



## Compliance and Enforcement Decision CRTC 2014-545

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Ottawa, 23 October 2014

*File number: PDR 9174-1457*

### **Natures Carpet Cleaning (2012) Ltd. – Violations of the Unsolicited Telecommunications Rules**

*The Commission imposes total administrative monetary penalties of \$8,000 on Natures Carpet Cleaning (2012) Ltd. for initiating telemarketing telecommunications to consumers whose telecommunications numbers were registered on the National Do Not Call List (DNCL), and for doing so while the company was using a version of the National DNCL obtained more than 31 days prior to the date on which the telecommunications in question were placed, in violation of the Unsolicited Telecommunications Rules.*

#### **Introduction**

1. Between 14 May and 21 November 2013, the Commission received numerous complaints in relation to telemarketing telecommunications that appeared to have been made by Natures Carpet Cleaning (2012) Ltd.<sup>1</sup> (Natures Carpet).
2. These complaints were investigated and, on 7 February 2014, a notice of violation was issued to Natures Carpet pursuant to section 72.07 of the *Telecommunications Act* (the Act). The notice informed Natures Carpet that it had initiated, on its own behalf,
  - two telemarketing telecommunications to consumers whose telecommunications numbers were registered on the National Do Not Call List, in violation of Part II, section 4<sup>2</sup> of the Commission's Unsolicited Telecommunications Rules (the Rules);<sup>3</sup> and
  - two telemarketing telecommunications while using a version of the National DNCL that had not been downloaded within the 31 days preceding the telecommunications, in violation of Part II, section 13<sup>4</sup> of the Rules.

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<sup>1</sup> Natures Carpet Cleaning (2012) Ltd., Calgary, Alberta, Tel.: 403-255-9394. Industry – Sale and provision of carpet-cleaning services.

<sup>2</sup> Part II, section 4 of the Unsolicited Telecommunications Rules states that a telemarketer shall not initiate a telemarketing telecommunication to a consumer's telecommunications number that is registered on the National DNCL, unless express consent has been provided by such consumer to be contacted via a telemarketing telecommunication by that telemarketer.

<sup>3</sup> The Rules were made pursuant to section 41 of the Act.

<sup>4</sup> Part II, section 13 of the Unsolicited Telecommunications Rules states that a telemarketer and a client of a telemarketer shall use a version of the National DNCL obtained from the National DNCL operator no more than 31 days prior to the date that any telemarketing telecommunication is made.

3. The notice of violation set out administrative monetary penalties (AMPs) for four violations at \$2,000 per violation, for a total amount of \$8,000.
4. Natures Carpet was given until 7 March 2014 to pay the AMPs set out in the notice of violation or to make representations to the Commission regarding the violations.
5. The Commission received representations from Natures Carpet dated 28 February 2014.
6. Based on the record of this proceeding, the Commission has identified the following issues to be addressed in this decision:
  - Did Natures Carpet commit the violations?
  - Do the representations filed by Natures Carpet raise a defence against the violations?
  - Is the amount of the AMPs reasonable?

### **Did Natures Carpet commit the violations?**

7. In its representations, Natures Carpet did not deny having made the telemarketing telecommunications set out in the notice of violation. Further, Natures Carpet acknowledged that it initiates telemarketing calls to consumers in the Calgary area, and did not contest having contacted consumers whose telecommunications numbers were registered on the National DNCL or having failed to keep its version of the National DNCL up to date.
8. Accordingly, the Commission finds that Natures Carpet committed the violations set out in the notice of violation.

### **Do the representations filed by Natures Carpet raise a defence against the violations?**

9. In Telecom Decision 2007-48, the Commission considered defences that were available to a person subject to a notice of violation, including a defence of due diligence, which is provided for under subsection 72.1(1) of the Act, and other common law defences.
10. Natures Carpet indicated that it was unaware of the requirement established in Part II, section 13 of the Rules to download the list every 31 days, because this requirement was not identified in a previous citation letter, dated 14 May 2013, that it had received from Commission staff.
11. The Commission notes that the citation letter that Natures Carpet referred to included direct quotations of specific sections of the Rules that were relevant to the company's conduct at that time, and indicated that Natures Carpet was obligated to comply with all the Rules. The letter included links to the full text of the Rules on the Commission's website, as well as to the National DNCL operator's website, which also provides information to telemarketers on their obligations under the Rules. Accordingly, the Commission considers that the information that Natures Carpet received through the letter provided sufficient guidance to the company of its obligations under the Rules.

12. The Commission notes that, as it has consistently held in previous decisions, lack of awareness of the Rules is not considered a valid defence. The Commission considers that persons initiating unsolicited telecommunications for the purpose of telemarketing are choosing to engage in a regulated activity and, as such, are responsible for ensuring that their conduct complies with the Rules.
13. In its representations, Natures Carpet also made reference to its practice of keeping a detailed internal do not call list in order to prevent the initiation of telemarketing telecommunications to consumers who have expressed a desire not to be contacted.
14. The Commission notes that none of the violations at issue relate to Natures Carpet's maintenance of an internal do not call list. The Commission further considers that adherence to the rules that relate to internal do not call lists, which are set out under Part III of the Rules, is not an alternative to compliance with the National DNCL Rules, which are set out under Part II of the Rules, or the remainder of the Rules. Companies engaged in telemarketing are required to comply with all applicable sections of the Rules.
15. Other compliance measures identified by Natures Carpet, including the addition of new staff to carry out functions related to its obligations under the Rules, were implemented only after the dates of the violations identified in the notice of violation, and thus do not contribute to the establishment of Natures Carpet's practices as being sufficient to establish a defence of due diligence.
16. Accordingly, the Commission finds on a balance of probabilities that Natures Carpet's representations do not successfully raise a defence against the violations at issue.

