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Ottawa, February 4, 2013

Mr. Bruce Wallace
Director, Security and Privacy Policy
Digital Policy Branch, Department of Industry
Jean Edmonds Tower North, 18th Floor, Room 1891D
300 Slater Street
Ottawa, ON K1A 0C8

Dear Mr. Wallace:

I am writing to you regarding the proposed Electronic Commerce Protection Regulations as published in Part I of the *Canada Gazette* on January 5, 2013.

Imagine Canada is the national umbrella for Canadian registered charities and public-benefit nonprofits. There are approximately 165,000 registered charities and nonprofits in Canada, located in every community and ranging in size from small community-based organizations to large universities, hospitals, and national organizations. Charities and public-benefit nonprofits partner with communities, governments, and the private sector to help address many of the most intractable challenges we face as a society. The charitable and nonprofit sector is also an engine of economic activity, providing jobs for some two million Canadians and representing more than seven percent of GDP.

In our capacity as an umbrella, Imagine Canada engages directly with a large number of organizations representing the full breadth and diversity of the sector; our reach is extended by our close working relationships with organizations representing specific parts of the sector including community and private foundations, United Ways, arts organizations, and health charities, among others. It is not in the interest of charities and public-benefit nonprofits to abuse the trust of Canadians or to act in ways that alienate their actual and potential supporters. Without the support of individual Canadians – whether as donors, volunteers, members, beneficiaries, supporters, or purchasers of goods and services – they would not be able to fulfil their missions.

We would like to take this opportunity to express deep and fundamental concerns about the draft regulations published by Industry Canada on January 5. **Imagine Canada recommends that Industry Canada should, using the regulatory powers granted in the Act, exempt electronic communications sent by, or on behalf of, registered charities and public-benefit nonprofits from the explicit consent requirements.** We are not, however, seeking an exemption from regulations concerning themselves with unsubscribe mechanisms; we believe that, when individuals make such a request, it should be accommodated.

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We make this recommendation for the following reasons, upon which I will expand:

1. The definition of "commercial electronic message" is sufficiently broad that it will restrict the ability of many charities and public-benefit nonprofits to carry out activities that further their missions to serve Canadians and communities.
2. The draft regulations, as presented, would place undue financial and administrative burdens on charities and public-benefit nonprofits.
3. The draft regulations do not reflect or accommodate the ways in which charities and public-benefit nonprofits communicate with each other, with key stakeholders, or with the general public.
4. The draft regulations are inconsistent with other domestic policies and with the federal government's stated objectives regarding philanthropy and the facilitation of earned income by charities and public-benefit nonprofits.
5. The draft regulations are inconsistent with policy developments internationally.

The definition of "commercial electronic messages"

The *Act* defines a commercial electronic message as "an electronic message that, having regard to the content of the message, the hyperlinks in the message to content on a website or other database, or the contact information contained in the message, it would be reasonable to conclude has as its purpose, or one of its purposes, to encourage participation in a commercial activity." Commercial activity is itself defined as "any particular transaction, act or conduct or any regular course of conduct that is of a commercial character, whether or not the person who carries it out does so in the expectation of profit."

The broadness of this definition means that almost all electronic communications carried out by charities and public-benefit nonprofits could be affected, including:

1. Soliciting donations where the donation itself involves a commercial activity of any kind. There are myriad ways in which donations today may involve commercial activity. The most obvious would be tickets to a dinner or event, where there is, on the part of the donor, the direct expectation of a tangible benefit in return for the donation. Also likely to be included are situations where the organization benefiting from the donation provides a token of appreciation, such as a calendar or a keychain; if mention is made of this, the message is likely commercial. New and innovative ways of promoting philanthropy would also likely be affected; for example, it is increasingly popular for international development charities to offer opportunities to choose specific gifts, such as donating towards the purchase of a goat for a family in a developing country – which, arguably, is encouraging participation in a commercial activity.
2. Any message at all that includes a hyperlink to the organization's website. Many charities and public-benefit nonprofits offer opportunities, on their main page, for people to interact in ways that would be deemed "commercial." Even where there is no commercial content in the body of an electronic message, by providing a link to their website for the purpose of identification, organizations risk falling under the auspices of the explicit consent regulations.

3. Messages offering goods or services to an individual or organization, even where offering those goods and services is done to provide opportunities or public benefit. Organizations offering services directly to members of the public who are most likely to benefit from them, even when they do so on a break-even basis or at a loss, and even where they may be acting to help fulfil government policy, will see their messages deemed commercial.

