



## Compliance and Enforcement Decision CRTC 2016-107

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*File number: 8665-P67-201410117*

### **Probit Inc. – Application to seek relief in respect of the Unsolicited Telecommunications Rules**

*The Commission **denies** Probit Inc.’s application to amend the Unsolicited Telecommunications Rules to further limit their application to survey research. The existing framework governing unsolicited telecommunications is consistent with Parliament’s 2005 amendments to the Telecommunications Act, and provides an appropriate balance between permitting unsolicited telecommunications related to survey research, and preventing undue inconvenience or nuisance that may result from the potential misuse of the survey exemption.*

*Even in instances where calls are made for legitimate survey research purposes, the promotion of specific products or services during these calls may cause telecommunications that would normally fall under the applicable exemption not to be covered by this exemption. Persons who offer incentives to increase survey response rates must therefore ensure that their calls are made for the sole purpose of collecting information for a survey of members of the public, and that any incentives are presented in a manner that will not be perceived as solicitation.*

#### **Application**

1. The Commission received an application from Probit Inc. (Probit), dated 29 September 2014, in which Probit requested that the Commission amend the application of the Unsolicited Telecommunications Rules (UTRs) with respect to survey research.
2. Specifically, Probit requested that the Commission
  - amend the definitions of “telemarketing” and “telemarketer”, as set out in Part I of the UTRs, to exclude research undertaken to determine the views of members of the public; and
  - amend Part IV of the UTRs to expressly exclude the Automatic Dialing-Announcing Device (ADAD) Rules’ application to survey research.
3. The Commission received one intervention regarding Probit’s application from the Marketing Research and Intelligence Association (MRIA). The public record of this proceeding, which closed on 3 November 2014, is available on the Commission’s website at [www.crtc.gc.ca](http://www.crtc.gc.ca) or by using the file number provided above.

## Issues

4. The Commission has identified the following issues to be addressed in this decision:
  - Should the definitions of “telemarketing” and “telemarketer”, as set out in Part I of the UTRs, be amended to exclude research undertaken to determine the views of members of the public?
  - Should Part IV of the UTRs be amended to expressly exclude survey research from the application of the ADAD Rules?

### **Should the definitions of “telemarketing” and “telemarketer”, as set out in Part I of the UTRs, be amended to exclude research undertaken to determine the views of members of the public?**

5. Probit argued that the Commission’s authority to regulate unsolicited telecommunications is the result of legislative amendments made by Parliament to the *Telecommunications Act* (the Act) in 2005 to facilitate the creation of the National Do Not Call List (DNCL) and an associated administrative monetary penalties regime. Probit asserted that exemptions created by Parliament under those amendments were intended to exempt telecommunications made by market research organizations from being regulated as telemarketing telecommunications.
6. Probit submitted that subjecting survey calls to either the Telemarketing Rules or the ADAD Rules is contrary to Parliament’s express desire to exclude these types of calls from telemarketing regulation. The MRIA and Probit therefore questioned the appropriateness of Commission staff’s enforcement activities with respect to the offering of monetary or non-monetary compensation for participation in survey research (i.e. incentives). In their view, such enforcement activities deviate from Parliament’s instructions, as well as from past Commission decisions and publications that have recognized market research activities as being exempt from such regulation. The MRIA highlighted the importance of participation incentives to the market research industry. Probit made reference to presentations prepared by Commission staff members and given to members of the market research industry in August 2008, in which telephone calls to recruit focus groups were represented as survey activity.
7. Accordingly, Probit requested revisions to the definitions of “telemarketing” and “telemarketer” to unconditionally exclude any “research undertaken to determine the views of members of the public” from the application of the National DNCL Rules and the Telemarketing Rules.

### **Commission’s analysis and determinations**

8. The Commission regulates unsolicited telecommunications pursuant to sections 41 to 41.7 and 72.01 to 72.15 of the Act. The Commission’s current framework for the regulation of unsolicited telecommunications is set out in the UTRs. The

Commission most recently introduced changes to the UTRs in Compliance and Enforcement Regulatory Policy 2014-155.

