PETITION TO HER EXCELLENCY
THE GOVERNOR IN COUNCIL

PURSUANT TO SECTION 12(1) OF
THE TELECOMMUNICATIONS ACT

IN THE MATTER OF
TELECOM DECISION CRTC 2004-35
REVIEW OF TELEMARKETING RULES
MAY 21, 2004

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CANADIAN MARKETING ASSOCIATION

Filed
AUGUST 19, 2004
1. This Petition is brought by the Canadian Marketing Association (CMA) on behalf of its 800 corporate members. It is made pursuant to section 12(1) of the *Telecommunications Act* (S.C. 1993, c-38, as amended), which provides that the Governor in Council may, on petition in writing, or on its own motion, by order vary or rescind a decision of the Canadian Radio-television and Telecommunications Commission (CRTC) or refer all or a portion of the decision back to the CRTC for reconsideration.

2. In this Petition, the CMA is requesting the Governor in Council to stay implementation of Telecom Decision CRTC 2004-35, *Review of Telemarketing Rules* (Decision 2004-35), until such time as a national do not call registry is established in Canada. As discussed in greater detail below, the CMA is requesting the Governor in Council to grant one of three alternative forms of relief:

   **Alternative 1:** Stay Decision 2004-35 pending the passage of a new *Do Not Call Act* along the lines proposed in Bill C-520 and in the U.S. *Do-Not-Call Act*;

   **Alternative 2:** Stay Decision 2004-35 pending the passage of amendments to the *Telecommunications Act* to expressly empower the CRTC to administer or delegate the administration of a national do not call registry, and to fund that registry; or

   **Alternative 3:** Refer the decision not to establish a national do not call registry back to the CRTC for reconsideration and stay implementation of the new measures in Decision 2004-35, pending completion of that review.

3. The decision in question concerns the rules and regulations governing the treatment of unsolicited marketing calls by any business or organization,
including charities, made via the telephone and certain other forms of telecommunication. The decision applies to the acquisition of new customers, communications to current customers or donors and business-to-business calls. The CRTC's decision, was released on May 21, 2004 - approximately two years after the conclusion of a public proceeding that was initiated in 2001. During the course of that 2001 proceeding, the CRTC sought public input on ways to improve the telemarketing rules then in place. The CMA participated in the CRTC's proceeding.

4. In its decision, the CRTC rejected the creation of a national "do not call" registry for consumers who do not wish to receive unsolicited telephone marketing calls, in favour of a system of multiple call lists to be maintained on an individual basis by the thousands of Canadian businesses and charities that use the telephone to market their goods and services to the Canadian public. This includes not only calls made by "call centres" or "telemarketers" to consumers – but also calls made by the whole gamut of Canadian businesses and charities – regardless of whether the call is made on a "cold call" basis to a consumer – or to an existing customer, client or donor. It also purports to cover business-to-business calls, including those to existing business customers.

5. Under the CRTC's approach, every business or charity that uses the telephone to market its goods or services, or to solicit donations, will have to maintain a special database in which to record the names of individuals who no longer wish to receive unsolicited calls from that organization. In addition, each such business or charity will have to set up a toll-free number to administer this service and support that toll-free number with live operators during regular business hours and automated voice recording (AVR) devices after hours. They will also have to administer a system of unique registration numbers for each individual consumer or business customer that wishes to register. These rules
apply regardless of the size of business or charity and regardless of how much business they do via the telephone.

6. The new regulations grow more complicated when a third party agency, such as a third party call centre, is used by a business or charity to make these types of calls on its behalf. In these cases, the caller must give the called party the option of registering on the call centre's do not call list, or on the do not call list of the business it represents, or both. This option is confusing to consumers and difficult for them to assess properly since they have no way of knowing what other businesses or charities the call centre may represent, now or in the future. Due to the CRTC's decision to include calls to existing customers or clients of businesses, as well as calls to regular donors of a charity, consumers may unwittingly curtail many types of calls that they would not normally consider to be unsolicited.

7. As discussed in greater detail below, the CRTC's system of multiple call lists will not relieve the plight of Canadian consumers who are annoyed with unsolicited calls, and it will cost Canadian businesses hundreds of millions of dollars to administer. The system is confusing to consumers who can register on literally hundreds, if not thousands, of do not call lists and still continue to receive unwanted calls. This will do little to address the problem faced by consumers and will generate bad will toward both the regulator and Canadian businesses that use the telephone in connection with their marketing activities.

8. The CRTC's decision will have a very negative impact on the $16 billion per annum business of telephone marketing and charitable fund raising in Canada and will create a barrier to smaller Canadian businesses using the telephone as a marketing tool. It will also cause many businesses to reassess their decision to locate call centres in Canada with the consequent loss of Canadian jobs in this important and growing sector of the Canadian economy.
9. In contrast with the CRTC’s approach, a centrally administered national do not call registry, such as the one that was recently established in the United States, or the one that was introduced as Private Member’s Bill C-520 in the last Parliament, would provide a simple and effective means for consumers to avoid unwanted calls, while enabling Canadian businesses to share the costs of administration at a lower aggregate level. A uniform approach to this issue in North America would also curtail the flight of Canadian marketing business off-shore to avoid the expensive and confusing Canadian regulations. This in turn will save jobs in many of Canada's smaller communities that have hitherto attracted call centres to locate in their region. For these reasons, the CMA is requesting the Governor in Council to stay implementation of the "interim measures" established by the CRTC in Decision 2004-35 either until new legislation is introduced or until the CRTC has had sufficient time to reconsider the establishment of a national do not call registry.

