



Compliance and Enforcement Regulatory Policy CRTC 2015-109

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Administrative monetary penalties under the Voter Contact Registry

The Commission establishes the factors to be taken into consideration when it determines the amount of an administrative monetary penalty for contraventions of the Canada Elections Act that relate to the Voter Contact Registry.

Background

1. On 19 June 2014, the *Fair Elections Act* received royal assent. The legislation provides for a number of amendments to the *Canada Elections Act* with respect to the way federal elections (including by-elections and referendums) are held in Canada. It also introduced new provisions for the regulation of voter contact calling services through a voter contact registry.
2. “Voter contact calling services” are defined in the *Canada Elections Act* as services involving the making of calls during an election period for any purpose related to an election, including
 - promoting or opposing a registered party, its leader, a candidate, or a nomination contestant, or any position on an issue with which such a party or person is associated;
 - encouraging electors to vote or to refrain from voting;
 - providing information about the election, including information about voting hours and the location of polling stations;
 - gathering information about how electors voted in past elections or will vote in the election or their views on a registered party, its leader, a candidate, or a nomination contestant, or any issue with which such a party or person is associated; and
 - raising funds for a registered party, a registered association, a candidate, or a nomination contestant.

3. Enforcement powers for the Voter Contact Registry regime are set out in the *Telecommunications Act* and are similar to those currently used for enforcement of the Commission's Unsolicited Telecommunications Rules (the Rules). These enforcement powers include the power to levy administrative monetary penalties (AMPs) against persons¹ or groups² who have violated the requirements of the Voter Contact Registry, in order to promote compliance.
4. The amended *Telecommunications Act* prescribes the maximum penalty that can be assigned to an individual violation of the Voter Contact Registry: \$1,500 for individuals or \$15,000 for corporations or groups. It does not stipulate how the amount of an AMP should be determined, beyond the maximums set out.
5. On 17 November 2014, the Commission published Compliance and Enforcement Notice of Consultation 2014-598 (the notice) with the aim of establishing a list of criteria that would be applied to the determination of any future AMPs issued in respect of the Voter Contact Registry.
6. In the notice, the Commission proposed lists of criteria similar to those set out in Telecom Decision 2007-48, in which the Commission established a framework for unsolicited telemarketing calls and other unsolicited telecommunications received by consumers.
7. The notice also took into consideration those factors prescribed under Canada's Anti-Spam Legislation (CASL).³
8. The Commission considered that any list of possible factors could include
 - the nature of the violation;
 - the number and frequency of complaints and violations;
 - the relative disincentive of the measure;
 - the potential for future violations;
 - the person or group's previous history with respect to any previous violations;and

¹ "Person" is defined under section 2 of the *Telecommunications Act* as any individual, partnership, body corporate, unincorporated organization, government, government agency, and any other person or entity that acts in the name of or for the benefit of another, including a trustee, executor, administrator, liquidator of the succession, guardian, curator, or tutor.

² "Group" is defined under section 348.01 of the *Fair Elections Act* as a registered party, registered association, unincorporated trade union, trade association, or other group of persons acting together by mutual consent for a common purpose.

³ "CASL" refers to *An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act*, S.C. 2010, c. 23.

- the ability to pay the AMP.
9. The Commission received interventions from two individuals, as well as from the Forum for Research and Policy in Communications (FRPC) and the Market Research and Intelligence Association (MRIA). The Commission did not receive any comments from elected officials or political parties.
 10. The public record of this proceeding, which closed on 17 December 2014, is available on the Commission's website at www.crtc.gc.ca or by using the file number provided above.
 11. The Commission has identified the following issues to be addressed in its determinations:
 - What is the purpose of an AMP?
 - In what cases should an AMP be issued?
 - Should complaints and ability to pay be taken into account when determining the amount of an AMP?