The broadness of the definition – and the severe penalties for going offside – will likely force charities and public-benefit nonprofits to err on the side of caution, and treat most of their electronic communications as commercial, whether this is the intent of the legislation and regulations or not. This will, in turn, impact on their ability to fulfil their missions and to reach and serve communities and vulnerable individuals. I will expand on these issues in the sections below.

Financial and administrative burdens

Donors are placing an increasing amount of importance on charities' and public-benefit nonprofits' efforts to manage administrative costs. Administrative costs, and the need to manage them effectively, were also raised by members of the House of Commons Standing Committee on Finance during its recent hearings on charitable giving

Charities and public-benefit nonprofits continually seek new ways to both reduce their costs and expand their outreach to Canadians. A significant and welcome development has been the utilization of electronic communications for outreach, fundraising, and the sale of products and services. This is a significantly less expensive way of doing business than traditional direct mail or telemarketing, and allows charities and public-benefit nonprofits to engage their members, donors, supporters, beneficiaries, and communities in a less invasive manner.

Charities and public-benefit nonprofits have adhered to the consent regulations established in existing regimes, most significantly PIPEDA. By not grandfathering consent that has already been obtained, the draft regulations will require them to start all over again. For charities and public-benefit nonprofits that have technical capacity, this will entail significant administrative costs. For others – particularly the 54 percent of organizations that rely solely on volunteers rather than paid staff – these financial costs will be compounded by significant technical and capacity issues.

The regulations, as drafted, would require charities and public-benefit nonprofits to take a number of steps, such as:

- Databases will have to be examined in order to determine which contacts represent existing business or nonbusiness relationships.
- Where existing business and nonbusiness relationships are identified, the timeframe will need to be determined. This is likely to be extremely difficult for many organizations, as it is information that has not previously been required.
- Databases will have to be augmented and expanded so that they can differentiate between contacts that have provided explicit consent and those where consent can, for a limited period, be implied.

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- Databases will have to be re-programmed to "scrub" contacts where implied consent has expired.
- Communications campaigns will have to be undertaken, within the grace period allowed, to try to obtain explicit consent where it is absent, and contact lists will need to be updated.

Even for larger and more sophisticated organizations with in-house technical expertise, this will be an extensive and expensive undertaking. Resources that could be used – and that donors expect to be used – carrying out activities for the public good, will instead be devoted to regulatory compliance.

Smaller organizations, particularly those operated solely by volunteers, will have even greater difficulty. Many of them do not make use of sophisticated software that can be retrofitted to accommodate the new requirements. They do not have in-house technical expertise. They also will often lack the capacity to identify existing business or nonbusiness relationships with any precision. The cost to obtain the necessary expertise will in many cases be prohibitive, if it can be met at all. Many organizations will be faced with a choice between meeting compliance costs at the expense of their mission, risking noncompliance (and the potential for significant penalties well beyond the means of these organizations, their volunteers, or staff), or ceasing activity altogether.

The significant financial investment that organizations will have to make to comply with the regulations as drafted, risks creating a backlash among donors and supporters as administrative costs rise. This backlash will be compounded as individuals are contacted ad nauseam by organizations and businesses seeking explicit consent. (Individuals who currently receive communications from a number of organizations – be they private businesses or nonprofit entities – will receive messages from each, seeking explicit consent for future communications. Given the likely low response rate for each round of messaging, they will probably receive multiple messages from each organization during the period the regulations allow for this activity.)

The financial and administrative burdens the proposed regulations would place on charities and public-benefit nonprofits outweigh, in our opinion, the potential public policy benefits. We believe that this merits an exemption for charities and public-benefit nonprofits.

While we are not aware of any definition, under existing federal laws or regulations, to differentiate the "public-benefit" segment of the nonprofit population, we note that other jurisdictions have successfully dealt with this issue. For example, Alberta's *Lobbyists Act* of 2007 provides, in Section 3(1)(i) an exemption for a defined class of nonprofits that encompasses registered charities and public-benefit nonprofits. Specifically, it exempts "directors, officers or employees of an organization referred to in section 1(1)(g)(iv) not constituted to serve management, union or professional interests nor having a majority of members that are profit-seeking enterprises or representatives of profit-seeking enterprises."

We also note that in defining existing nonbusiness relationships for the purposes of paragraph 10(13)(c) of the anti-spam *Act*, paragraph 7(2) of Industry Canada's proposed regulations limits the concept of "membership" to certain types of organizations, namely "a non-profit organization that is

organized and operated exclusively for social welfare, civic improvement, pleasure or recreation or for any purpose other than profit, if no part of its income is payable to, or otherwise available for the personal benefit of any proprietor, member or shareholder of that organization unless the proprietor, member or shareholder is an organization whose primary purpose is the promotion of amateur athletics in Canada." Industry Canada has, for the purpose of defining existing nonbusiness relationships, given great thought as to how to differentiate between public-benefit nonprofits and other nonprofit organizations. If this can be done in order to provide the limited exemption afforded to existing nonbusiness relationships, we believe it can also be done to achieve a broader exemption for charities and public-benefit nonprofits, such as was granted by Alberta's lobbying legislation.