10. Although the CRTC refers throughout its decision to protecting the interests of "consumers", the orders contained in its decision are not similarly limited. They purport to include business-to-business calls and calls made to existing clients and customers, or to prior donors in the case of charities, within the realm of "unsolicited calls." In this respect, the scope of the Commission’s new requirements extend much further than similar telephone solicitation rules in the United States or the proposals in Bill C-520. The Commission’s rules also purport to capture activities, such as communications with existing customers, that have been recognized as being a legitimate form of communication in other types of legislation, including the various privacy statutes that have been enacted in Canada. The new regime now purports to capture a wide range of calls to existing customers, including calls to bank customers regarding loan or mortgage renewals, or calls to a regular donor of a charity to determine whether they would be willing to offer another contribution.
11. Application of the new regulations to these types of calls will inevitably result in the decline of telecommunications as a business marketing tool – especially for smaller businesses which may not be able to afford the administration costs associated with special databases, unique registration numbers and live operators manning toll-free numbers. It will also result in the loss of call centres for many communities in Canada that have come to rely on these as a valuable source of employment. This in turn runs counter to the telecommunications policy objectives of the Canadian Government which are generally directed at encouraging the efficient use of telecommunications in Canadian business. In addition, Canadian consumers will inevitably end up paying the price for these onerous and ineffective regulations.

12. Under the CRTC’s new rules the caller must identify him or herself, as well as the organization calling and provide a toll free number for complaints – prior to asking to speak to the called party and prior to ascertaining whether the intended party has in fact answered the phone. This new measure is proving to be totally ineffective since in many cases, it results in the wrong party receiving the requisite information (when, for example, a child answers the phone – or another adult fails to pass along the information to the intended caller). It also breaches the privacy of the intended called party since it often imparts to a third party the nature of the call in question. This requirement is causing havoc in the Canadian marketing industry.

13. These restrictions on how telephone marketers identify themselves to consumers, donors or business customers are also contrary to the freedom of expression guarantees in the Canadian Charter of Rights and Freedoms. While the Charter has been interpreted by the courts to sanction restrictions being placed on commercial speech in certain limited circumstances, such restrictions must prescribe a reasonable limit to this infringement that is both effective in achieving the desired public policy objects and is a proportionate response to the perceived harm being addressed. The law or regulation must impair the
expression right no more than is reasonably necessary to achieve the government's objectives and the benefit achieved must not outweigh the deleterious effect on the person whose right is being restricted. In this instance, the CRTC's requirements are ineffective and unreasonable since they often result in the wrong party receiving the information required to be imparted. Details of the CMA's legal arguments respecting the CRTC's breach of the Charter are set out at paragraphs 119 to 150 of the CMA's application to the CRTC of August 6, 2004 requesting the CRTC to review and vary its decision.

14. These problems with the new identification measures could be easily remedied by a more common sense approach to the issue of caller identification so that the caller can establish contact with the individual being called before implementing the identification measures. Once contact is established, the caller would be required to identify himself/herself and the name of the agency and the client he or she is calling on behalf at the beginning of the conversation with the called party. The caller would also be required to provide a toll free telephone number to the individual being called, but would be at liberty to provide this information at the end of the call when the called party knows what the call was about and can make an informed decision about whether or not to act.

**The Need for a National Do Not Call Registry**

15. The CMA does not question the need for regulation of unsolicited telephone marketing in Canada. The CMA and its members recognize the public interest in protecting consumers from unwanted solicitations over the telephone. They also recognize that it is not good for business to continue to target individuals with marketing initiatives, if the consumers in question do not want to receive them. This erodes good will and wastes valuable marketing resources.

16. The CMA has therefore always been interested in the development of a national do not call registry where consumers could register their desire not to
receive telephone solicitations. To this end, the CMA has set up and administered its own do not call registry since 1989. Participation in the CMA’s do not call list became compulsory for the CMA’s 800 corporate members in 1993. This requirement applies to the members’ telephone marketing activity, regardless of whether they conduct their business in-house or use an agency. In the latter case, the agency must also use the CMA’s list. In addition, a number of non-member companies participate in the CMA’s registry on a voluntary basis. Consumers can enter their names on the CMA list via the Internet, fax or telephone. The CMA also handles complaints respecting the list – although these have been very few in number. At the current time, there are approximately 340,000 unique names registered on the CMA’s do not call list, with approximately 7,500 additions each month. This do not call list is funded on a subscription basis by CMA member companies and those non-members who choose to participate.

17. In 2001, when the CRTC invited comments on ways to improve the “telemarketing rules”, the CMA proposed the creation of a national registry based on the models then in place in several States in the United States of America.

18. Since that time, regulatory agencies and legislators in the United States have recognized the importance of establishing a national do not call list for all marketers who use the telephone to solicit. On September 18, 2002, the Federal Communications Commission (FCC) released a Memorandum Opinion and Order and Notice of Proposed Rulemaking seeking comment on whether the FCC’s rules for telephone marketers need to be revised. Among other issues, the FCC sought comment on whether to establish a national do not call list and, if so, how such action might be taken in conjunction with the Federal Trade Commission’s (“FTC”) proposal to adopt a national do-not-call list. On December 18, 2002, the FTC released an order adopting a national do not call registry to be
maintained by the federal government to help consumers avoid unwanted telemarketing calls.

19. The adoption of a national do not call list by the FTC prompted the U.S. Congress to pass a law on March 11, 2003, titled the *Do-Not-Call Act*. The Act authorized the FTC to collect fees from marketers who use the telephone for the implementation and enforcement of a do-not-call registry. The Do-Not-Call Act also required the FCC to issue a final rule in its ongoing telephone marketing proceeding and to consult and coordinate with the FTC to ensure maximize consistency between its rules and those established by the FTC.