Positions of parties

12. The MRIA argued that the Commission should introduce a distinction between what the MRIA considered to be legitimate survey activity and other types of calls. It further argued that anyone involved in a push poll⁴ or a misleading survey should face the maximum penalty. It also proposed that membership in the MRIA itself, and adherence to the organization's code of conduct, could serve as a watermark for what is and is not legitimate survey activity.
13. The FRPC submitted that AMPs should only be imposed in the most exceptional circumstances, such as in situations where the Commission has received many complaints or a violator has willfully repeated the same infractions despite repeated and published warnings. The FRPC also argued that while complaints do not necessarily correlate to breaches of the law, they can still be indicative of the existence of problems. However, the FRPC submitted that cases involving a minimal number of complaints should not involve AMPs.
14. Both the MRIA and the FRPC commented on other issues, including concerns about the breadth of the Voter Contact Registry program and the types of calls it captures, the Commission's strategies for outreach and education and the publication of information about the program, and the enforcement of the Rules. The Commission is mindful of these submissions, but finds that they fall outside the scope of this

⁴ The MRIA defines a "push poll" as a method of promoting or denigrating a viewpoint or a candidate by using a misleading public opinion survey that contains biased questions intended to influence respondents and result in a wanted response.

proceeding, which was initiated for the purpose of establishing a list of factors to be considered in the determination of AMPs.

15. The two individuals who submitted interventions expressed support for the Voter Contact Registry program.

Commission's analysis and determinations

What is the purpose of an AMP?

16. The underlying purpose of an AMP is to promote compliance, rather than to simply punish non-compliance. This principle is specifically recognized in subsection 20(2) of CASL, as well as in the new amendments to the *Telecommunications Act*⁵ and the *Radiocommunication Act*.⁶ The Commission has factored the principle of promoting compliance into enforcement strategies and decisions related to the Rules to date, and it will do so with respect to the Voter Contact Registry.
17. The Commission considers that where an AMP is imposed, it cannot be so large that it becomes punitive. However, in order to be effective at promoting compliance, an AMP must be of a sufficient size that it is not perceived by regulated persons or groups as simply a cost of doing business.

In what cases should an AMP be issued?

AMPs as exceptional remedies

18. Regarding the FRPC's submission that the use of AMPs should be limited to exceptional circumstances or repeated violations, the Commission notes that a Notice of Violation that imposes an AMP is the only administrative enforcement measure specified in the *Telecommunications Act* for enforcement of the Voter Contact Registry, and that the range of possible penalties set out under section 72.01 affords designated persons and the Commission significant discretion in the specific amount of an AMP.
19. Further, the Commission considers that other methods of addressing non-compliant activity may be developed and implemented by designated Commission enforcement staff or the Commission, as has taken place under the Rules and CASL. In light of the above, the Commission does not consider that its power to impose AMPs should be restricted to being used only exceptionally with respect to the Voter Contact Registry.

⁵ See subsection 72.002(2).

⁶ See subsection 15.11(2).

Deceptive or misleading telecommunications

20. With respect to the MRIA's suggestion that the amount of an AMP should be increased in cases of fraudulent or misleading survey activity, the Commission notes that the Voter Contact Registry does not impose any restrictions or requirements on the actual content of telecommunications, nor does it distinguish between research calls and other types of calls. Rather, the legislation is concerned with what classes of person or group must register, the information they must provide when doing so, and what records must be kept.
21. The Commission considers that while the overall intent of the Voter Contact Registry is to protect Canadians from misleading calls by increasing overall transparency, determining whether specific calls were intended to deceive or mislead is outside the AMP regime created by the *Fair Elections Act* and administered by the Commission.

Should complaints and ability to pay be taken into account when determining the amount of an AMP?

