflect Parliament's instruction to exempt survey research from the telemarketing regime, and because the decision is not based on any evidence that market and survey research is an undue nuisance requiring regulation.

3.0 Canada's legislative and regulatory approach to unsolicited telecommunications

3.1 CRTC began to receive complaints about telemarketing in the 1980s

13. In the mid-1980s the CRTC began to receive growing numbers of complaints from people in Canada that they were receiving unwanted telephone calls that were attempting to sell them goods or services.³
14. Many of these unwanted telephone calls were being made by companies using 'automatic dialing-announcing devices' (ADADs) that were programmed to deliver pre-recorded messages that

³ See *Use of Automatic Dialing-Announcing Devices*, Telecom Decision CRTC 85-2, 4 February 1985, which reviewed the general regulations for federally regulated telecommunications companies. A majority of the Commission concluded that until it has been demonstrated that reasonable safeguards are inadequate to deal with perceived abuses of ADADs, their outright prohibition was not warranted.

- solicited the purchase of goods or services. ADADs were the precursor to today's more sophisticated IVR technology.
15. Despite a number of CRTC initiatives in the 1990s to protect telephone subscribers' privacy and right to avoid unwanted telecommunications,⁴ telephone subscribers continued to receive unwanted telephone calls trying to sell them products or services.
 16. To reduce the volume of unsolicited telemarketing calls being received by Canadians, the Minister of Industry decided in 2004 to give the CRTC the authority to create a national 'do not call list'. He also decided to give the CRTC the power to levy fines against telemarketers who broke rules for telemarketing.⁵

3.2 *Parliament directed the CRTC to regulate telemarketing in 2005*

17. In 2005 Parliament amended its 1993 telecommunications statute to establish a national do-not-call list regime. *An Act to Amend the Telecommunications Act* came into force on 30 June 2006. The *Act*

⁴ See e.g. *Bell Canada - Proposed Tariff Revisions Related to Commercial Solicitation, Telemarketers and the Use of Automatic Dialing Devices*, Telecom Public Notice CRTC 93-59 (Ottawa, 27 September 1993); *Provision of Directory Database Information and Real-Time Access to Directory Assistance Databases*, Telecommunications Decision CRTC 95-3 (Ottawa, 8 March 1995), subsequently varied by Order in Council P.C. 1996-1001 (25 June 1996); *Use of telephone company facilities for the provision of unsolicited telecommunications*, Telecom Decision CRTC 94-10 (Ottawa, 13 June 1994) and Telecom Order CRTC 96-1229 (Ottawa, 7 November 1996); CRTC, *Letter Decision* (Ottawa, 1 February 2000), which directed all local exchange carriers to include a provision in their contracts with resellers to adhere to the consumer safeguards in a CISC Customer Transfer Group report; *Telemarketing restrictions extended to all telecom service providers*, Telecom Order 2001-193 (Ottawa, 5 March 2001); and *Review of telemarketing rules*, Telecom Decision CRTC 2004-35, 21 May 2004.

⁵ *Proceeding to establish a national do not call list framework and to review the telemarketing rules*, Telecom Public Notice CRTC 2006-4, (Ottawa, 20 February 2006), as amended by Telecom Public Notice CRTC 2006-4-1 (Ottawa, 13 March 2006), at para. 15.

- added legislative and enforcement frameworks for the DNCL to the *Telecommunications Act*,⁶ and generally required companies that it exempted from the national DNCL (nDNCL) requirements to maintain their own or internal DNCLs (iDNCLs).⁷
18. Parliament's amendments gave the CRTC the authority to prohibit or regulate unsolicited telecommunications "to the extent that the Commission considers it necessary to prevent undue inconvenience or nuisance, giving due regard to freedom of expression."⁸
- 3.3 *Parliament wanted to exempt survey research from its do-not-call regime***
19. When Members of Parliament were considering the 2005 amendments to the *Telecommunications Act*, they wanted to ensure that survey research would not be captured by a new telemarketing regime.
20. Industry Canada's Assistant Deputy Minister for Information Technologies and Telecommunications assured the House of Commons Standing Committee that was studying the proposed legislation that the CRTC had not previously regulated "people who do market surveys" because they were exempt under the CRTC's rules.⁹ His view was that the CRTC would not then reverse its position and begin to regulate survey companies.

⁶ Ss. 41.2 to 41.7 and 72.01 to 72.15.

⁷ S. 41.7(4)

⁸ S. 41(1).

⁹ See Appendix 1, 13 April 2005 (Michael Binder evidence).

For example, in *Review of Telemarketing Rules*, Telecom Decision CRTC 2004-35, 21 May 2004, <http://www.crtc.gc.ca/eng/archive/2004/dt2004-35.htm>, the CRTC explained that it had decided not to treat market and survey research calls as telemarketing, because there was no evidence that such calls were an undue nuisance:

21. Despite these assurances, Members of the Standing Committee and Parliament decided to add specific protection for survey research companies from the new telemarketing regime. They exempted seven types of telecommunication from CRTC prohibitions or requirements made with respect to its information-collection systems,¹⁰ including calls "made for the sole purpose of collecting information for a survey of members of the public".¹¹
22. Moreover, while Parliament required those it had exempted from the DNCL regime to maintain their own 'internal' DNCLs (iDNCLs), it again specifically exempted parties making telecommunications "for the sole purpose of collecting information for a survey of members of the public"¹² from this requirement.

