



17 December 2014

John Traversy
Secretary General
CRTC
Ottawa, ON K1A 0N2

Dear Mr. Secretary General,

Re: *Administrative monetary penalties under the Voter Contact Registry: Call for comments, Compliance and Enforcement Notice of Consultation CRTC 2014-598 (Ottawa, 17 November 2014)*

1. The Forum for Research and Policy in Communications (FRPC) is a non-profit and non-partisan organization established to undertake research and policy analysis about communications, including broadcasting. The Forum supports a strong Canadian broadcasting system that serves the public interest.
2. We are pleased to participate in the process initiated by Compliance and Enforcement Notice of Consultation CRTC 2014-598, regarding administrative monetary penalties under the Voter Contact Registry. Our comments on the issues raised in the Commission's notice are attached. We have also appended a preliminary report we have completed analyzing the CRTC's use of AMPs.
3. We look forward to the opportunity of reviewing other comments submitted in this proceeding.

If you have any questions, please do not hesitate to contact the undersigned.

Sincerely yours,

A handwritten signature in blue ink that reads 'Monica Auer'.

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A fond farewell to Kafka

Administrative monetary penalties under the Voter Contact Registry:

Call for comments,

Compliance and Enforcement Notice of Consultation

CRTC 2014-598 (Ottawa, 17 November 2014)

Comments of the Forum for Research and Policy in Communications

17 December 2014

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Executive Summary

Introduction: a fond farewell to Kafka

- ES 1** The Forum for Research and Policy in Communications (FRPC) is a non-profit and non-partisan organization established to undertake research and policy analysis about communications, including broadcasting.
- ES 2** The most important aspects of the CRTC's administration of these new responsibilities are transparency, consistency and fairness. Canadians are entitled to expect that the CRTC's regulatory approach is transparent, consistent and fair – rather than the confusing or complicated, inconsistent or unfair experience of characters in a story by Kafka.

FRPC's main concerns

- ES 3** Regulations for the new VCR regime must be very clearly written, as the parties expected to comply with these rules are likely to be inexperienced with the CRTC's practices, procedures and precedents.
- ES 4** The CRTC should, in particular, define each term on which its determinations rely, even if Parliament has not defined those terms itself. Clear, published definitions provide opportunities for education, encourage compliance, and enable the courts to understand the CRTC's reasons.
- ES 5** The terms that especially require definitions include "any purpose related to an election". Our concern is that if this term is too broadly applied, it will capture broadcasters, other media and academic institutions that commission surveys about important electoral issues during an election. Canada's historical approach to journalistic and academic independence should not be put into question because definitions reach beyond their appropriate grasp.
- ES 6** The CRTC should clarify its approach to the use of documentation it receives from VCR registrants. For instance, unions rarely publish details of their correspondence with their members – would the *Fair Elections Act's* reporting requirements permit the CRTC to obtain that information and if so, what will the Commission do with it? The CRTC should provide parties subject to the VCR with a reasonable expectation of confidentiality, when this does not conflict with Parliament's objectives for the VCR.
- ES 7** The CRTC should set out the facts surrounding each factor assigned for consideration in administrative enforcement actions. Setting out these facts promotes objectivity, predictability and consistency, all of which serve the public

interest. Setting out the facts for each factor will also establish that the CRTC is acting reasonably, rather than arbitrarily.

- ES 8** In particular, the CRTC should clearly describe how it will calculate the number of violations, whether the breach of one rule is more serious than the breach of another, and the per-violation fine for first, second and subsequent breaches.
- ES 9** Finally, the CRTC’s education and outreach initiatives should be deployed in each federal election, in the same way that the CRTC issues information bulletins about election broadcasts at the beginning of each election. The CRTC should also provide a mechanism for interested parties to register in advance of, or during, election periods to obtain information about the VCR. When the federal writs drop, the CRTC should contact previous violators to remind them about the consequences of repeat violations, and to promote compliance.