20. The FCC announced that it would implement a national do not call list registry in conjunction with the FTC on June 26, 2003. At that time, it also announced that the national registry would be effective three months later on October 1, 2003. The *Do-Not-Call Act* and the regulatory initiatives of the FCC and FTC in the United States provides American consumers with a simple and effective way to register and it provides marketers with a simple solution to the problem of unwanted calls. According to the FCC, the new registry is working well and there has been "exceptional compliance" with the new measures.

21. Here in Canada, the issue of unsolicited calls is equally as important as it is in the United States – but neither the Government, nor the regulator, has yet taken the steps necessary to adequately address the issue.

22. The Government of Canada has recognized in the *Telecommunications Act* the public interest in protecting the privacy of individuals and in protecting them from unsolicited telecommunications. In section 7 of the Act, "the protection of the privacy of persons" was enshrined as one of the objectives of Canadian telecommunications policy and, in section 41, Parliament empowered the CRTC "…to prohibit or regulate the use by any person of the telecommunications facilities of any Canadian carrier for the provision of
unsolicited telecommunications, to the extent ...necessary to prevent undue inconvenience or nuisance."

23. In the last session of Parliament, a Private Member's bill entitled Bill C-520, An Act to Establish and Maintain a National Do-Not-Call Registry received first reading on April 28, 2004. The purpose of this Bill was to establish, maintain and update a national registry of Canadian residential telephone subscribers who choose not to receive telephone solicitations. Unfortunately, this Bill died on the order papers when Parliament was prorogued in May.

24. Bill C-520 provided a simple answer to the consumer problems posed by unwanted telephone solicitations. Like the U.S. legislation, it was limited to consumer protection and did not purport to cover business-to-business calls. The Bill proposed that the Minister of Industry appoint a Registrar to administer the Do-Not-Call Registry and that the Governor in Council be empowered to regulate the fees payable by businesses or consumers using the Registry.

25. As indicated above, during the course of the CRTC's public proceeding in 2001-2002, the CMA proposed the creation of a national do not call registry. This proposal received wide-spread support, including that of the Consumers Association of Canada and the Public Interest Advocacy Centre.

26. In Decision 2004-35, the CRTC rejected the proposal to implement a national do not call list, notwithstanding its express determinations "...that there is considerable merit in the establishment of a national do not call list," "...that separate do not call lists for each telemarketer are less effective and more onerous on the consumers," and notwithstanding the fact that "the Commission recognizes the efficiency of a national do not call list where a consumer could register just once and effectively stop all unwanted telemarketing calls". Despite
these benefits, the CRTC decided against establishing such a national registry, opting instead for the “interim measures” set forth in its decision.

27. In making this determination, the Commission stated that “…implementing a national do not call list in Canada without appropriate start-up funding and without effective fining power for enforcement would be counter-productive.” The Commission also considered that “…the establishment and maintenance of a national registry would be expensive and would likely require a separate administrator”, and that “…at this time, it is not feasible to establish a national registry without due consideration and resolution of the related framework.”

28. The Commission has therefore acknowledged in its Decision that the “interim measures” established in its Decision are inferior compared with the establishment of a national registry – but has cited several impediments to proceeding with a national registry.

29. As discussed above, the interim measures adopted by the Commission are significantly worse than sub-optimal. They are proving to be extremely expensive to implement, as well as ineffective in attaining the Commission’s consumer protection policy objectives. They are also threatening the on-going ability of many Canadian businesses to make use of telecommunications to market their products and services and are threatening thousands of jobs in Canada call centres.

30. What the CRTC appears to have done in Decision 2004-35 is to recognize the superiority of a national registry over its own measures – but to reject this remedy pending legislative changes that would expressly empower the CRTC to establish a national registry, appoint an administrator and fund its activities. The Private Member’s Bill that died in the last session of Parliament would have
addressed these issues outside of the CRTC – under the auspices of the Minister of Industry.

31. Either option would be supported by the CMA. What is unsupportable is the CRTC's interim regime as set forth in Decision 2004-35. This regime is more expensive to operate and less effective than a national registry and it is needlessly damaging an important sector of the Canadian economy.

The Need for Immediate Action

32. The CRTC's decision to put in place new "interim measures" to govern unsolicited calls, pending the passage of new legislative powers (that have yet to be introduced), has put Canadian businesses in an untenable position.

33. They are being directed to implement new measures, which are proving to be extremely expensive to implement on an individual basis, and which are ineffective in addressing the underlying consumer protection issues. Moreover, these measures would be unnecessary if a national do not call registry were established.

Impact on Consumers

34. With respect to Canadian consumers, CMA believes that the new measures imposed by the Commission will create additional confusion, increase the costs for those who make telephone purchases and negatively affect the privacy interests of those individuals who receive solicitation calls. Confusion will also result from the Commission’s decision to perpetuate multiple do not call lists, as well as a number of the new requirements to strengthen the old regime.

35. The new identification procedures, which require the caller to identify him or herself, as well as the organization calling and a toll-free number for
complaints, prior to allowing the caller to ascertain whether the intended called party is on the phone, will inevitably mean that the intended called party may never receive this information or be able to take advantage of the complaint procedure. This will occur whenever a younger child answers the phone or another family member who does not understand the language of the caller. It is also unlikely that the unintended party who answers the phone will take note of this information or pass it on to the intended caller, once that person is summoned to the phone. For these reasons, the requirement is unlikely to be effective, and is likely to lead to consumer frustration and confusion.