105. The Commission notes that the current restrictions apply only to unsolicited calls made for the purpose of solicitation. The current restrictions do not apply to unsolicited live voice and fax calls that do not solicit, including calls for emergency purposes, account collection and market and survey research. In Decision 94-10, the Commission determined that the conditions imposed on live voice and fax solicitations would not apply to calls that did not solicit. The Commission concluded that these calls had less potential to cause undue inconvenience or nuisance.

106. The Commission notes that the majority of parties in this proceeding did not support any changes to the application of these rules. Further, the Commission considers that those parties, who advocated that market and survey research calls be covered by the restrictions, did not provide compelling evidence to demonstrate any undue inconvenience or nuisance.

107. The Commission further notes that those parties representing the market and survey research industry, such as the CAFII, CSRC and the ICA, argued that applying the solicitation conditions to market and survey research calls would impact on the ability of those conducting such calls to obtain accurate and cost-effective data. The Commission also notes that several TSPs reported that they had not received a significant number of complaints related to market and survey research calls.

108. The Commission considers that, in the absence of evidence demonstrating undue inconvenience or nuisance, it is inappropriate to amend the rules that apply to market and survey research calls at this time.

¹⁰ S. 41.7(1) ("Exemptions").

¹¹ S. 41.7(1)(f):

41.7 (1) An order made by the Commission that imposes a prohibition or requirement under section 41 that relates to information contained in any database or any information, administrative or operational system administered under section 41.2 for the purpose of a national do not call list does not apply in respect of a telecommunication ...

(f) made for the sole purpose of collecting information for a survey of members of the public

¹² S. 41.7(3), (4) and (5):

3.4 CRTC's new powers over telemarketing

23. Parliament's 2005 legislative amendments added a new regime for regulating unsolicited telecommunications to the CRTC's regulatory arsenal. While the *Act* already allowed the CRTC to "prohibit or regulate" telecommunications "to prevent undue inconvenience or nuisance",¹³ Parliament's 2005 changes created "a legislative framework for a national do not call list".¹⁴
24. The 2005 amendments also gave the CRTC explicit authority to administer information-collection systems, to make orders about these systems, to investigate alleged contraventions of its orders,¹⁵ and to delegate some of its powers.¹⁶
25. The DNCL framework allows residential subscribers to register their telephone numbers on a National Do Not Call List established by the CRTC: registrants may then complain to the CRTC if they subsequently receive telemarketing calls. Those authorized by the Commission to investigate such complaints, and who believe on reasonable grounds that a party has breached the DNCL regime,

Identification of purpose

41.7(3) Any person making a telecommunication referred to in subsection (1) must, at the beginning of the telecommunication, identify the purpose of the telecommunication and the person or organization on whose behalf the telecommunication is made.

Marginal note: Distinct do not call lists

(4) Every person or organization that, by virtue of subsection (1), is exempt from the application of an order made by the Commission that imposes a prohibition or requirement under section 41 shall maintain their own do not call list and shall ensure that no telecommunication is made on their behalf to any person who has requested that they receive no telecommunication made on behalf of that person or organization.

Marginal note: Exception

(5) Subsections (3) and (4) do not apply in respect of a person making a telecommunication referred to in paragraph (1)(f).

¹³ S. 41(1):

The Commission may, by order, prohibit or regulate the use by any person of the telecommunications facilities of a Canadian carrier for the provision of unsolicited telecommunications to the extent that the Commission considers it necessary to prevent undue inconvenience or nuisance, giving due regard to freedom of expression.

¹⁴ S. 41.1.

¹⁵ S. 41.2(a), (b) and (c) ("Administration by Commission").

¹⁶ S. 41.3(1) ("Delegation of powers").

must issue a notice of violation.¹⁷ The notice must set out "the penalty for the violation",¹⁸ which for corporations can be fined up to \$15,000 for each contravention.¹⁹

3.5 CRTC told Canadians and survey companies that its telemarketing requirements do not apply to surveys

26. The CRTC took several steps to implement the new DNCL regime, including the development and publication of a seven-part set of *Unsolicited Telecommunications Rules*²⁰ that it published in 2007.
27. The Commission also held a number of briefings to explain the *Rules* and how they would be applied. In August 2008 the CRTC briefed MRIA members about the new DNCL regime. The CRTC's webinar presentation and in its response to follow-up 'frequently asked questions' stated explicitly that the *Unsolicited Telecommunications Rules* would not apply to survey research, or to incentives offered to survey participants (see Appendix 2 at 8, 10 and 14-17, and Appendix 3 at 2, question 4).