Response to CRTC questions

CRTC questions	Position of the FRPC
Q.1 The requirement to register does not apply until 48 hours after voter contact calls begin. As a result, Canadians who file complaints with respect to voter contact calls may not be in a position to determine whether the call violated any requirements of the Registry. To what extent should the number and frequency of complaints, as distinct from the number and frequency of violations, be considered as a factor?	<i>De minimus</i> numbers of complaints should not attract penalties for first-time offenders, who should instead receive warnings. If an offender re-offends, the CRTC should not levy fines when a <i>de minimus</i> number of complaints is involved.
Q2. If the Commission chooses to adopt the relative disincentive of the measure as a factor, how should that disincentive be assessed in situations where the benefit obtained by the person or group may not have been financial in character?	The CRTC’s goal should be to use a range of administrative enforcement actions that promote compliance. Naming and shaming may be as, and possibly more, effective than fines in promoting compliance.
Q3. Ability to pay is expressly identified as a factor under CASL. To what extent should it apply under the Registry, and what steps can be taken to ensure it is assessed in a manner that is objective and consistent?	The CRTC should define ‘ability to pay’ and give examples about how the term will be applied. Fines should, however, be a sanction that is used exceptionally, for the most serious offences – such as huge numbers of complaints, and/or wilful and repeated non-compliance.
Q4. If the Commission chooses to adopt the potential for future violations as a factor, to what extent should a person’s efforts toward compliance with the Registry, including implementing training of employees and volunteers, responding in a timely manner to inquiries from the Commission, and self-reporting of potential violations, be taken into consideration?	Parties’ past and current compliance should be the major consideration in all cases. It should weigh heavily in setting AMPs. The CRTC and its staff should consider both the compliance steps parties took before breaching the CRTC’s regulations, and those taken after they were notified about a breach or breaches.

CRTC questions	Position of the FRPC
	Self-reporting should be public, and simple. The CRTC should not use self-reported breaches as evidence in subsequent cases, except that parties that repeatedly breach the CRTC's rules should receive warnings that additional non-compliance will be sanctioned.

Conclusions: the outcome of this proceeding should be regulations that are and can be applied transparently, consistently and fairly

- ES 10 Respectfully, parties' experience with the CRTC's regulatory process for the VCR should not be Kafkaesque.
- ES 11 The public interest is best served by quasi-judicial enforcement that is transparent, consistent and fair.

Recommendations

- ES 12 The Forum therefore recommends that the CRTC
 - 1 Establish transparent reporting procedures
 - 2 Report on all factors, considered or not
 - 3 Set out frequently updated, frequently asked questions
 - 4 Retain documentation online

I Introduction: registering voter contacts

- 1 The Forum for Research and Policy in Communications (FRPC) is a non-profit and non-partisan organization established to undertake research and policy analysis about communications, including broadcasting.
- 2 The Forum supports consistent, fair and transparent regulation in the public interest.
- 3 We therefore welcome the CRTC's call for comments about the approach it will adopt towards enforcing requirements for a Voter Contact Registry (VCR) in future federal election periods.
- 4 We respectfully submit that the most important aspects of the CRTC's administration of these new responsibilities are transparency, consistency and fairness.
- 5 Canadians are entitled to expect that the CRTC's regulatory approach is transparent, consistent and fair regulation – rather than the confusing or complicated, inconsistent or unfair experience of characters in a story by Kafka.

II The Fair Elections Act

- 6 The *Fair Elections Act*¹ creates new responsibilities for the CRTC. It (or someone it delegates²) must establish and maintain a "Voter Contact Registry" and keep all documents it receives from VCCS, their clients and third-party organizations and groups.³ The CRTC must also create new identification and reporting requirements for "voter contact calling services".⁴ Finally, the legislation requires the CRTC to sanction those who violate the registration requirements.
- 7 The *Fair Elections Act* removes anonymity from VCCS contracts. It defines who can enter into⁵ and sign agreements with VCCS: organizations' official representatives, or individuals in their own name.⁶ Each must file proof of identification with the CRTC.

¹ The Act's full title is: *An Act to amend the Canada Elections Act and other Acts and to make consequential amendments to certain Acts.*

² *Canada Elections Act*, s. 348.13(1).

³ *Ibid.*, s. 348.11.

⁴ By adding Division 1.1 to Part 16.1 the *Canada Elections Act* (after s. 348.01 of that legislation).

⁵ *Fair Elections Act*, section 76, addition to *Canada Elections Act* of section 348.02.

⁶ *Ibid.*, s. 76, by adding s. 348.02 to the *Canada Elections Act*.