36. Rather than providing consumers with a simple and cost effective way to register on a national do not call list and to avoid receiving unsolicited marketing calls, the new rules are perpetuating the deficiencies of the old rules causing a myriad of less comprehensive do not call lists to be maintained and administered by thousands of businesses and charities across Canada who either conduct their own marketing via the telephone – or retain others to do this work for them. Under this regime, consumers will have to register numerous times for many different do not call lists and will inevitably wonder why they keep receiving unsolicited calls from marketers or businesses with whom they have not yet registered. To them, the new system will appear both confusing and ineffective. This will have an adverse impact on both the stature of the CMA’s membership and the credibility of the regulator.

37. The Commission’s new requirement for marketing agents, that call on behalf of other organizations and that receive consumer requests to be put on a do not call list, to ask the consumers if they want to be put on that specific organization’s list, or on the agent’s list, or both, will also prove to be confusing and unhelpful to consumers, as well as potentially harmful. When responding to that query, consumers will not be aware of which organizations the marketing agent represents, either at that moment in time or in the future, and will therefore have no way of knowing the scope of his or her request. This will in many cases
result in those consumers being removed from the lists of marketing agents that represent companies and organizations that the consumer might be interested in hearing from, and may already be doing business with.

38. Due to the broad scope of the term “unsolicited call”, and the Commission’s failure to exclude calls to existing clients or donors or business-to-business calls, consumers may unwittingly block calls that they wish to receive. The requirements imposed in Decision 2004-35 make no attempt to differentiate between “cold calls” made to individuals who do not have a pre-existing relationship with the organization that the marketer represents and those calls where the organization has an existing business or supplier relationship with the consumer. In those situations where a caller is representing an organization that has an existing relationship with the individual that is being called, the call is unlikely to be perceived as a nuisance or inconvenience. For example, a magazine publisher that calls an existing subscriber to determine whether he or she would be interested in renewing a magazine subscription would be required to comply with the Commission’s requirements, notwithstanding that the subscriber would not perceive the unsolicited call to be a nuisance or an inconvenience. Similarly, an individual who receives an unsolicited call from his or her financial institution that involves the promotion of a new service would not be a nuisance, however, it is our understanding that such a call would be required to comply with the measures outlined in Decision 2004-35.

39. In other instances where governments have established measures to regulate telephone solicitation, the rules limiting those solicitations did not apply to situations where the marketer had an existing or on-going relationship with the consumer that is contacted. This is true of the national do not call list registry established in the United States by the Federal Communications Commission (FCC) and Federal Trade Commission (FTC) and it was also true of each of the do not call lists that had been established by state governments in the U.S. In effect, these governments recognized that in certain circumstances (i.e. where
there is an existing business relationship) it is reasonable to assume that the consumer would implicitly consent to receive unsolicited calls.

40. Similarly, in the context of privacy legislation enacted in Canada, it is significant to note that the federal government and provincial governments have adopted an implied consent model. Under these Acts, an organization is exempt from the prohibition on using an individual's personal information if that information is used by the organization to communicate with the individual with which it has an on-going relationship (such as sending out at notice for magazine renewal or a solicitation for a further charitable donation). We would noted that one of the principles of federal government's Model Code for the Protection of Personal Information (set out in the Schedule to the Personal Information Protection and Electronic Documents Act) provides that consent to the disclosure of an individual's personal information will be implied in situations where it would be reasonable for an individual to assume that an organization would use the information for some other related purpose, such as, in the case of a magazine publisher, using the information to solicit the renewal of a magazine subscription.

41. As for the new measures governing company-specific do not call lists, certain requirements imposed on call centres are proving to be confusing to customers and require those call centres to engage in considerable time and effort explaining the do not call options that are available to a customer who requests to have his or name number included on the lists. Under the Commission’s rules, each marketing agency that calls on behalf of a client and receives a request to be included on a do not call list is required to ask the customer if they want their name and number removed from only the client's list, only the agency's list or both lists. This question will undoubtedly require the caller to spend a significant amount of time explaining the nature of the lists and the impact of the requirement, which will ultimately hinder the marketer's ability to sell or promote products and services.
42. Those consumers who make purchases and contributions as a result of telephone solicitation, as well as consumers in general, will be forced to incur increased costs as a result of the implementation of the Commission’s new measures. Marketing organizations will have no choice but to pass on the significant expenses associated with many of the new measures. Further detail on these increased costs is provided below.

43. As for the privacy concerns of consumers, there is ample reason to believe that the requirement for each caller to identify his or her name and the name of the organization that is calling to the first person that answers the telephone may result in that person obtaining personal information about the individual that is the target of the call. If, for example, a financial institution calls to speak to an existing customer for the purpose of soliciting new investment opportunities, the person who answers the telephone will learn that the customer has an ongoing relationship with that institution. Similarly, if a charitable health organization calls to solicit a further donation, but must first disclose the caller’s name and the name of the organization, the individual who answers the telephone will be immediately aware of personal information about the customer.

44. The requirement for businesses or charities engaged in telephone marketing (whether on their own behalf or through an agency) to provide the requesting party with a unique registration number at the time of the request for placement on a customer-specific or an agency-specific do not call list (or both) is proving to be an onerous and costly requirement for many businesses to implement. At the same time, it is unlikely to provide consumers with an effective means of following up on complaints or initiate enforcement procedures.