3.6 When CRTC reviewed its telemarketing rules in 2013, it did not say that it was planning to apply them to market research or surveys

28. In 2013 the CRTC decided to review, and invited public comment on, the *Unsolicited Telecommunications Rules*. The review was launched because of an application by the Canadian Marketing Association (CMA) in late 2011, to use IVR technology for telemarketing, provided anyone contacted in this manner already

¹⁷ S. 72.07(1).

¹⁸ S. 72.07(2)(a).

¹⁹ S. 72.01(b).

²⁰ *Unsolicited Telecommunications Rules framework and the National Do Not Call List*, Telecom Decision CRTC 2007-48 (Ottawa, 3 July 2007), as am. by *Erratum*, Telecom Decision CRTC 2007-48-1 (Ottawa, 19 July 2007)

- had an existing business relationship with the party making the call, or the telemarketer's client.²¹
29. When the CRTC asked Canadians about the review, it described the CMA's application as a 'proposal to relax the rules which restrict the use of Automatic Dialing-Announcing Devices (ADADs). It did not suggest that it would be adding new information requirements to its Part IV ADAD rules, and it did not refer to surveys except to say that they were exempt from requirements to maintain iDNCLs:
35. In light of the above, the Commission invites interested persons to comment on the following questions:
- Should the UTRs related to obligations to maintain internal DNCLs be broadened to capture all unsolicited telecommunications made by exempt entities, with the exception of those related solely to a survey of members of the public, irrespective of the purpose of the telecommunication, consistent with subsections 41.7(4) and (5) of the Act?
30. The MRIA participated in this proceeding as the representative of Canada's market and survey research industry, and said that it was not aware of "any new evidence that suggests that legitimate survey research by MRIA members is seen as an undue inconvenience, nuisance or invasion of privacy by the public."²²
31. After reviewing Canadians' comments, the CRTC changed the *Unsolicited Telecommunications Rules* to require parties making IVR

²¹ *Review of the Unsolicited Telecommunications Rules*, Compliance and Enforcement Regulatory Policy 2014-155 (Ottawa, 31 March 2014), introductory remarks. CMA originally filed an application (8662-C131-201115832) to review and vary Telecom Regulatory Policy 2009-200, in December 2011. On 23 December 2011 the CRTC suspended consideration CMA's application, "to allow the Commission to consider whether the CMA's application should be reviewed in a broader context." Andrea Rosen, Chief Compliance and Enforcement Officer, Letter to the CMA, (Ottawa, 23 December 2011), <http://www.crtc.gc.ca/eng/archive/2011/lt111223a.htm>.

²² Intervention 116 to Notice of Consultation 2013-140, at para. 16.

calls to name their clients.²³ This change, issued in March 2014 in Compliance and Enforcement Regulatory Policy CRTC 2014-155, was a surprise because it was not raised in the notice seeking Canadians' views on simplifying the *Unsolicited Telecommunications Rules*.²⁴

32. If the CRTC's 2013 request for comments about the *Unsolicited Telecommunications Rules* had mentioned proposals to require the naming of clients in IVR calls, the CRTC would have received

²³ Review of the *Unsolicited Telecommunications Rules*, Regulatory Policy 2014-155 (Ottawa, 31 March 2014) at paras :

59. Regarding the provision of contact information during an ADAD call, the Commission is aware that some consumers rely on the postal address provided as part of the identification message to verify the legitimacy of a calling party and that not all consumers have access to the Internet. However, the Commission is of the view that, on balance, allowing calling parties the option of including either a postal address or an email address, in addition to a valid telephone number, would provide consumers with sufficient means to contact the caller if needed.

60. Further, the Commission is of the view that allowing the calling party to identify itself and briefly state the purpose of the call at the beginning of an ADAD message would meet many of the concerns expressed in the submissions about consumers prematurely terminating calls containing important service notifications, while still providing consumers with the necessary contact information at the beginning of the call.

61. In light of the above, the Commission modifies the UTRs as follows (changes are indicated in bold italics):

...

Part IV, section 4(d), relating to the identification message required for non-solicitation ADADs, is replaced with the following:

such telecommunications shall begin with a clear message identifying the person on whose behalf the telecommunication is made **and a brief description of the purpose of the telecommunication**. This identification message shall include **an electronic mail address or postal** mailing address and a local or toll-free telecommunications number at which a representative of the originator of the message can be reached. In the event that the actual message relayed exceeds sixty (60) seconds, the identification message shall be repeated at the end of the telecommunication ...

[bold font in original text]

²⁴ *Review of the Unsolicited Telecommunications Rules*, Compliance and Enforcement Notice of Consultation CRTC 2013-140 (Ottawa, 20 March 2013), <http://www.crtc.gc.ca/eng/archive/2013/2013-140.htm>

comments about the serious problems this would create for survey and market research.

3.7 *CRTC has been fining parties for using the telephone system to conduct surveys*

33. As previously noted (paragraph 2.2, above), the CRTC has fined eight parties under the *Unsolicited Telecommunications Rules* for telephone calls they made which involved surveys (or polls).