8 Those engaging a VCCS must give the service provider their name, address, telephone number, and a copy of a piece of CRTC-authorized identification containing their name when they make the agreement⁷ and also before the first call is made.⁸ A VCCS must keep all this for a year after the election.⁹

9 The *Fair Elections Act* also promotes explicit discussions about calls intended to contact voters between VCCS and their clients. Parties wanting to engage a VCCS must tell the calling service provider that they want to make a VCCS agreement,¹⁰ and the VCCS must also ask each of these parties whether the calls “constitute voter contact calling services.”¹¹

A What is included within ‘voter contact calling services’?

10 The *Fair Elections Act* defines voter contact calling services (VCCS) as services or businesses involving the making of live and/or automated calls¹² “during an election period for any purpose related to an election”.¹³

11 ‘Any purpose related to an election’ is very broadly defined to include the promotion/opposition of candidates, parties or positions; getting out the vote initiatives; information gathering; and fund-raising. (Table 1 sets out the *Act’s* categories.)

<p>Table 1: ‘Purpose related to an election’ includes</p> <p><u>Support or opposition</u> – the promoting or opposing of</p> <ul style="list-style-type: none"> • a registered party • the leader of a registered party • a candidate or a nomination contestant, or • any position on an issue with which such a party or person is associated <p><u>Getting out the vote</u> - encouraging electors to vote or not to vote, and “providing information about the election, including information about voting hours and the location of polling stations”</p> <p><u>Information gathering</u> – collecting information about how electors voted in past elections or will vote in the election, electors’ views on</p> <ul style="list-style-type: none"> • a registered party • its leader • a candidate or a nomination contestant or • any issue with which such a party or person is associated” <p><u>Fund-raising</u> – “for a registered party, a registered association, a candidate or a nomination contestant”.</p> <p>Source - <i>Fair Elections Act</i>, section 75, which adds section 348.01 to the <i>Canada Elections Act</i> – note that the italicized and underlined text are not set out in the legislation</p>
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⁷ *Ibid*, section 75, adding section 348.03 to the *Canada Elections Act*.

⁸ 348.05(2)

⁹ *Canada Elections Act*, adding s. 348.04(1) and (2).

¹⁰ *Fair Elections Act*, s. 348.03.

¹¹ *Ibid*, s. 348.05(1).

¹² ‘Calls’ are defined by section 75 in the *Fair Elections Act* as “live voice calls”, “calls made by means of an automatic dialing-announcing device”, or a combination of live and automated calls. (Note that section 75 of the *Fair Elections Act* adds these and other definitions to the *Canada Elections Act* by creating and adding section 348.01 to the *Canada Elections Act*).

¹³ *Fair Elections Act*, s. 75.

B CRTC must establish a ‘Voter Contact Registry’

- 12 The *Fair Elections Act* requires the CRTC to create a new system with which VCCS and their clients must register almost immediately after they have begun to contact voters. The CRTC or someone it delegates¹⁴ must establish and maintain a “Voter Contact Registry” (VCR) and keep all documents received from VCCS, their clients and third-party organizations and groups.¹⁵ The CRTC may keep these documents for up to seven years.
- 13 VCCS and their clients must register with the VCR within 48 hours of making their first call.¹⁶ They must give the CRTC their name, the client’s name, “the type of calls to be made under the agreement”¹⁷ as well as the identification required by the CRTC.¹⁸ If the information provided is incomplete, it is deemed not to have been made,¹⁹ which presumably constitutes a violation. (The *Fair Elections Act* does not define “type of calls”, however, this is something the CRTC may have to clarify.)
- 14 Unions will be affected by the new CRTC requirements, because the registration obligation applies to third-party corporations or groups that use their own internal telephone services to make live or automated calls “for any purpose relating to the election”.²⁰ (Except that they need only state that they are making live calls, not the type of calls.²¹)
- 15 The definition of VCCS is very broad. FRPC is concerned that it may encompass organizations that were not originally intended to be covered by the legislation – such as broadcasters and the print media that frequently survey voters during election periods. Some academic institutions also undertake voter survey research during elections.

¹⁴ *Canada Elections Act*, s. 348.13(1).

¹⁵ *Ibid*, s. 348.11.

¹⁶ *Ibid*, s. 348.06(1) for VCCS, and s. 348.07(1) for clients.

¹⁷ *Ibid*, s. 348.06(2) for VCCS and s. 348.07(2) for clients. ‘Type of calls’ is not defined in the *Fair Elections Act*.

¹⁸ *Ibid*, s. 348.07(3) for clients.