45. In its Decision, the Commission indicated that the issuance of a unique registration number would provide consumers with evidence of registration on the do not call list of a particular business or marketing agent, and proof of such registration in cases of disputes or complaints. However, this measure is unlikely
to assist consumers to any significant extent since they will still face the same problems that they faced under the pre-existing regime with trying to identify the underlying telecommunications carrier in order to lodge their complaint. As acknowledged by the Commission, one of the failings of the previous regime was the inability of the consumer to identify the telecommunications carrier or service provider who was furnishing businesses or their marketing agents with underlying telecommunications services. Since the enforcement regime relied on complaints being made to the underlying carrier, and that underlying carrier enforcing the rules vis-à-vis the marketer, the regime was difficult, if not impossible, to effectively enforce. This aspect of the old regime remains unchanged. The addition of the requirement to issue a unique registration number will therefore provide no more effective an enforcement mechanism in most instances.

46. This requirement, which is proving to be both costly and difficult to implement is likely to lull consumers into the false sense of having stopped unwanted calls, while in reality, it will only provide evidence of registration on a single business or marketing agency’s do not call list. It is likely to lead to many complaints by consumers who think they have stopped all such calls – but in reality have not done so due to the multitude of non-comprehensive lists sanctioned by the Commission. Moreover, as indicated above, when the consumer tries to enforce his or her registration rights, it will still be difficult, if not impossible, to locate the correct telecommunications carrier to complain to.

47. As discussed further below, the CMA is not suggesting that new consumer safeguards are not warranted. The CMA believes that they are. However, there are far more effective measures that could be taken without the consequent harm and confusion that the Commission’s interim regime is creating.
Impact on Canadian Businesses

48. The cost to Canadian businesses of implementing the new requirements will be substantial and could undermine the financial stability of smaller businesses and organizations that rely on telephone solicitations to sell their products or services or to obtain donations. The CMA has canvassed its membership to gain a better understanding of costs associated with implementation of the CRTC's decision. While the members are still coming to terms with the costs associated with some elements of the new regime, including the unique registration number system, it is becoming clear that the costs to individual businesses are high, and the cost to the business market as a whole are staggering. Indeed, the costs threaten to dwarf the costs of establishing and administering a common national do not call registry.

49. Each part of the Commission's decision carries a price tag for Canadian businesses.

50. The disclosure requirements at the beginning of the call, prior to asking to speak with the intended recipient of the call, are tending to confuse the person who answers the phone and are leading to increased length of calls and consumer dissatisfaction. For example, one Canadian retailer, that is engaged primarily in business-to-business sales activity, has discovered that this requirement is particularly annoying for business customers and is leading to an estimated loss of revenue in the order of $1.3 million per annum.

51. The requirement for call centres that receive requests from consumers to be placed on a do not call list, to ask whether they want to be on a customer-specific list or the agency’s list, or both, is proving to be very time-consuming and confusing for consumers, who naturally want to know the implications of these
options. It is also resulting in consumer dissatisfaction since the agency cannot disclose its other clients to the consumer.

52. Both of these measures are leading to increased calling times, increased dropped calls and increased training costs.

53. The requirement for both businesses and call centres to maintain a database of unique identification numbers for every consumer that wishes to go on their do not call list, is proving to be particularly expensive to implement. Regardless of whether the caller is representing a bank, a charitable organization or small business, under the new rules, the organization will have to establish and administer a new database that contains the unique registration numbers of its customers. The cost to implement such a system is estimated to range from $5000 to $15,000 for small businesses, $1 million for a large telecommunications carrier, and $3 million for a large financial institution. In addition, the on-going aggregate costs associated with administering thousands of such databases is expected to run to tens of millions of dollars per annum.

54. The cost of staffing live operator positions to receive complaints during regular business hours and providing toll-free access, will also run into the millions of dollars. For those companies marketing on a national basis, the regular business day is 12.5 hours long. One medium-sized business engaged in telephone marketing has estimated the cost of live operators alone at $280,000 for its organization. Since many smaller businesses no longer utilize live operators, their ability to use the telephone to market their products and services may be seriously impaired by this requirement. When it is considered that the CRTC’s new regime includes calls made to existing business customers, as well as to existing consumer customers (for example to renew a mortgage) it is easy to see how many Canadian businesses will be adversely affected.
55. In addition to these direct costs, there are also enormous costs associated with the loss of business that will result from consumer frustration with the new system.

56. The total cost to the Canadian marketing community is estimated to be in the hundreds of millions of dollars. The impact of the CRTC's new measures and the likelihood that these costs would have to be passed on to consumers were not matters that were addressed by the CRTC in Decision 2004-35. When it is realized that these costs will be incurred by businesses both large and small, in all segments of a $16 billion market, the total price tag will be enormous. One large Canadian Bank, for example, has estimated its start-up costs at $3 million and its on-going costs at $10 million per annum, including loss of productivity.

57. The CMA recognizes that some of these costs would be incurred under any regime, including a national do not call registry. However, all indications are that a national registry would cost significantly less to establish and maintain in aggregate than the cost to Canadian businesses of the interim regime. Furthermore, a national registry would lower the entry bar to smaller businesses to use the telephone to market their services and would provide consumers with a simpler and more effective way to avoid unwanted solicitation calls.

**Impact on the Canadian Economy**

58. Imposing the CRTC's new requirements will also have a far-reaching impact on the Canadian economy. As noted above, the business of marketing products and services using the telephone contributes more than $16 billion to the Canadian economy each year. This sector of the marketing community also employs approximately 270,000 people – often in smaller communities across Canada. If the financial consequences of the Commission’s new measures, which are identified above, materialize this will have a significant impact on the Canadian economy. There is a real possibility that call centres will move off-
shore and that Canadian marketing organizations will decide to use marketing agents that are located outside Canada. Some of the CMA’s members are already receiving indications from their client base that this will occur if the rules are not simplified and made more consumer and business friendly.