9. The UTRs include the National DNCL Rules, the Telemarketing Rules, and the ADAD Rules. The National DNCL Rules were first introduced in Telecom Decision 2007-48. Restrictions on telemarketing and the use of ADADs have existed long before that decision. Such restrictions, which were previously integrated into the tariffs approved for each individual carrier, can be found in earlier Commission decisions, such as Telecom Decisions 85-2 and 94-10.
10. Probit's arguments rely in part on an incorrect understanding of the nature of the Commission's authority to regulate unsolicited telecommunications and the exemptions set out by Parliament under section 41.7 of the Act.
11. The Commission's general power to regulate with respect to unsolicited telecommunications is not restricted to the regulation of telemarketing or the administration of a national do not call list. Probit has incorrectly attributed the origin of subsection 41(1)<sup>1</sup> of the Act to Parliament's 2005 amendments to the Act. However, the Commission's authority under this subsection has existed since the Act was passed into law in 1993.
12. In the 2005 amendments, Parliament introduced sections 41.1 through 41.7 of the Act, which "create a legislative framework for a national do not call list." Pursuant to paragraph 41.7(1)(f) of the Act, calls made for the sole purpose of collecting information for a survey of members of the public were exempted from the application of prohibitions or requirements with respect to a national do not call list. The exemptions established in section 41.7 of the Act do not apply to other unsolicited telecommunications frameworks, such as the Telemarketing Rules and the ADAD Rules.
13. The revisions sought by Probit would in fact improperly broaden the exemption created by Parliament for survey research, since if these revisions were implemented, the collection of information for a survey of members of the public would no longer need to be the sole purpose of the call. Unlike other exemptions set out in section 41.7 of the Act, the exemption for survey calls applies regardless of the identity of the caller. By tying the exemption to the purpose of the call, and by requiring that the exempt purpose be the only purpose of the call, both the Act and the UTRs prevent misuse of the exemption. Consequently, a telemarketer calling to advertise the products or services of a business cannot circumvent the National DNCL Rules and/or the Telemarketing Rules simply by asking questions of the recipient alongside their promotional messaging. Likewise, a surveyor cannot circumvent the National

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<sup>1</sup> Subsection 41(1) of the Act states that 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.

DNCL Rules and/or the Telemarketing Rules by asking questions of the recipient for the purpose of lead-generation.<sup>2</sup>

14. Neither the documents referenced by Probit and the MRIA nor any communications from Commission staff constitute Commission determinations establishing Commission policy or modifying the UTRs. Furthermore, in the document cited by Probit, Commission staff answered a question that is different and more general in nature than the question of whether it is permissible under the UTRs to promote incentives to potential survey participants to increase response rates.
15. The Commission acknowledges that the offering of incentives is a legitimate practice used by the market research industry when conducting surveys to increase response rates. However, like any other kind of unsolicited call, survey calls must be conducted in compliance with the UTRs.
16. For a survey call to be exempt from the National DNCL Rules, it must fully satisfy the criteria set out in section 41.7 of the Act. Paragraph 41.7(1)(f) of the Act specifies that survey calls must be made for the sole purpose of collecting information for a survey of members of the public. Similarly, the exemption of survey calls from the Telemarketing Rules is contingent upon such calls being void of solicitation. As defined in the UTRs, “solicitation” includes the indirect selling or promoting of a product or service, whether on behalf of the caller or another person.
17. Researchers who choose to offer survey participation incentives must therefore exercise caution with respect to what they offer and how that offer is presented. If an incentive is presented in such a way that it alters the context of a call – for example, if it is intended to incent participation in an activity other than in a specific survey – then the survey would no longer be the sole purpose of that call and the exemption from the National DNCL Rules would no longer apply. If the offering of the incentive constitutes solicitation – for example, if it unduly promotes specific products or services – the Telemarketing Rules would apply.
18. Contextual factors that persons or organizations conducting telephone surveys should consider when choosing to promote participation in unsolicited survey calls, which might alter the purpose of the call to fall within the definition of solicitation and thus become telemarketing, include the following:
  - the quantum or financial value of the incentive;
  - whether the incentive is directly related or connected to products or services offered by the surveyor, or a client or sponsor who commissioned the survey;
  - whether the incentive is similar to any typical promotional activities of the surveyor or client, such as free estimates from a home contractor;

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<sup>2</sup> “Lead-generation” refers to the assessment of prospective consumer interest.