### **Is the amount of the AMPs reasonable?**

17. Natures Carpet submitted that the total AMP amount of \$8,000 was too high, and would either put the company out of business or affect its ability to keep people employed.
18. The Commission stated in Telecom Decision 2007-48 that the ability to pay an AMP was not an appropriate factor to be considered in the determination of the amount of an AMP. The Commission stated that appropriate factors to be considered in determining the amount of an AMP include the nature of the violations, the number and frequency of complaints and violations, the relative disincentive of the measure, and the potential for future violations.
19. The Commission considers the making of unsolicited telemarketing telecommunications by a telemarketer to consumers whose numbers are registered on the National DNCL to be a serious violation that causes significant inconvenience and nuisance to consumers, and violates the expectation of consumers expressed through their registrations with the National DNCL that they will receive fewer telemarketing calls.
20. The Commission further considers that a telemarketer's failure to access and download the National DNCL at least once every 31 days is also a significant breach of the Rules. Subscribing to the National DNCL is one of the core responsibilities of telemarketers under the National DNCL regime. Failing to actually use a subscription as required by the Rules

increases the likelihood that calls will be made to consumers whose numbers are registered on the National DNCL, and serves to erode consumers' confidence in the efficacy of the National DNCL.

21. Regarding the number and frequency of complaints and violations, the Commission notes that the initiation of a single telemarketing telecommunication may, in some circumstances, result in multiple violations of the Rules. Therefore, evidence of the occurrence of a telemarketing telecommunication may be used to support the finding of more than one violation of the Rules when multiple violations relate to that telecommunication. In the present case, at least two violations occurred during each of the two telemarketing telecommunications at issue.
22. Regarding the relative disincentive of the measure, in view of the information provided by Natures Carpet in its registrations with the National DNCL operator and financial information received from the company, the Commission considers Natures Carpet to be a small-sized business for the purpose of determining the appropriate AMP.
23. The amount of the AMPs the Commission imposes must not be so low as to be financially advantageous for a telemarketer of a particular size to pay the amount as a cost of doing business.
24. Further, as referenced above, Natures Carpet was issued a citation letter for telemarketing telecommunications made to consumers whose numbers are registered on the National DNCL, and for engaging in telemarketing without registering or subscribing to the National DNCL.
25. The Commission notes that this non-monetary enforcement action did not result in Natures Carpet bringing its telemarketing operations into compliance with the Rules. The Commission therefore considers that an appropriate disincentive is required to address the potential for future violations.
26. In light of the above, the Commission considers that total AMPs of \$8,000 are reasonable and necessary to promote compliance with the Rules by a business of Natures Carpet's size.

## **Conclusion**

27. In the circumstances of this case, the Commission considers that a penalty of \$2,000 for each of the two violations of Part II, section 4 of the Rules and for each of the two violations of Part II, section 13 of the Rules is appropriate. The Commission therefore imposes total AMPs of \$8,000 on Natures Carpet.
28. The Commission hereby notifies Natures Carpet of its right to apply to the Commission to review and rescind or vary this decision under section 62 of the Act and to seek leave of the Federal Court of Appeal to appeal this decision before that court under section 64 of the Act. Any review and vary application under section 62 of the Act must be made within 90 days of the date of this decision, and the Commission will place all related documentation on its

website.<sup>5</sup> In accordance with section 64 of the Act, an application for leave to appeal must be made to the Federal Court of Appeal within 30 days of the date of this decision or within such further time as a judge of the Court grants in exceptional circumstances.

29. The Commission reminds Natures Carpet that, should it continue to initiate telemarketing telecommunications on its own behalf or engage telemarketers for the purpose of solicitation of its products or services, it is required to comply with the Rules. Examples of measures that it should adopt to ensure compliance with the Rules include, but are not limited to, the following:
  - maintaining the company's registration with the National DNCL operator;
  - maintaining the company's subscription to the National DNCL;
  - downloading the National DNCL at least once every 31 days prior to the date of a telemarketing telecommunication; and
  - establishing and implementing adequate written policies and procedures to comply with the Rules, which include documenting a process to (a) prevent the initiation of telemarketing telecommunications to any telecommunications number that has been registered for more than 31 days on the National DNCL, and (b) honour consumers' requests that they not be contacted by way of telemarketing telecommunications.
30. The Commission advises Natures Carpet that in order to ensure compliance with the Rules, the Commission may impose larger AMPs for subsequent violations.
31. The amount of \$8,000 is due by **24 November 2014** and is to be paid in accordance with the instructions contained in the notice of violation. For any amount owing that is not paid by **24 November 2014**, interest calculated and compounded monthly at the average bank rate plus three percent will be payable on that amount and will accrue during the period beginning on the due date and ending on the day before the date on which payment is received.
32. If payment has not been received within 30 days of the date of this decision, the Commission intends to take measures to collect the amount owing, which may include certifying the unpaid amount and registering the certificate with the Federal Court.

Secretary General

## Related documents

- *Revised guidelines for review and vary applications*, Telecom Information Bulletin CRTC 2011-214, 25 March 2011
- *Unsolicited Telecommunications Rules framework and the National Do Not Call List*, Telecom Decision CRTC 2007-48, 3 July 2007, as amended by Telecom Decision CRTC 2007-48-1, 19 July 2007

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<sup>5</sup> In Telecom Information Bulletin 2011-214, the Commission issued, pursuant to the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure*, revised guidelines for review and vary applications to reflect the modified time limit in which such applications must be made.