59. As outlined in this Petition, CMA and its members believe that the implementation of the requirements set out in Decision 2004-35 will have a negative impact on almost every consumer, business and organization in Canada. The failure on the part of the CRTC to adequately assess that impact, in CMA’s view, brings into substantial doubt the correctness of Decision 2004-35.

**Canadian Businesses Can't Fund Two Regimes**

60. It is clear that the CRTC has opted for its new regime on an interim basis despite its finding of superior benefits from a national do not call registry. It appears that the CRTC is willing to wait for new legislation prior to proceeding with a national registry.

61. While the CRTC may be in a position to wait, Canadian businesses are not. They cannot afford the price tag, loss of business and consumer bad will associated with the interim regime.

62. In making these trade-offs between implementation of a national registry now or the implementation of a national registry after new enabling legislation is passed, the CRTC has failed to weigh the costs associated with its interim regime with the high costs it anticipated for a national registry. These costs are not only going to be borne by large businesses and marketing agents – but also by many small businesses and charitable organizations that rely on the telephone to market their services or to raise money for their charitable activities. The CRTC has failed to consider that these costs are now likely to be borne twice – once now to establish the interim regime; and a second time later, to
establish a national registry. The costs of two regimes are quite independent of each other. All the costs of establishing the CRTC's interim measures will be forgone when a national registry is created. Businesses and consumers will ultimately be forced to bear these costs twice.

63. The CMA submits that the CRTC had only rough estimates of the cost of establishing a national registry when it made its determinations, and had no estimates of the high costs of implementing its “interim measures.” Indeed the concept of unique registration numbers, that is proving to be one of the most expensive new requirements to implement, was not even raised as an issue in the 2001 proceeding – let alone subjected to scrutiny or cost estimates. Now that the United States has implemented a national do not call registry, and the high cost of administering the CRTC's interim measures are starting to be known, there is considerably better information upon which to base a decision to proceed expeditiously to establish a national do not call list in Canada.

The CRTC's Rationale for Rejecting a National Do Not Call Registry "at this time"

64. The CRTC's rationale for rejecting the creation of a national do not call registry at this point in time, despite its acknowledged advantages, were based on perceived short-comings in the CRTC's powers under the Telecommunications Act:

The Commission believes that there is considerable merit in the establishment of a national do not call list. The Commission is aware of the reported costs of establishing such a system recently in the U.S., as well as legislative authority provided by the U.S. government. The Commission considers that implementing a national do not call list in Canada without appropriate start-up funding and without effective fining power for enforcement would be counter productive. The Commission recognizes that there is a need for significant enforcement power, such as the power to impose AMPs, which is not available to the Commission under current legislation. The Commission has also considered the comments that the establishment and maintenance of a national registry would be expensive and would likely require a separate administrator.
The Commission is of the view that, at this time, it is not feasible to establish a national registry without due consideration and resolution of the related framework.

(Decision 2000-35, at para. 92)

65. While the CMA believes that the CRTC does have the requisite statutory power under the *Telecommunications Act* to implement a national do not call registry at this time, and has asked the CRTC to review its decision, there would appear to be three viable approaches to addressing this urgent issue:

**Alternative 1:** Stay Decision 2004-35 pending the passage of a new *Do Not Call Act* along the lines proposed in Bill C-520 and in the U.S. *Do-Not-Call Act*.

66. Staying Decision 2004-35 would relieve Canadian businesses from having to pay the cost of two successive regimes and would avoid the very damaging consequences of the new legislation.

67. This would not leave Canadian consumers unprotected in the interim since the rules in place prior to May 21, 2004 would remain in effect. This would be the same regime that remained in place during the two year gap between the conclusion of the CRTC's public process and the release of Decision 2004-35. It should take significantly less time to introduce, consider and pass a *Do-Not-Call Act*.

**Alternative 2:** Stay Decision 2004-35 pending the passage of amendments to the *Telecommunications Act* to expressly empower the CRTC to administer or delegate the administration of a national do not call registry, and to fund that registry.
68. The required legislation would be relatively simple to accommodate within the existing framework of the *Telecommunications Act*.

69. The *Telecommunications Act* was amended in 1998 by the addition of sections 46.1 to 46.5 which *inter alia* empower the CRTC to administer databases or information, administration or operational systems related to the functioning of telecommunications networks, to delegate these powers to a third party administrator, to regulate the rates charged by the administrator and the manner in which these services are provided when the CRTC determines that to do so would "facilitate the interoperation of Canadian telecommunications networks." The existing powers in these sections could easily be extended to a national do not call list by either removing the reference to "interoperation of Canadian telecommunications networks" in section 46.1 – or by adding the words "or further any of the other objectives in this Act" to the existing wording.

70. A new subparagraph could also be added to section 46.1(a) along the lines suggested below:

46.1 The Commission may, if it determines that to do so would facilitate the interoperation of Canadian telecommunications networks or further any of the objectives of Canadian telecommunications policy set forth in section 7,

(a) administer

   (i) databases or information, administrative or operational systems related to the functioning of telecommunications networks, or

   (ii) numbering resources used in the functioning of telecommunications networks, including the portion of the North American Numbering Plan resources that relates to Canadian telecommunications networks; and

   (iii) databases or information, administration or operational systems to prevent undue inconvenience or nuisance to
consumers from unsolicited telecommunications in accordance with section 41.

(new wording emphasized)

71. Section 46.5 of the Act currently provides the CRTC with the power to require any telecommunications service provider to contribute to the contribution fund to support continuing access by Canadians to telecommunications services. A similar section could provide for subscription rates to be paid by Canadian businesses for use of a national do not call registry, similar to the Do-Not-Call Act in the United States or the proposals in Bill C-520.