34. All eight were fined under Part IV, section 4(d) of the *Unsolicited Telecommunications Rules*:

Wildrose Alliance Political Party	May 2013	\$90,000 penalty for telecommunications made in six polling campaigns from Mar 2011 to Nov 2012
Alberta Federation of Labour	Aug 2014	\$50,000 penalty for telecommunications made to conduct a poll from 17-18 April 2012
RackNine Inc.	May 2013	\$60,000 penalty for telecommunications that included polling and surveys, between March 2011 and February 2013
Progressive Conservative Party of Ontario	May 2013	\$85,000 penalty for telecommunications that conducted a survey between 1-7 Sept 2011
Marc Garneau Leadership Campaign	May 2013	\$2,500 penalty for telecommunications made to conduct a poll on 7 March 2013
Paul Dewar Leadership Campaign	July 2013	\$7,000 penalty for telecommunications made to conduct a poll from 8-9 February 2012
Canadian Union of Postal Workers	Aug 2013	\$50,000 penalty for telecommunications made to conduct a poll from 21 May to 26 June 2013
Union Calling	Sept 2013	\$65,000 penalty for telecommunications that included polling campaigns from Sept 2011 to Aug 2013

35. The reason parties that were conducting survey research were fined is because the Part IV ADAD rules have two provisions whose

effect is to submit all IVR surveys to rules otherwise created solely for IVR telemarketing. Section 1 of the Part IV ADAD rules stipulates that the ADAD rules apply even if a call is exempt from the nDNCL rules, while section 4 of the Part IV rules stipulates that it applies to all IVR calls, even if the calls would otherwise be exempt from telemarketing rules:

Part IV: Automatic Dialing-Announcing Device (ADAD) Rules

1. The ADAD Rules apply whether or not the telemarketing telecommunication is exempt from the National DNCL Rules.

...

4. A person using an ADAD to make unsolicited telecommunications where there is no attempt to solicit, shall comply with the following conditions:

....

36. The parties noted in paragraph 34, above, were fined because they did not comply with the requirements of Part IV, section 4(d) of the *Unsolicited Telecommunications Rules*, stipulating the provision of specific contact information.
37. At least one of the parties - Union Calling - has said that it did meet the contact information requirements of Part IV, section 4(d), by providing the information via the click-through capabilities of IVR technology. In other words, recipients of Union Calling's IVR calls could press a number to obtain the contact information.²⁵ The CRTC notices of violation do not indicate whether any of the other seven parties fined for violating the contact-information requirement also used the click-through features of IVR technology to provide contact information. The Part IV rules do not clearly

²⁵ See <http://unioncalling.ca/content/union-calling-inc-pays-65000-end-crtc-investigation-its-clients> (release is attached as Appendix 4).

state how contact information must be provided, and do not expressly prohibit the use of 'click-through' systems to provide contact information:

4(d) such telecommunications shall begin with a clear message identifying the person on whose behalf the telecommunication is made and a brief description of the purpose of the telecommunication. This identification message shall include an electronic mail address or postal mailing address and a local or toll-free telecommunications number at which a representative of the originator of the message can be reached. In the event that the actual message relayed exceeds sixty (60) seconds, the identification message shall be repeated at the end of the telecommunication

38. Having fined parties for IVR surveys because of purportedly inadequate contact information, the CRTC's staff now also say that incentives offered by market or survey researchers to telephone call recipients to encourage them to participate in surveys transform calls made for survey research purposes, into telemarketing. As noted above in paragraph 7 of the 10 September 2014 letter, the CRTC staff has told *Probit* that

The [Unsolicited Telecommunications] Rules define solicitation as the selling or promoting of a product or service, or the soliciting of money or money's worth, whether directly or indirectly and whether on behalf of another person.

Based on this definition, **your offer of a monetary prize is solicitation, and therefore all calls made that contain this offer are telemarketing in nature.**²⁶

39. If the CRTC agrees with this definition, any survey or market research company that offers any kind of benefit to increase survey response rates will be a telemarketer - contrary to the exemption granted by Parliament in section 41.7(f) of the *Act*.

²⁶ 10 September 2014 letter, at 2.

3.8 CRTC continues to say that its telemarketing requirements do not apply to surveys

40. Meanwhile, and even though it has fined eight parties for telemarketing offences when they were conducting surveys, and is now also threatening action against *Probit*, the CRTC continues to say that market and survey researchers are exempt from the national DNCL regime. For example, on September 23, 2014, the CRTC's website contained the following statement:

When Parliament amended the Telecommunications Act to create the National DNCL regime, it allowed certain types of calls to be exempt from it. The exemptions include calls made by or on behalf of:

- registered charities
- newspapers solely selling subscriptions
- political parties, leadership contestants and candidates
- a business to another business
- companies that have an existing business relationship with a consumer (i.e., within the last 18 months), and
- organizations solely conducting market research, polls or surveys

CRTC, "Silencing Annoying Phone Calls Since 2008",
<http://www.crtc.gc.ca/eng/DNCL/CE/ann.htm>

4.0 Grounds of Probit's application

4.1 No evidence that more contact information needed in Unsolicited Telecommunications Rules

41. *Probit* notes that parties to the 2013 *Unsolicited Telecommunications Rules* review did not know the CRTC was thinking of adding more identification requirements to the Part IV IVR rules, and therefore could not have known that they needed to submit evidence about the impact of this change.