¹⁹ *Fair Elections Act*, s. 76, creating s. 348.07(4) of the *Canada Elections Act*: “... a registration notice is deemed not to have been filed if the information and the copy of the piece of identification are not provided at the time the registration notice is filed.”

²⁰ *Canada Elections Act*, s. 348.08(1) for live calls, and s. 348.09(1) for automated calls.

²¹ *Ibid.*, s. 348.08(2)(c) for live calls, and s. 348.09(2)(c) for automated calls.

- 16 Our concern is that a requirement for news-gathering and academic institutions to register within 24 hours of surveying voters during election periods weakens Canada's long-standing commitment to journalistic and academic independence.
- 17 FRPC therefore respectfully submits that the CRTC clearly state that such organizations will not be required to register with the VCR when they are undertaking surveys on their own behalf.
- 18 Given the breadth of parties potentially affected by the registration process, it is clear to FRPC that the CRTC will have to undertake an enormous educational outreach program before it begins to impose sanctions for breaches. The CRTC should convene an informal meeting of national and provincial organizations to advise the Commission about ways of maximizing the impact of its outreach program. The CRTC should also seek advice from national and provincial
- unions about the best ways of reaching local unions – that are often structurally separate from their national counterparts, and
 - political parties for reaching local riding associations – that may also be structurally separate from national political parties.
- 19 Given the growing importance of Canada's multicultural population the CRTC should in particular reach out to the many national congresses and associations representing Canadians with a multicultural heritage to ensure that they understand their reporting requirements.
- 20 The CRTC should post all briefing materials provided to these organizations on its website, so that they are readily available for consultation at all times.
- 21 All registrations will be made public, after the election. The CRTC or its delegate²² must publish all registration notices that it received after the election, as quickly as possible once 30 days have passed since polling day.²³
- C Record-keeping requirements**
- 22 VCCS²⁴ and "every person or group" that enters into an agreement with such firms for VCCS,²⁵ must keep a copy of all "unique" scripts used in live calls and of recordings of all "unique" automated calls, for three years after the election period.

²² *Ibid.*, s. 348.13(1).

²³ *Ibid.*, s. 348.12 for VCCS.

²⁴ *Ibid.*, s. 348.16.

23 Similarly, persons or groups that use their own internal services to make automated calls “for any purpose relating to the election” must keep a recording of each unique message, and the date on which it was sent, but only for one year after the election.²⁶

ES 13 As third-party corporations, unions and other groups that use their internal services to make live calls “for any purpose relating to the election” must keep copies of and the dates on which each unique script was used.²⁷

D CRTC enforcement

24 The *Fair Elections Act* requires the CRTC to administer and enforce these new rules.²⁸ It gives the CRTC the authority to enter places and inspect documents, information or things relevant to enforcing these requirements.²⁹

25 Every breach of the registration prohibitions or requirements will constitute a violation, subject to administrative monetary penalties of up to \$1,500 for an individual, or up to \$15,000 for a corporation.³⁰

26 If, on the other hand, a VCCS, person or group that does not keep scripts and/or recordings³¹ is prosecuted in the courts and convicted, it will be guilty of an offence for which, if convicted by a court, the maximum penalty for an individual will be \$10,000, and for a corporation, \$100,000.³²

27 The legislation allows common law principles to be used to justify or excuse breaches of the prohibitions or requirements, “to the extent that the rule or principle is not inconsistent with this Act”.³³

²⁵ *Ibid.*, s. 348.17.

²⁶ *Ibid.*, s. 348.18.

²⁷ *Ibid.*, s. 348.19.

²⁸ *Ibid.*, s. 348.1(1).

²⁹ *Fair Elections Act*, s. 140, amending s. 72.06(1)(a) of the *Telecommunications Act*.

³⁰ *Ibid.*, s. 138, as amending s. 72.01 of the *Telecommunications Act*.

³¹ *Ibid.*, s. 495.1 for VCCS; s. 495.2 for persons or groups.

³² *Ibid.*, s. 144.(1), amending s. 73(2) of the *Telecommunications Act*.

³³ *Ibid.*, s. 141, as amending s. 72.1(2) of the *Telecommunications Act*.

III Concerns

28 FRPC's central concerns with the CRTC's enforcement of its new responsibilities under the *Fair Elections Act* have to do with transparency, consistency and fairness.

A Clear? Crystal.