**Alternative 3:** In the alternative, the Governor in Council should refer the decision not to establish a national do not call registry back to the CRTC for reconsideration and stay implementation of the new measures in Decision 2004-35, pending completion of that review.

72. The CMA believes that the CRTC has overstated the shortcomings of its existing legislative powers to implement a national do not call registry. Just as the CRTC has seen its way clear to establishing a contribution regime in advance of legislative changes addressing this particular issue, and just as it has established numerous other regimes applicable to telecommunications service providers and telecommunications users without the power to levy fines for infractions, it is within the CRTC's statutory jurisdiction to implement a national do not call list. In the CMA's view, the CRTC should be directed to use these powers to establish a national do not call registry now. These powers could easily be augmented at a later date if and when the Government of Canada decides to introduce legislation. This would avoid the double costs inherent in the "interim measures" adopted in Decision 2004-35 and would better serve Canadian consumers. It would also avoid the loss of valuable Canadian jobs and
would be consistent with other Government policies favouring efficient use of Canadian telecommunications facilities.

**Lack of Start-up Funding**

73. With respect to the issue of start-up funding, it is CMA’s view that the availability of start-up funding for a body to administer a do not call list should not have been viewed by the CRTC as a major impediment to the implementation of a national registry. The CRTC has, on a number of prior occasions taken regulatory initiatives that entail significant administrative expense. The most recent examples include the initiation of local number portability and contribution regimes established pursuant to Telecom Decision 97-8.

74. While it is true that the independent bodies established by the CRTC following Decision 97-8 were established pursuant to section 46.1 of the *Telecommunications Act*, section 41 of the Act is broad enough for the Commission to directly regulate telemarketers and to take such measures as are necessary to provide for the establishment of an effective do not call list. That section specifically provides the Commission with the statutory authority “to prohibit or regulate the use by any person of the telecommunications facilities of any Canadian carrier for the provision of unsolicited telecommunications, to the extent that the Commission considers it necessary to prevent undue inconvenience or nuisance”. The term “to regulate” provides the CRTC with statutory authority to establish and implement the most effective mechanism available to prevent “undue inconvenience or nuisance” caused by unsolicited telecommunications and the power to prohibit use (except in accordance with the CRTC's regulations) is expressly stated in the section.

75. Section 41 is an extraordinary provision insofar as it is one of the few provisions in the Act that empowers the CRTC to regulate the use of telecommunications facilities by any person, (having due regard to freedom of
expression). Most of the other sections of the Act apply only to carriers or telecommunications service providers.

76. In addition to the broad powers contained in section 41, the CRTC has the power to indirectly regulate use of telecommunications services for unsolicited communications through its regulation of the tariffs and terms and conditions of service of Canadian carriers. There are numerous examples of regulatory requirements being imposed on otherwise unregulated entities through this avenue. Examples include resellers, operator service providers and competitive pay telephone service providers, all of who are required to register with the CRTC and abide by the terms of the carrier’s tariffs. These terms include various consumer safeguards which the CRTC lacked statutory authority to impose directly – but could do so indirectly through the regulation of underlying services.

77. These terms and conditions could include the obligation on users of telecommunications for unsolicited communications to register with the CRTC and to participate in a national do not call registry sanctioned by the CRTC, or otherwise be prohibited from using telecommunications services for purposes of unsolicited marketing.

78. The CRTC has in the past imposed requirements on unregulated resellers to pay contribution fees (see Telecom Decision CRTC 92-12) even prior to enactment of the specific provisions now in the *Telecommunications Act*. In the same decision, the Commission imposed an obligation on interconnecting carriers to share start-up costs for equal access – again through provision in the LECs’ interconnection tariffs. The CRTC has also required users of telecommunications equipment to comply with Industry Canada certification standards for terminal attachments, through imposition of terms and conditions in the LECs’ tariffs. This was done notwithstanding the fact that the standards were
administered by an independent third party (Industry Canada) (See Telecom
Decision CRTC 82-14).

79. The fact that one of the nine statutory objectives in the Telecommunications Act affirms the requirement “to contribute to the protection of privacy of persons” and that section 47 of the Act requires the CRTC to exercise its powers under the Act with a view to implementing these policy objectives, adds further to the legitimacy of the Commission accepting a broad regulatory mandate over this subject matter and broadly interpreting the express statutory powers conferred on it by Parliament.

80. There are therefore ample powers in the Act to enable the CRTC to establish a national do not call registry and to provide for its funding.

81. An alternative approach for the establishment of a national do not call list would be to follow the CRTC’s approach in the broadcasting sector where the Commission has established a voluntary system for the administration and enforcement of the various broadcasting codes. Under that system, a broadcaster agrees on a voluntary basis to be a member in good standing of the Canadian Broadcast Standards Council (CBSC), or the Cable Television Standards Council (CTSC) and thereby is exempted from conditions of licence that would require the licensee to abide by one or more of the broadcasting codes. Those broadcasters who do not agree or fail to remain members in good standing of the CBSC or CTSC, as the case may be, are subject to regulation by the Commission.

82. While it is true that the CRTC imposes this obligation on broadcasters as a condition of licence through its licensing powers under the Broadcasting Act, it would be possible to impose similar obligations on telephone marketers either pursuant to section 41 or through the tariffs of underlying carriers.
83. It should also be noted that the Commission did not view lack of start up funding as an impediment to the establishment of these broadcasting standard councils. They are funded by the member broadcasters who use them.