42. Moreover, Compliance and Enforcement Policy 2014-155 does not present clear evidence to support the addition of a 'purpose' and client-identification requirement - perhaps because no evidence

about this issue was placed on the proceeding's record. The Policy itself says simply that the change

... would meet many of the concerns expressed in the submissions about consumers prematurely terminating calls containing important service notifications, while still providing consumers with the necessary contact information at the beginning of the call.²⁷

43. These scant reasons do not clearly establish whether the CRTC considered the impact of the change on privacy rights, or on survey research. They also do not indicate whether the CRTC considered the impact that a requirement for IVR surveys to state the purpose of the call and the identity of the survey client could have on survey research conducted by telephone in Canada.
44. It is well-known by survey professionals, for example, that survey respondents' answers can be influenced by what they know about the sponsor and purpose of the survey. The resulting error - known as response bias - reduces the accuracy of survey research results.
45. Probit respectfully submits that the CRTC should review its *Unsolicited Telecommunications Rules* to ensure that new requirements for providing purpose and client-identification information do not unintentionally reduce the validity of Canadian telephone survey research results. A notice of consultation that sets out this issue clearly will provide parties with an opportunity to submit evidence on which the Commission may then rely when it reaches a determination.

²⁷ Para. 60.

4.2 *The UTRs breach Canadians' right to privacy*

46. Probit is aware that several parties have asked the CRTC to review the *Unsolicited Telecommunications Rules* because the CRTC's decision to require IVR calls to identify the client who commissioned the call, raises serious concerns that individuals' right to privacy will be breached.

47. Probit shares these concerns, which seem to contradict Parliament's desire that Canadian telecommunications protect individuals' privacy.²⁸

4.3 *The Unsolicited Telecommunications Rules are being applied to survey research, although Parliament exempted surveys from the DNCL regime*

48. Finally, Probit asks the CRTC to review its approach to surveys when it administers Parliament's DNCL regime, to ensure that it is respecting Parliament's express desire to exempt surveys (or polls, as they are sometimes called) from telemarketing.

49. For example, we do not understand the rationale for applying the survey exemption piecemeal: surveys only seem to be exempt if they are made using people, instead of IVR technology. To the best of our knowledge the CRTC has not discussed evidence it considered which shows that IVR surveys cause undue inconvenience and annoyance - and in the absence of this evidence, it is unclear why the CRTC insists on pursuing survey companies that use IVR technology under its Part IV ADAD rules.

²⁸ Section 7(i) of the *Act* affirms that one of the objectives of Canada's telecommunications policy is "to contribute to the protection of the privacy of persons."

50. Similarly, we do not understand why the CRTC believes that survey researchers who offer respondents incentives to participate in quantitative or qualitative research are actually telemarketing. To the best of our knowledge, the CRTC has not issued any documents setting out this definition of telemarketing. In our experience, survey recruitment incentives are often necessary to ensure appropriate numbers of respondents, particularly for small or remote populations.
51. If the CRTC has revised its understanding of telemarketing, so as to include survey research when it tries to increase response rates by offering incentives to respondents, it should give Canadians the opportunity to comment on this decision, particularly since it seems to fly in the face of Parliament's express intention that surveys be exempted from the concept of telemarketing.

5.0 **Nature of decision sought**

52. As noted at the outset of this application, Probit is asking the CRTC to amend Parts 1 and IV of the *Unsolicited Telecommunications Rules*.
53. Specifically, Probit is asking the Commission to
- a amend the definitions of 'telemarketing' and 'telemarketer' set out in Part I of the *Unsolicited Telecommunications Rules*, so as to exclude research undertaken to determine the views of members of the public, and to
 - b amend Part IV of the *Unsolicited Telecommunications Rules* to expressly exclude this Part's application to survey research.

54. Probit is aware that the Commission has notified parties who have raised concerns about the *Unsolicited Telecommunications Rules* and privacy issues that

... Commission staff is suspending the proceedings initiated by the Coalition of Collections Agencies (8665-C208-201407503), the application from Ontario Society of Collection Agencies (8665-T173-201407768), as well as the deadline for reply comments from Total Credit Recovery (8665-T170-201406835) until such time as the Commission determines the appropriate process.²⁹

55. Probit respectfully recommends that the appropriate process in this case, as a number of issues have arisen regarding the *Unsolicited Telecommunications Rules*, is for the Commission to issue a notice of consultation. The notice should invite comments about the issues Probit has raised regarding the treatment of survey research as telemarketing, as well as the important concerns raised by others about privacy rights.
56. Probit also recommends that the Commission suspend any investigations its staff is now undertaking of survey companies, until the Commission has heard submissions about the correct interpretation of 'telemarketing', and the application of the exemption to surveys granted by Parliament.