The nature of communications by charities and public-benefit nonprofits

The limitation of existing nonbusiness relationships to certain types of contact occurring within the previous two years, does not take into account the reality of the relationship between supporters and charities and public-benefit nonprofits.

The exception for existing nonbusiness relationships would be of limited assistance to charities and public-benefit nonprofits. Individuals who support a number of organizations may not donate to or make a purchase from each one every year, or every other year. When one considers the vast array of services offered by the charities and public-benefit nonprofits, it is easy to see why individuals would not necessarily interact with them in the manner foreseen by the proposed regulations. For example, a person's decision to attend a performance by a theatre company or a symphony orchestra may be primarily driven by that person's interest in the program being offered, and several years may go by between offerings that someone finds attractive. This does not mean that the person does not support the organization in question, value contact with it, or want to be aware of its offerings. The regulations, as drafted, would deny them this information.

Limiting nonbusiness relationships to volunteers, donors and members does not allow charities and nonprofits sufficient flexibility to communicate with beneficiaries, or potential beneficiaries, of their programs. A number of scenarios come immediately to mind:

- an organization providing services to seniors, on a partial- or full-cost recovery basis, would not be able to electronically reach out to the steady influx in new people who would benefit greatly from those services;
- an organization serving people who have suffered physical disabilities, would not be able to electronically contact those people to make them aware of new products or services that could improve their lives;
- a hospital that has developed courses to help survivors of cancer or other debilitating conditions learn new techniques to extend or improve their lives (such as dietary or exercise programs) would not be able to e-mail former patients;
- a literacy organization that offers basic training for free, but charges a small fee for further training, would not be able to e-mail former clients;

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- universities and colleges seeking to establish relationships with new alumni would be limited in doing so; or,
- a sporting organization wanting to make new parents or new residents of a neighbourhood aware of the opportunities they offer, would be unable to do so.

All of these are examples of how the services provided by charities and public-benefit nonprofits, which many of us take for granted, are often "commercial" as defined by the *Act* and proposed regulations. By excluding beneficiaries (and potential beneficiaries) from the definition of nonbusiness relationship, the *Act* and proposed regulations would actively limit the ability of organizations to reach those who most need and would benefit from their services. This would, ironically, limit their ability to adhere to requirements placed on them by other federal departments and agencies; for example, funding agreements that may require them to reach out to and offer services to targeted population groups.

Also problematic is that communications by these organizations are often multi-faceted. In order to reduce the number of e-mails they send, organizations often combine information items (such as updates on their activities, or notices of upcoming meetings) with opportunities to make donations or purchase goods or services. This is more efficient for the organization, but also less disruptive for the recipient, who receives fewer messages as a result. In theory, organizations could separate these messages – but this would result in higher costs and in more messages going out. And even if an attempt was made to send purely informational messages, merely providing a link to the organization's website may, as I mentioned above, be enough to classify the message as commercial. This dramatically increases the likelihood of inadvertent non-compliance.

We believe the issues raised in this section justify the exemption we recommend above.

The draft regulations are inconsistent with other federal policies

In terms of regulating marketing activities, the closest federal parallel with the draft anti-spam regulations would be rules and regulations governing telemarketing and the establishment of the national Do Not Call registry. As you are no doubt aware, registered charities seeking donations are exempt from these regulations.

Given the proposed restrictions on charities and public-benefit nonprofits, the cost of compliance, and the likelihood that virtually all communications sent by organizations could be construed as having a commercial component, adoption of the anti-spam regulations as they are would encourage organizations to move back towards the certainty of telephone solicitation. This would also result in increased costs, but with fewer worries about noncompliance. It would also, ironically, encourage organizations to utilize a much more disruptive method of communication; this appears to us to be, at best, an illogical approach.

In recognition of the challenges facing the sector, the federal government has taken steps to publicly support and encourage philanthropy and volunteerism. The House of Commons Finance Committee has, acting upon a unanimous request by the House and a further request made by the Minister of

Finance, been holding hearings on how to incentivize Canadians to give more. Research conducted by the Association of Fundraising Professionals indicates that when asked why they do not give more generously than they do, Canadians respond that they would give more if they were asked more frequently to do so. Limiting the ability of charities and public-benefit nonprofits to communicate with the public limits our ability to grow philanthropy in Canada, which is at odds with the federal government's stated goals.