84. The Canadian Broadcast Standards Council model is germane to the Canadian marketing industry where, as described above, the CMA has administered a do not call list, for both members and non-members since 1989 on a subscription basis. The CMA’s do not call list and procedures could easily be augmented by an independent review board and its rules and procedures could be reviewed by the Commission to fully accord with Commission policies. Any marketers not complying on a voluntary basis with this independent do not call list could be prohibited from making unsolicited calls pursuant to section 41 of the Act.

85. Finally, the CMA would note that although the CRTC cited start-up funding as an obstacle to the establishment of a national registry, it totally failed to examine the cost of implementing its interim measures in Decision 2004-35. Indeed the concept of unique registration numbers, that is proving to be one of the most expensive new requirements to implement, was not even raised as an issue in the proceeding – let alone subjected to scrutiny or cost estimates. These implementation costs, which must be borne by all businesses and charities that use the telephone to make unsolicited calls, appear to significantly exceed the cost of implementing a common national registry.

Lack of Effective Enforcement Mechanisms

86. The CMA submits that the CRTC abdicated its responsibilities under the Telecommunications Act when it relied on what it termed lack of an “effective fining power” as a reason for rejecting a national do not call list.
87. While the CMA acknowledges that it might be useful for the Commission to be conferred with a power to fine persons who breach its regulations, this is not a valid reason for failing to establish a national do not call list. The Commission still has a wealth of powers to enforce its regulatory regime and the *Telecommunications Act* contains a number of criminal and civil remedies. The Commission itself noted several of these enforcement mechanisms in Telecom Decision CRTC 2004-45:

   The Commission could issue an order that service to a telemarketer be suspended or disconnected. The Commission could also issue an order prohibiting all service providers from reconnecting that telemarketer for a set period. The Commission considers that such tools, which deprive a customer of service, would be most appropriate when there is an indication that the customer does not intend to comply with the rules, but are less appropriate consequences for, for example, a first breach of the rules. The Act provides for the possibility of a criminal prosecution pursuant to section 73. It also provides for a mandatory order requiring compliance pursuant to section 51, and for contempt of court proceedings in the event of a subsequent violation.

88. In addition, there is a right of civil action for individuals who sustain damages as a result of any breach of the CRTC's decisions or regulations.

89. In its decision, the CRTC went on to note that these tools are generally better suited to situations where non compliance is ongoing rather than for a first breach of the rules, but it failed to provide any indication as to why these enforcement tools, which appear to be effective in enforcing other requirements that its has imposed under the *Telecommunications Act*, would somehow be less effective in the context of enforcing a national do not call list.

90. The power of the CRTC to order the disconnection of a customer who fails to comply with the terms and conditions of a carrier’s tariffs has long been an effective enforcement mechanism against subscribers, resellers and other telecommunications service providers. For businesses that rely on telecommunications to market their products and services, or for call centres who
perform this task for third party businesses, the threat of cutting off their phone service should go a long way to enforcing the rules.

91. While it might be useful for the CRTC to be able to impose a small fine for first time offences, it is questionable whether this would be any more effective for first time offenders than a warning letter stating that telephone service will be cut off if they do it again.

92. Moreover, it should be noted that the CRTC has seen fit to maintain its existing system of regulating unsolicited calls, and has seen fit to augment this regime with new regulations, in the absence of a fining power.

93. It is difficult to see why the CRTC’s existing enforcement powers are preventing it from implementing a national do not call registry, while they are apparently adequate to police its contribution regime, its pay telephone regime, its operator service regime, its terminal attachment regime, its resale regime, its international licensing regime, its regime to prevent use of the telephone for harassment and countless other regulations and decisions made by the CRTC.

94. Furthermore, it is respectfully submitted that the CRTC’s function is to carry out its statutory duties using the powers that have been conferred on it by Parliament. While it is open to the CRTC to request additional powers when before a Parliamentary Committee charged with reviewing these powers, it is not open to the CRTC to use the lack of some additional enforcement powers as a reason for not proceeding with the powers at its disposal.

95. It is noteworthy that although the FCC established a national do not call list in the United States in October 2003 and despite the fact that the FCC has the statutory authority to impose fines for violating the regime, it has never actually exercised that power to enforce its do not call list at any time since the list was established. On February 13, 2004, the FCC issued a press release in
which it noted that there has been “exceptional compliance with the National Do Not Call Registry”. Surely, if the FCC can achieve “exceptional compliance” with its do not call list without fines being issued, then a similar success rate could be achieved in Canada in the absence of a fining power. The threat of a fine is unlikely to be more intimidating than the threat of disconnection of telephone service to a business.

96. Finally, it is noted that Bill C-520 did not propose an independent fining power for the Registrar. Instead, that Bill provided for criminal sanctions similar to those already present in the *Telecommunications Act*.

97. For all of these reasons, the CMA believes that the CRTC has adequate powers to establish a viable national do not call registry, should it decide to reconsider its decision either in response to the CMA’s August 6, 2004 application to the CRTC to review and vary the decision, or in response to an order by the Governor in Council.

98. Notwithstanding the foregoing, the CMA respectfully submits that it would be both prudent and in the public interest for the Government of Canada to consider the alleged deficiencies in the CRTC’s statutory powers and to either consider entertaining amendments to the *Telecommunications Act* to address those deficiencies on an expedited basis or press on with the enactment of a *Do-Not-Call Act*, such as proposed in Bill C-520 in the last Parliament.

99. This issue is important to consumers and Canadian businesses alike. Failure to act promptly will result in the waste of hundreds of millions of dollars for an ineffective interim regime, as well as the loss of jobs for Canadians and the loss of a valuable marketing tool for Canadian businesses.

100. All of which is respectfully submitted on behalf of the Petitioner.