- whether the incentive would tend to draw the participant to the place of business of the surveyor or client, such as maintenance checks from an auto-repair business;
  - whether the incentive is offered to all participants, or only to those giving certain responses;
  - whether the incentive is tied to participation in a specific survey, or to general or future participation in activities that may only incidentally or potentially include a survey; and
  - the general nature and tone of the messaging that informs the participant of the incentive.
19. In light of the above, the revisions sought by Probit to the definitions of “telemarketing” and “telemarketer” are neither necessary nor appropriate. The exemptions set out in section 41.7 of the Act are directly reproduced in the National DNCL Rules. Further, the Telemarketing Rules do not apply to unsolicited calls made for purposes other than solicitation.
20. The exemptions within the UTRs reflect a balanced approach that prevents misuse by parties making calls for purposes other than survey research. Although researchers must exercise an appropriate degree of care to ensure that their calls are in fact placed solely for the purpose of collecting information for a survey of members of the public, legitimate survey calls continue to be exempt from both the National DNCL Rules and the Telemarketing Rules.

**Should Part IV of the UTRs be amended to expressly exclude survey research from the application of the ADAD Rules?**

21. Probit asserted that the application of the ADAD Rules to survey calls constitutes telemarketing regulation, and that survey calls should be exempt from this regulation, since they do not constitute telemarketing. According to both Probit and the MRIA, subjecting survey calls to the ADAD Rules is contrary to Parliament’s instructions and is inconsistent with section 41.7 of the Act.
22. Both the MRIA and Probit objected to the requirement that survey calls disclose the party on whose behalf the call is placed when made using ADAD technology (the identification requirement). Probit and the MRIA further argued that subjecting survey calls to the identification requirement within the ADAD Rules threatens the integrity of survey data, and that this requirement was imposed without warning or notice to their industry in Compliance and Enforcement Regulatory Policy 2014-155, and without justification. According to the MRIA, the identification requirement contradicts the exemptions set out in section 41.7 of the Act, and the Commission failed to give appropriate consideration to the impact of the identification requirement on the integrity of survey data.

### **Commission's analysis and determinations**

23. As explained above, section 41.7 of the Act exempts calls made for the sole purpose of collecting information for a survey of members of the public from the application of the National DNCL Rules. Such calls nonetheless remain unsolicited telecommunications.
24. Contrary to Probit's submission, the ADAD Rules do not solely target telemarketers. The ADAD Rules regulate the use of ADAD technology for the purpose of initiating any unsolicited telecommunications. Consequently, all unsolicited telecommunications made using ADAD technology must comply with the ADAD Rules, regardless of whether or not they are made for the purpose of solicitation. Parliament has given no indication that survey calls are to be treated differently in this regard.
25. With respect to the rationale for such regulation, the Commission has addressed the unique nuisance and inconvenience posed to consumers by ADADs on a number of occasions. For example, in paragraph 446 of Telecom Decision 2007-48, the Commission stated the following:

In Decision 94-10, the Commission determined that unsolicited ADAD calls caused greater inconvenience or nuisance than unsolicited voice calls and were more likely to be perceived as an intrusion because ADAD calls did not permit the consumer to interact with a live agent. The Commission is of the view that the creation of a National DNCL does not sufficiently mitigate this concern. The Commission considers that consumers who do not register on the National DNCL because they are receptive to live telemarketing telecommunications will not necessarily be receptive to telecommunications made by an ADAD. As such, the nuisance factors specific to the use of ADADs would still exist for these consumers.
26. The Commission expressed similar concerns about the intrusive nature of ADADs in Telecom Decision 2004-35, in Compliance and Enforcement Regulatory Policy 2014-155, and most recently in Compliance and Enforcement Decision 2015-117.
27. While the Commission did introduce changes to the ADAD Rules in Compliance and Enforcement Regulatory Policy 2014-155 with respect to non-solicitation ADAD calls, those changes were limited to a new requirement to include a brief statement identifying the purpose of the call, a relaxing of the identification requirement to allow the substitution of an electronic mailing address for a physical one, and a requirement for any contact information provided to remain valid for a period of at least 60 days.
28. ADAD calls placed for purposes other than solicitation (such as survey research) have been subject to other regulatory requirements, including the identification requirement, since the implementation of Telecom Decision 94-10, in which the Commission stated the following in section 3:

In order to permit called parties to better identify the caller and to assist in the tracing of calling parties who may violate the conditions, the Commission considers that each permitted unsolicited ADAD call should begin with a clear message identifying the person on behalf of whom the call is being made.

29. The impact of the identification requirement on the effectiveness of telephone survey activities was raised in the proceeding leading to that decision, and was addressed in the next paragraph of that decision, as follows:

Under the terms of this decision, live voice calls for survey research will not be subject to restrictions. Thus, where identification of the called party would, for example, bias the results, surveys could still be conducted by means of “live” operators.

30. The Commission reaffirmed the identification requirement in Telecom Decision 2004-35, and carried it forward in the UTRs, which require that “... such telecommunications shall begin with a clear message identifying the person on whose behalf the telecommunication is made ...”
31. Contrary to the parties’ position that the identification requirement was introduced in Compliance and Enforcement Regulatory Policy 2014-155 and was imposed on the industry without appropriate opportunity to comment, this requirement has applied specifically to calls made for purposes other than solicitation since the issuance of Telecom Decision 94-10. There have been multiple opportunities to comment on this issue, including during the Commission’s most recent review of the UTRs initiated by Compliance and Enforcement Notice of Consultation 2013-140.
32. In light of the above, the revisions sought by Probit to Part IV of the UTRs to expressly exclude survey research from the application of the ADAD Rules are neither necessary nor appropriate. The ADAD Rules regulate the use of ADAD technology by anyone initiating unsolicited telecommunications. Exemptions from the National DNCL Rules and the Telemarketing Rules do not apply to the ADAD Rules.

## **Conclusions**

33. The Commission’s current regulatory framework governing unsolicited telecommunications includes a broad exemption from the National DNCL Rules and the Telemarketing Rules for unsolicited telecommunications placed for the sole purpose of conducting a survey of members of the public. All unsolicited telecommunications made using ADADs are subject to the ADAD Rules, including those that do not constitute telemarketing.
34. Probit has not established that the requested relief is necessary to comply with Parliament’s intentions regarding the regulation of unsolicited telecommunications. Probit’s proposed changes would increase the potential for misuse of the survey exemption as a telemarketing or a lead-generating tool, resulting in an increase in the number of unwanted unsolicited telecommunications to Canadians.

35. In light of all the above, the Commission **denies** Probit's application.

Secretary General

### **Related documents**

- *Application to review and vary Compliance and Enforcement Regulatory Policy 2014-155, and applications to modify the Unsolicited Telecommunications Rules regarding the use of automatic dialing-announcing devices for debt recovery calls, Compliance and Enforcement Decision CRTC 2015-117, 31 March 2015*
- *Review of the Unsolicited Telecommunications Rules, Compliance and Enforcement Regulatory Policy CRTC 2014-155, 31 March 2014*
- *Review of the Unsolicited Telecommunications Rules, Compliance and Enforcement Notice of Consultation CRTC 2013-140, 20 March 2013; as amended by Compliance and Enforcement Notice of Consultation CRTC 2013-140-1, 31 May 2013*
- *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*
- *Review of telemarketing rules, Telecom Decision CRTC 2004-35, 21 May 2004*
- *Use of telephone company facilities for the provision of unsolicited telecommunications, Telecom Decision CRTC 94-10, 13 June 1994*
- *Use of Automatic Dialing-Announcing Devices, Telecom Decision CRTC 85-2, 4 February 1985*