In the 1992 film, *A Few Good Men*, the character of Lieutenant Daniel Kaffee (played by Tom Cruise), cross-examines Colonel Nathan Jessop (played by Jack Nicholson):

...

Kaffee: ... Kendrick was clear on what you wanted?

Jessop: Crystal.

...

29 The CRTC uses regulations to enforce its legislative mandate, and we assume the Commission will issue regulations for the new VCR.

30 Any regulations that the CRTC enacts to implement the VCR must be clear so that parties who are unfamiliar with the CRTC's regulatory approach are nevertheless able to understand and follow the rules. Parties need 'crystal clarity' to understand their responsibilities for compliance.

31 FRPC addresses this point in a recent report on the CRTC's use of AMPs in the context of its unsolicited telecommunications regime. A copy of the report is attached, for the reader's convenience.

32 Clarity about the language used in the VCR regulations is essential because the CRTC's current *Unsolicited Telecommunications Rules* are not clear. To give one example, the regulations for "Record Keeping" do not deal with the records to be kept by those subject to the *Rules* (which can be everyone, including those exempted by Parliament from the unsolicited telecommunications regime). To give another example, the CRTC's rules for ADADs now require contact information to be provided:

4. A person using an ADAD to make unsolicited telecommunications where there is no attempt to solicit, shall comply with the following conditions:

...

d) such telecommunications shall begin with a clear message identifying the person on whose behalf the telecommunication is made and a brief description of the purpose of the telecommunication. This identification

message shall include an electronic mail address or postal mailing address and a local or toll-free telecommunications number at which a representative of the originator of the message can be reached. In the event that the actual message relayed exceeds sixty (60) seconds, the identification message shall be repeated at the end of the telecommunication

- 33 Does this regulation permit any of the content in the message to be delivered through a 'click-through' system?
- 34 Does the regulation require the message content to be delivered in the order stated? – namely, identification, brief purpose, e-mail or postal address, telephone number.
- 35 Suppose an IVR message is being delivered to communities where many people speak more than one language: does the regulation require IVR messages delivered in a specific language first?
- 36 We do not know the answers to these questions – but fear that without clarity, those subjected to these rules may find their enforcement by the CRTC to be arbitrary and inconsistent.
- 37 The CRTC should therefore define each term on which its determinations rely, even if Parliament has not defined those terms itself. Clear, published definitions provide opportunities for education, empower those subject to the regulations by encouraging compliance, and will enable the courts to understand the CRTC's reasons.
- 38 FRPC therefore urges the Commission to draft its regulations so that someone unfamiliar with the complexities of statutory drafting will be able to understand and comply with their requirements.
- 39 FRPC is especially concerned that unless it is carefully and clearly defined, the very broad term, "any purpose related to an election", will over time be applied to parties that Parliament did not intend the CRTC to regulate. For example – will the commissioning of surveys by broadcasters or publications about the issues that matter to the electorate during a federal election fall within a "purpose" of the election, so that broadcasters and newspapers must register on the VCR? The Commission should state its position on this point, to avoid imposing unwelcome and unexpected surprises either in the near or longer term.

B Use of non-identification information collected from registrants

- 40 The *Fair Elections Act* does not state whether the CRTC would be able to publish or otherwise disseminate any of the scripted or recorded content that registrants must retain, and may have to provide to the CRTC.
- 41 Such content may reveal the internal strategies of political parties and other organizations. Considering that commercial strategies are typically granted confidentiality, it would be reasonable to expect that strategies for political campaigns merit even more protection.
- 42 Would the CRTC be able to ask unions for the content of communications to their membership – content that is usually confidential? What about political parties' communications to their members?
- 43 The CRTC should publish its commitment not to disclose this information unless the information is demonstrably relevant to a determination that the Commission is required to make about an alleged violation.
- C Caesar's wife: calculating penalties**
- 44 Julius Caesar is said to have divorced his wife because she was suspected of wrongdoing - and the significance of his position in Roman society meant that his wife had to be above suspicion.
- 45 Quasi-judicial decision-makers face the same standards when it comes to democratic elections. The CRTC must give clear and explicit reasons when it defines and applies penalties for breaches of the VCR regulations, to avoid the slightest hint of suspicion about the motives underlying its decisions.
- 46 Reviewing the decisions issued by the Commission about breaches of the *Unsolicited Telecommunications Rules* shows that clarity and explicit reasons are generally absent: the CRTC generally does not state the actual numbers of complaints it receives, the actual numbers of calls made, or explain the choice of a specific penalty per call/complaint to calculate a violator's total penalty.
- 47 Instead the CRTC chooses a figure to use as the number of violating calls, multiplies this by the number of regulations breached, and multiplies that result by a penalty that ranges from \$250 (Bionet Nettoyage) to \$6,667 (Xentel). Factors related to the size of the caller, and the gravity of offence somehow factor into this equation.
- 48 The CRTC mentioned this briefly in a July 2013 unsolicited telecommunications enforcement decision. It noted that the violator's calling records showed that it had made