In November, the Minister of Human Resources and Skills Development launched consultations on how new social finance mechanisms can be used to support charities and public-benefit nonprofits in carrying out their missions. Many of the new ideas for promoting greater financial sustainability involve leveraging organizations' assets to expand the sale of goods and services. This is not done for profit or for any personal gain, but to strengthen the communities in which we live. Limiting the options for charities and public-benefit nonprofits to communicate about these new opportunities will have a negative effect on their ability to fulfil the role that the federal government sees for them in building stronger communities.

We also note that the federal government has declared the reduction of red tape to be a priority, and has established a commission with the aim of reducing the amount of red tape faced by small- and medium-sized businesses. Charities and public-benefit nonprofits also face a significant amount of red tape. The proposed regulations, by adding to the regulatory burden and red tape faced by organizations of all kinds, appear to contradict the government's commitments and stated aims in this regard.

We are also concerned that the proposed definition and exemption for existing business relationships could impede some organizations, particularly capacity-building organizations, from fulfilling their mandate and obligations. Imagine Canada, for example, is a federally-registered charity whose purpose – regulated by the Canada Revenue Agency – is to provide services to and support the work of charities more broadly. We do this in a number of ways – providing research, public policy advice, access to information about grants and other funding sources, and providing a wide range of courses and educational opportunities about issues such as governance, financial reporting, human resources management, volunteer management, regulatory compliance, and public accountability. We finance our activities through membership fees and through charging fees to partially cover the costs of the goods and services we provide. We do not have existing relationships with all 85,000 registered charities in Canada, or with the new organizations registered by the CRA each year. Our charitable purpose, however, as overseen by the CRA, is to make our services available to them all. Electronic communication is the most efficient and effective way to make contact with other organizations in order to make them aware of the support we can provide. The regulations, as drafted, would prevent us from using this vital tool in support of our charitable purpose.

In order to be consistent with existing federal government policies and with the federal government's stated goals for the sector, charities and public-benefit nonprofits should be exempt from the proposed regulations.

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The draft regulations are inconsistent with practices in other countries

Australia's 2003 *Spam Act* recognizes the unique position of charities in ways that our legislation and the proposed regulations do not. It sets out clear definitions of what constitutes commercial electronic messaging, and soliciting donations is not included; thus, electronic messages seeking donations are not covered by the legislation. Furthermore, Schedule 1 of the *Act* explicitly exempts charities and educational institutions from the explicit consent requirements governing messages promoting the sale of goods or services. The Australian approach is much more reflective of the realities of the sector and provides much greater assurance than is currently proposed in Canada. We understand that the Australian example, particularly its emphasis on explicit consent, was used as a model in developing Canada's legislation. As such, it would benefit us to also learn from the measures Australia incorporated to minimize the disruption to organizations providing a public benefit.

In the United States, the *CAN-SPAM Act of 2003* does not require explicit prior consent, as long as opt-out mechanisms are in place and are respected. This means that charities and public-benefit nonprofits in the United States do not face the significant financial and administrative burdens that would be imposed on similar organizations in Canada.

The United Kingdom's *Privacy and Electronic Communications Regulations of 2003* contain a broad requirement for explicit consent, but they also allow for a "soft opt-in" whereby it is permissible to send electronic messages to contacts who have provided their details through previous interactions. Once again, opt-out provisions must be in place and organizations have 28 days after receiving a request, to remove someone from their contact lists. In effect, the UK regulations grandfathered existing consents that had already been obtained by organizations. This is a much less disruptive approach than is proposed in Canada, where the draft regulations would render all consent that has already been obtained null and void.

Canada's proposed approach does not follow international best practice, particularly when compared to Australia. We believe this merits the exemption for charities and public-benefit nonprofits which we recommend above.

Potential specific amendments

For the reasons stated above, Imagine Canada firmly believes that there is justification in providing an exemption, under the proposed regulations, for registered charities and public-benefit nonprofits. If passed in their current form, the regulations would have far-reaching negative effects on charities and public-benefit nonprofits and on their ability to serve Canadians and their communities. There is also a real risk that thousands of organizations, many of them run by volunteers seeking nothing more than to make a positive difference, will find themselves in non-compliance.

Failing a blanket exemption for charities and public-benefit nonprofits, there may be specific ways in which the negative consequences of the proposed regulations could, to some extent, be mitigated.