Complaints under the Voter Contact Registry regime

22. With respect to the FRPC's submissions regarding the handling of complaints, as opposed to violations, the Commission considers that while the presence of complaints may be indicative of a problem or particular nuisance, the opposite inference cannot necessarily be drawn from the absence of them. Those persons or groups that behave less transparently in dealing with Canadians – for example, by using spoofed caller identification information or misrepresenting who is calling – will receive fewer identifiable complaints simply by virtue of Canadians having less information upon which to act.
23. The Commission also considers that unlike the Rules or CASL, where consumers can be presumed to have some understanding of whether a call or electronic message they receive is a violation – for example, that they are registered on the National Do Not Call List but receive an unauthorized telemarketing call – the same does not hold true for the Voter Contact Registry. Canadians may feel that a call was particularly intrusive, or know that it violated provisions of the Rules, but will not be in a position at the time they receive a call to know whether or not the person calling them has registered with the Commission – a requirement that also allows a grace period of up to 48 hours after calls commence.
24. The Commission thus finds that while the number of complaints received may help define or add context to the overall scope of the violations at issue in some cases, it should not be considered an independent factor in determining the amount of an AMP.

Ability to pay

25. The Commission has previously noted with respect to the Rules that the ability to pay an AMP may be difficult to assess or quantify with the information available in an administrative proceeding. In Telecom Decision 2007-48, the Commission considered that it would be difficult to assign a monetary value to the degree of harm to a consumer or to determine the ability of a telemarketer to pay the AMP.
26. The Commission considers, however, that its analysis is not limited to a person's immediate financial ability to pay an AMP. Rather, the Commission considers that examining the ability to pay should take into account the overall financial impact of the penalty on the person or group. This relates to and includes other metrics already used when considering the relative disincentive of an AMP under the Rules, including the size of an entity, the scope of its operations, the number of people it employs, and other indicia of its overall revenue-generating capabilities.
27. The Commission also considers that where a person or group applies for review of a Notice of Violation and argues that an inability to pay should lower or mitigate the amount of the AMP set out therein, it is reasonable to place the burden on that person to provide documentation or detailed information supporting that position or rebutting any analysis of this factor set out in a Notice of Violation. It will generally not be sufficient for an applicant raising ability to pay as a mitigating factor to merely state that they cannot afford to pay a penalty.
28. With a view to Parliament's inclusion of this factor in newer AMP regimes, including CASL and new amendments to the *Telecommunications Act* and the *Radiocommunication Act*, as well as the impact this factor would have in determining the overall disincentive of an AMP, the Commission finds that it is appropriate to consider ability to pay under the Voter Contact Registry regime, as well as under the Rules, going forward.

Conclusions

29. The Commission considers that despite differing terminology, each of the factors for determining the amount of an AMP identified under the Rules, CASL, and the recent amendments to the *Telecommunications Act* and *Radiocommunication Act* deals with essentially the same underlying subject matter: the weighting of an AMP such that it will promote compliance with the regulatory regime in question without being punitive.
30. For example, under the Rules, the Commission considers the nature of the violation, as well as the number and frequency of complaints and violations. Within the other regimes, these factors are combined and referred to as the "nature and scope" of the violation. The other regimes include the person's history of violations or compliance, which is generally used as a means of assessing the potential for future violations under the Rules. Likewise, factors like the benefit received from committing the

violation and ability to pay are ways of breaking down what under the Rules is identified as “the relative disincentive of the measure.”

31. The Commission considers that given the underlying similarity between the various AMP regimes it is now responsible for enforcing, and the possibility that some persons may find themselves captured by more than one of these regulatory frameworks, it is preferable to strive toward consistent terminology to the extent possible. The recent amendments to the *Telecommunications Act* and *Radiocommunication Act* are instructive in this respect, since they reflect the most recent efforts by Parliament to codify the factors that should be used in determining an AMP.
32. The Commission therefore finds that the decision to issue a Notice of Violation under the Voter Contact Registry regime and the determination of the amount of any penalty should take into account the following factors:
 - the nature and scope of the violation;
 - any benefit that the person obtained from the commission of the violation;
 - the person’s ability to pay the penalty;
 - the person’s history of compliance with the requirements of the Voter Contact Registry and any relevant history of compliance with the Rules; and
 - any other relevant factor.
33. These factors will always be applied with a view to the purpose of an AMP, which is to promote compliance, and not to punish non-compliance.

Secretary General

Related documents

- *Administrative monetary penalties under the Voter Contact Registry*, Compliance and Enforcement Notice of Consultation CRTC 2014-598, 17 November 2014
- *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