6.0 Parties copied on this application

57. The following parties have been copied on this application:

²⁹ Manon Bombardier, Chief Compliance and Enforcement Officer, *Telecom Procedural Letter Addressed to Lorne Bozinoff (Forum Research Inc.) RE: Applications by the Government of Quebec (8662-G4-201406041), Total Credit Recovery (8665-T170-201406835), Coalition of Collection Agencies (8665-C208-201407503) and the Ontario Society of Collection Agencies (8665-T173-201407768) to Review and Vary Compliance and Enforcement Regulatory Policy CRTC 2014-155 – Procedural* (Ottawa, 29 August 2014) <http://www.crtc.gc.ca/eng/archive/2014/lt140829a.htm>.

Mark Ball, Receivables Management Association of Canada Inc.

Dr. Lorne Bozinoff, Forum Research

David Elder, Coalition of Collection Agencies

John Corbett, Corbett Communications,

Gregory Jodouin, PACE Consulting

André Labrie, Government of Quebec,

Jean-François Léger, on behalf of Public Interest Advocacy
Centre

Barbara Miller, on behalf of Total Credit Recovery

Leslie Milton, on behalf of Total Credit Recovery

Kara Mitchelmore, President, MRIA

Bill Reno, Union Calling

Bradley L. Rice, President, Ontario Society of Collection
Agencies

**Appendix 1 Extracts from the 2005 review of Bill C-37 by the
House of Commons Standing Committee on
Industry, Natural Resources, Science and
Technology**

13 April 2005 (<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=1762702&Language=E&Mode=1&Parl=38&Ses=1>)

....

Michael Binder (Assistant Deputy Minister, Spectrum, Information Technologies and Telecommunications, Department of Industry):

...

With slide 2, I want to remind everybody that the Telecommunications Act provides the CRTC, under section 41, with the responsibility for telecommunication. It in fact has been regulating telecommunication since 1994. It applies those regulations to all unsolicited sales services online and not to people who do market surveys or solicit ideas, opinions, and votes.

....

Again, under the existing CRTC definition of what telemarketing is, you would never have this problem because it's not done as solicitation for profit or a financial transaction. It's done really for health care, so it would never fall under the definition of telemarketing. A lot of the political activity is defined that way also. Even "survey" and "polling" are not defined as telemarketing in the sense we define it.

...

Mr. Werner Schmidt: I heard you loud and clear. That's what you said earlier.

...

The other one I would like to ask you about—and I think you do suggest that surveys and polls are not subject to the do-not-call list—is political parties. Are they exempt as well?

Mr. Michael Binder: They're exempt right now under the CRTC's existing rules.

...

Mr. Michael Chong: ...

Is it fairly certain or is it likely that, as in other jurisdictions, organizations that would be exempt from this do-not-call list would be charities, political parties, companies that conduct surveys? You've mentioned existing customers already, so I understand that part of it, but do you think it's very likely that those other three types of organizations would be exempt?

Mr. Michael Binder: Let me go backwards. Right now under CRTC's existing rule on telemarketing, surveys and calls related to political parties would be exempt. They have not ruled on existing relationships and on charities. Right now the way it works is that every one of the callers has to set up their own list.

Mr. Michael Chong: But we're talking about the proposed legislation here. This is in front of committee now, and if this legislation gets passed, and the CRTC goes out and does its tour for input, and then decides that they're not going to allow charities to call potential donors, and they're not going to allow political parties or associations to call potential or lapsed members, and they're not going to allow surveys and polls, I think I'd have some serious concerns about that. I'm just trying to get a feeling from you as to what the industry department's thoughts were when they put this bill together, and how you saw the world unfolding once

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the CRTC did complete its consultations, what kind of regulatory framework, specifically regarding these types of organizations, you saw unfolding.

Mr. Michael Binder: It's a good question. Is there a leap of faith here? Yes. But let me answer that in two ways.

First of all, I'd be stunned if the CRTC did not follow through on the existing rules and improve on them, learning from the U.S. and the U.K. and from whatever else is internationally available.

Second, if they really get offside, the government always has the prerogative of changing their--

Mr. Michael Chong: The GIC.

Mr. Michael Binder: That's right. The government can overrule them on this particular thing.

So I believe they will do the right thing. They have been toiling over this file, trying to fix it, for 11 years now, since 1994. They don't like the file, but they have to fix it. To be blunt, it's been a royal pain. So they would like to find a solution to this.

I think the American experience and the U.K. experience bring ready-made models that work and are accepted by the large population. Why wouldn't you follow them?

20 April 2005 (<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=1789837&Language=E&Mode=1&Parl=38&Ses=1>)

...

Hon. Jerry Pickard: You're absolutely correct, Paul, that it doesn't appear clearly. The fact is that political parties have been given exemption through CRTC regulations in the past.

I believe that would be consistent with the policy we have now, and I'm quite certain that that exemption would remain in place, and I think it would as well for those who are doing survey work and that type of work, which we explained at our last meeting.

The Chair: Thank you, Jerry.

Maybe what we could do, Paul, is just get a statement from the CRTC of its intentions with respect to that, just so there's assurance that the policy would be carried forward. Maybe that can be covered today in fact. With that, Paul, let's continue, and we'll raise it with our witnesses. How's that?