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Adoption of some or all of these measures would not alleviate all of our concerns, and would still result in increased administrative burdens and costs, but would provide greater assurance in respect to some of the activities carried out by charities and public-benefit nonprofits.

1. If the Act and regulations are not intended to limit the ability of charities and public-benefit nonprofits to solicit donations, this should be clearly articulated by providing an exemption for electronic messages, sent by registered charities and public-benefit nonprofits, which seek to solicit donations. In this case, the regulations should also clarify that providing a link to the organization's website for identification purposes, does not render the message commercial.
2. If the Act and regulations are not intended to limit fundraising, the regulations should provide an exemption for electronic messages promoting activities that could be deemed commercial, but where participants are eligible for charitable tax credits. It should be noted, though, that this would still have a significant impact on the earned-income activities of charities and public-benefit nonprofits.
3. Failing such an exemption in the regulations, if Industry Canada interprets the Act and regulations such that they would not apply to electronic messages in this manner, compliance or interpretation guidelines should be issued prior to the Act coming into force to set this out.
4. The regulations should provide an exemption for electronic communications sent by a charity or public-benefit nonprofit to individuals with whom an existing business or nonbusiness relationship has already been established at the time the regulations come into effect. This would recognize the efforts that charities and public-benefits have made to adhere to PIPEDA and existing regulations and grandfather the consent they have already received from those individuals. It would help to address the issue of organizations having to invest time and resources that many of them do not have, in completely redeveloping and updating their contact databases. It would also help to address the fact that the nature of relationships between charities, public-benefit nonprofits, and individual Canadians is not reflected in the two-year windows provided for in the *Act.* It should be noted, though, that such a grandfathering provision would still impose undue and long-term administrative and financial difficulties on charities and public-benefit nonprofits in establishing new relationships with individual Canadians.
5. The regulations should be amended to provide an exemption for electronic communications with the beneficiaries and potential beneficiaries (including alumni of universities and colleges) of the services provided by a charity or public-benefit nonprofit. This would help to address the fundamental shortcoming in the *Act's* definition of a nonbusiness relationship.
6. If existing consent already obtained by charities and public-benefit is not grandfathered, the regulations should be amended to allow for an exemption for communications made by charities and public-benefit nonprofits, where there is an existing business or nonbusiness relationship, and where that business or nonbusiness relationship has been established at any time in the preceding five years. This would better recognize the often sporadic nature of the relationship between organizations and those who donate to them or purchase goods or services from them.
7. The proposed regulatory exemption governing business-to-business communications is inadequate in that it does not provide protection for messages sent by volunteers. The categories of individuals who may send electronic messages under this proposed exemption, on behalf of an organization, should be amended to explicitly include volunteers.

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8. The proposed business-to-business exemption should be expanded to include communications by registered charities or public-benefit nonprofits, to other charities or public-benefit nonprofits, in pursuit of their purposes.

Conclusion

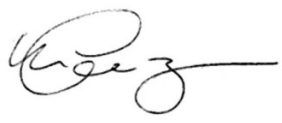
The proposed consent regulations will have significant impacts on tens of thousands of charities and public-benefit nonprofits across Canada. The short window that Industry Canada has provided for feedback and comment is inadequate. Many of the organizations that will be affected, particularly those that are run solely by volunteers, are not even aware that the draft regulations have been published. Of those that are aware, many have not had adequate time to properly analyze the full impact on their organizations or to prepare submissions and recommendations. We recognize that the *Act* itself received Royal Assent some time ago and that there is some urgency on the part of Industry Canada to finalize the regulations and have the *Act* take effect. However, we believe that it is more important to get the regulations right than to get them into place quickly.

As drafted, the regulations demonstrate a lack of understanding of the role that charities and public-benefit nonprofits play in Canadian communities and around the world, and of how they communicate and interact with individuals. In the interest of developing public policy effectively, rather than developing it quickly, we urge you to accept and consider representations made to you by charities and public-benefit nonprofits within a reasonable timeframe after the February 4 deadline. **We would also urge you, to the extent that these draft regulations are amended based on the submissions you receive, to allow for another public comment period prior to finalization or promulgation.**

The comments and recommendations Imagine Canada makes in this submission are based on the limited opportunity we have had to carry out our own analysis and seek input and feedback from key partners**. I would urge you to meet with Imagine Canada and other key stakeholders in the charitable and public-benefit nonprofit sector in order to identify issues and potential solutions prior to making any final decisions with regard to these regulations.** We would be more than happy to assist you in convening such a meeting, and I will ask my office to follow up with you in this regard.

Thank you in advance for your consideration of our views, and I look forward to hearing from you soon.

Yours truly,



Marcel Lauzière
President & CEO