3,828 of these telecommunications were made to consumers whose telecommunications numbers were registered on the National DNCL;

1,618 of those 3,828 telecommunications were made from 5 June to 10 July 2012, when OEG was registered with the National DNCL operator but had let its subscription lapse;

from 11 to 16 July 2012, 41 telemarketing telecommunications were made to consumers residing in area codes 705 or 905, while OEG's National DNCL subscription was for the 416 area code only; and

although OEG subscribed to the National DNCL for the 416 area code on 11 July 2012, it failed to download the list in a timely manner and made 47 telemarketing telecommunications from 11 to 13 July 2012 to consumers in that area code whose telecommunications numbers were registered on the National DNCL.³⁴

49 From these violations - 47 to 3,828 telecommunications in breach of the *Unsolicited Telecommunications Rules* – the CRTC chose 17.³⁵

50 The CRTC then explained that the number of violations is only considered when setting the total AMP:

The Commission notes that the amount of the AMP per violation is not determined based on the number of violations committed but rather on the following factors:

Is the business incorporated or not?

If it is incorporated, what is the size of the company?

Is it a first-time violation?

In contrast, the number of violations is taken into consideration when the total amount of the AMP is determined. In addition, the company's behaviour after being informed that complaints have been received and instructed on how to bring itself into compliance is also considered.³⁶

³⁴ *MDG Newmarket Inc., operating as Ontario Energy Group – Violations of the Unsolicited Telecommunications Rules*, Compliance and Enforcement Decision CRTC 2013-356, <http://www.crtc.gc.ca/eng/archive/2013/2013-356.htm>, (Ottawa, 31 July 2013), at para. 7.

³⁵ *Ibid.*, at para. 8.

³⁶ *Ibid.*, at paras. 19-20.

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- 51 Meanwhile, the *Telecommunications Act* states that each “contravention ... under section 41 constitutes a violation” and that “the person who commits the violation is liable ... to an administrative monetary penalty of up to \$15,000”.
- 52 The CRTC’s decisions provide insufficient information to know how it selects the number of violations that it will count, or the per-penalty fine. They generally do not list each of the factors that the Commission has said it would consider in setting penalties, and when factors are mentioned, do not state clear evidence about the factors’ application to the violator.
- 53 The result is that final penalties cannot be predicted, and their application seems arbitrary: the absence of a review of the evidence, the failure to consistently apply the factors developed for the *Unsolicited Telecommunications Rules* regime, unsolicited telecommunications rule factors clear exposition of reasons leaves the impression that the fines imposed are simply the maximum the CRTC thought it could extract.
- 54 Calls made during federal elections for the purposes of the election which breach the law should be subject to a predictable, transparent and fair process. Decisions should be based on published facts and clearly stated penalties – not on private contacts between CRTC staff and violators (see paragraph 61) or on negotiations conducted behind closed doors.³⁷
- 55 The CRTC should therefore clearly describe
- 1 how it will calculate the number of violations
 - 2 (a) whether each breach is equal in gravity to the next, or
 - (b) if one breach is more serious than another, how the breaches compare to each other in terms of gravity (twice as serious, for instance), and

³⁷ CRTC, *Report on the Operation of the National Do Not Call List for the period April 1, 2010 to March 31, 2011*, (Ottawa, September 30, 2011), <http://www.crtc.gc.ca/eng/dncl/rpt110930.htm>: During the reporting period, the CRTC negotiated five high-profile settlements with three major telecommunications service providers and one of the largest telemarketing companies in Canada. These settlements resulted in \$1.8 million being paid to the Receiver General for Canada and \$741,000 to educational institutions.

See also CRTC, *Report on Plans and Priorities, 2012-13*, <http://www.tbs-sct.gc.ca/rpp/2012-2013/inst/rtc-rtc-eng.pdf>, at 12:

To implement major telecommunications policies, the CRTC relies on market forces and negotiation among involved parties. Accordingly, the efficient and timely implementation of new policies and functioning of telecommunications markets in general depends on the good faith of affected parties.