...

Mr. Richard French (Vice-Chairperson, Telecommunications, Canadian Radio-television and Telecommunications Commission): Thank you. Good day Mr. Chairman. I will be very brief.

....

With respect to exemptions, one major point that I would like to leave in the minds of the committee is that from the point of view of the commission, we would very much welcome the guidance of Parliament on this subject. It's extremely helpful to the commission to have Parliament pronounce on such questions of fundamental social values as what is and is not appropriate in the way of telemarketing.

...

Mr. Nik Nanos (President-elect, Marketing Research and Intelligence Association): Thank you very much.

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Our association is supportive of Bill C-37 and a national do not call registry. However, we are recommending an amendment to provide for an explicit exemption for market and survey research.

...

What is survey research? To put it simply, there are two characteristics that define market survey research that differentiate our work from that of the telemarketing industry. First, legitimate survey researchers never attempt to sell anything. In fact, solicitation violates our rigorous code of conduct and ethical practice. Second, survey research gives Canadians an opportunity to voice their opinions and have their influence on important issues related to public policy and products and services, thereby serving a valuable societal purpose.

...

In regard to Bill C-37, the MRIA strongly supports the government's efforts to enhance privacy and consumer rights. It is our strong view, however, that Bill C-37 should include an express exemption for market and survey research, because we are very distinct from telemarketing, which is the focus and driver of this bill. The public policy input and other societal benefits of market and survey research are, we believe, well recognized and accepted by the general public and underlie Canadians' positive and cooperative attitudes towards our industry.

An absolutely fundamental issue for valid market research is the representativeness of a sample. A do not call registry that targeted telemarketers but swept in market and survey research under the same net would be too broad. It would severely impair our industry's ability to gather the opinions of Canadians in a manner that is representative and predictive of the views of society at large. Statistical reliability is the key to good research, which in turn is the key to good policy-making.

...

In Canada, the discussion concerning a national do not call registry originated with the CRTC in response to an increasing number of complaints related to telemarketing, and it's important to note that the CRTC itself acknowledged in these proceedings that "no compelling evidence (existed) to demonstrate any undue inconvenience or nuisance" by market and survey research calls.

...

In conclusion, while the MRIA is fully supportive, we believe it's equally in the public interest to make sure that market and survey research is exempted. We want to draw your attention to the fact that over the last ten years our industry has been in two other consultations with the CRTC on this issue. The public has been thoroughly consulted by the CRTC on this. The CRTC has been absolutely clear on the need to exempt calls that do not solicit. And, finally, it's in the public interest.

...

Mr. Nik Nanos: If I could, I'll just add a couple of things.

One thing that MADD and the survey research industry have in common is that we have a vested interest in ensuring that Canadians cooperate and are happy with those contacts. We're not telemarketers, where we are selling, basically. Those are two different things. We have a different interest.

When MADD Canada talks about how they maintain their list and why they engage in their own little internal do not call registry, they do that in order to keep their members happy, in order to engage in good corporate practices, because of the societal good they do. In the same way, market research companies maintain their own internal do not call lists, for the exact same reason--because we need Canadians to participate and cooperate. When our firm

does a survey, the first thing we say in the first 10 seconds is that this is not a sales call; this is a bona fide research initiative. It's very important.

...

Mr. Paul Crête: Would you prefer all exemptions to be in the Act, or should some exemptions be in the Act and others in the regulations, as is currently the case?

The CRTC representative said just now in his presentation: "Survey and polling calls are not made for the purpose of solicitation and therefore are exempt."

There is currently an exemption for surveys, but it is not in the Act. Would you like this exemption to be in the Act? I am speaking here of surveys. More generally, should all exemptions be in the Act?

After finding out about existing practices, it may be decided that what is exempted by the CRTC ought to be exempted in the Act itself so that there are not two different kinds of exemptions: those provided for in the Act and those resulting from CRTC practices.

When the CRTC evaluates new applications, it could very well say that Parliament would have placed this exemption in the Act if it had wanted to do so.

Are you in agreement with this, and with the proposed amendment? Would this amendment satisfy you?

[English]

Mr. Nik Nanos: Yes, I would agree. Our preference would be, to paraphrase Mr. French, for the committee to identify the societal value and goals and to clearly provide direction to the CRTC on exemptions, if the committee decides to have whatever exemptions. Our preference would be, at least for our stakeholders, to have survey market research specifically included in the act as an exemption.

...

Mr. Bradley Trost: I agree with Brian. We've got quite a bit of mail on these topics here from various groups.

There is just one thing. Whenever I go through legislation, I'm also looking for other ways to deal with problems. There is a problem out there. People do have a certain degree of annoyance. Having once had a part-time summer job in university working for a market research firm, and having run my share of phone banks, etc., during political campaigns, I know how people can respond on the phone. I think most politicians have worked the phones pretty extensively, and we understand the two-way relationship.

What I'm looking for is any ideas you have on how to handle or lessen the annoyance the general public feels. Part of this question comes from my own personal experience. It's not just the number of calls. It's sometimes the time of call, it's sometimes the length of call, it's sometimes--you know, various things like that.

I'm a Conservative here, so I really hate to get into too much government regulation on things. Organizations are pretty often more refined tools in disciplining themselves, but maybe there needs to be some regulation or legislation, and there already is, in some respects.

Are there other things you could suggest to maybe lessen the public's annoyance, be it with your particular cause or whichever of the three you're doing? I know with door-knocking for sales, going door to door in small towns, there are regulations about hours, days, frequency, number of calls--there are all sorts of things, and probably a lot I haven't thought of. Have you given any thought to that? And could you bring out any suggestions to maybe throw in for future legislation that would leave your businesses and organizations able to conduct what you need to do, but still lessen people's annoyance with the problem?

Mr. Brendan Wycks (Executive Director, Marketing Research and Intelligence Association): In the market and survey research industry we have a very strong self-regulatory focus. In our code of conduct and ethical practice we do have some provisions our members must adhere to around length of call and around stating the clear purpose at the very outset when reaching a respondent, that this is a survey and research call and is not for the purpose of solicitation, which is almost always very positively received.

It might be an idea to have in the regulations some guidelines around length of call and immediately stating the purpose of the call. It may be difficult to legislate specific times at which calls can be placed, because of time zones and centralized call centres and people in different stages of life preferring calls at different times of the day, etc

...

Mr. Nik Nanos: ... someone has to establish principles, or else there may be unintended, unforeseen consequences of not giving some direction; that's our only point. If there's a role, there has to be some kind of midway point in providing broad principles that are flexible enough to make sure the regulations are consistent with them, so that everyone sitting around the committee doesn't meet again in five years and realize we've created some unanticipated results that were never intended when we sat around the table today.

Hon. Jerry Pickard: With the regulations those can be dealt with. That's the whole point.

...

18 May 2005 (<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=1861929&Language=E&Mode=1&Parl=38&Ses=1>)

...

Mr. James Rajotte: It is basically to establish exemptions for the do not call list--existing business relationships; charities, as defined in the Income Tax Act; political parties; candidates' associations; telephone surveyors. Basically I think there's general agreement about charities, but for existing business relationships we thought it was important to maintain that.

...

For telephone surveys, there was mention of an Environics poll, if we want to be certain that they are using a random sample, that these telephone surveys are protected as that. So I think it's fairly straightforward.

In terms of timeline, the 18-month period, we're flexible on that. I know other members from other parties have other time periods, which I'm certainly willing to discuss with them.

...

Hon. Jerry Pickard: Concerning proposed paragraph 41.6(1)(f), "made for the purpose of collecting information for a survey of members of the public", would it be acceptable to you, Mr. Rajotte, to have it "made for the sole purpose" so we don't have somebody doing a survey and then following it up at a later point? Having "for the sole purpose" of collecting data doesn't allow the marketing to enter in.

Mr. James Rajotte: That's fine.

Appendix 2

CRTC's August 2008 webinar briefing of MRIA and its members

Appendix 3

**CRTC's response to questions from MRIA and its
members following August 2008 briefing**

Appendix 4 Union Calling Press Release (15 October 2013)**Union Calling Inc. pays \$65,000 to end CRTC investigation of its clients**

Toronto, Ontario (15 October 2013) — Union Calling Inc., a Canadian company that specializes in connecting unions with their members using automated telecommunications systems, has agreed to pay a \$65,000 penalty to the Receiver-General of Canada as part of an agreement with the Canadian Radio-television and Telecommunications Commission (CRTC) to terminate its investigation of the work Union Calling undertook for its clients from 2011 to 2013.

“While we appreciated the CRTC’s role in ensuring that Canadians can control the telephone calls they receive, we had very serious concerns about the scope of its investigation of our clients,” said Bill Reno, Union Calling’s founder. “Agreeing to the penalty proposed by the CRTC was the only way we saw to protect the confidentiality of our clients’ communications with their members.”

The CRTC’s *Unsolicited Telecommunications Rules* require anyone who makes automated telephone calls to state the address and telephone number of the person originating the calls. Union Calling’s policy has been to enable recipients to obtain this information by pressing a number on their telephone handset – but the CRTC rules require the information to be stated in the first few seconds of the message itself. “Our company has always provided contact information in the automated calls it helps to deliver,” said Christopher Murdoch, Union Calling’s Director of Operations and Chief Compliance Officer. “Going forward we will ensure that our clients are aware of this CRTC requirement.”

Union Calling was pleased that it was able to protect its clients’ information by accepting the terms offered by the CRTC for ending its investigation. “Although it came at a very high price,” Reno said, “we protected the confidentiality of the information entrusted to Union Calling by its clients about their internal matters.”

About Union Calling: Founded in 2004, Union Calling helps union leaders to connect with members through voice broadcasts and telephone town halls. Fully unionized, it works exclusively for unions, their allies and other progressive organizations.

Source: <http://unioncalling.ca/content/union-calling-inc-pays-65000-end-crtc-investigation-its-clients>

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