3 the per-violation fine for first offences, for second offences and so on

56 Quasi-judicial determinations about democratic processes must be fair, and must be seen to be fair.

D Complaints – from one to many

57 Complaints matter, and tend to signal the existence of problems. Not every problem is a breach of the law, however, and not every breach warrants prosecution. One complaint might warrant a reminder letter to the party involved; hundreds of complaints might warrant a fine. The CRTC should therefore publish the range of administrative actions it will use, and the circumstances that will generally elicit their use.

58 Adopting a consistent approach to reporting the total number of complaints received about alleged breaches of the VCR rules will enable the CRTC to demonstrate a fair approach to their enforcement: a single complaint should not, in our view, trigger the same penalty as thousands of complaints.

59 The CRTC should publish the range of administrative actions it may use, and describe when these actions will be used. CRTC officials have previously told members of the House of Commons that the CRTC's

... methods for ensuring compliance with the rules—such as issuing citations and notices of violations, imposing administrative monetary penalties, and working with violators to correct improper practices—can be adjusted to suit new purposes.

...³⁸

60 We support the Commission's use of a range of administrative actions. We do not believe the CRTC should issue AMPs for a first infraction, except in truly exceptional cases – when clear, incontrovertible evidence exists to show that the infraction raised widespread complaints and was intentional. Rather, the CRTC should develop and publish the graduated scale of actions it will take – ranging from warning letters, citations and notices. These actions should be published on the CRTC's website, to ensure transparent, consistent and fair decision-making.

³⁸ CRTC, Chief Compliance and Enforcement Officer, CRTC, [translation into English], *Evidence*, House of Commons Committees, Sess. 41, 2 No. 024.

- 61 FRPC does not support the use of undocumented or informal communications between the CRTC and those who breach its rules. These types of contacts are already used by the Commission in its enforcement of the *Unsolicited Telecommunications Rules* and in our view are entirely inappropriate:

I am writing further to our meeting of September 5, 2012 to express our concerns regarding the policies and practices of the Conservative Party of Canada (CPC) with respect to its obligations regarding unsolicited telecommunications under the Telecommunications Act (the Act) and the Unsolicited Telecommunications Rules, which include the National Do Not Call List (NDNCL) Rules. ...³⁹

- 62 While the CRTC has charged other political parties with breaching the *Unsolicited Telecommunications Rules*, letters about meetings with those parties are not posted on the CRTC's website. What leads the Commission to meet with some violators of its regulations, and not others?
- 63 We do not know, but in our view the use of private telephone calls and meetings is inconsistent with transparent, consistent and fair decision-making.

E Education and information

- 64 The CRTC has for many years issued bulletins to broadcasters about the Commission's policies for election broadcasts. See, for example, <http://www.crtc.gc.ca/eng/archive/2011/2011-218.htm>. This outreach approach ensures that new entrants in the sector are able to benefit from this advice to the same degree as experienced broadcasters.
- 65 The CRTC has clearly already considered outreach initiatives for the VCR. Its officials told Members of the House of Commons earlier this year that the CRTC
- ... would also need to ensure candidates and telephone service providers were aware of their new responsibilities, and provide timely information to the public.⁴⁰

³⁹ Chief Compliance and Enforcement Officer, CRTC, *Re: CRTC Investigation into Internal do not call list policies and practices of the Conservative Party of Canada – Compliance measures*, Letter to Executive Director, Conservative Party of Canada (Ottawa, 6 September 2012), <http://www.crtc.gc.ca/eng/archive/2012/lt120906.htm>.

⁴⁰ CRTC, Chief Compliance and Enforcement Officer, CRTC, [translation into English], *Evidence*, House of Commons Committees, Sess. 41, 2 No. 024.

- 66 When each election is announced, therefore, the CRTC should issue and distribute information bulletins about the VCR requirements to every political party, and to the organizations of which it has become aware. This educational initiative will promote compliance, and reduce enforcement costs.
- 67 The CRTC should also consider establishing a page on which those interested in receiving such notifications could, in non-election periods, register to receive such bulletins. Enabling parties to self-register will promote understanding of the rules, and reduce enforcement costs.
- 68 Finally, when elections are announced the CRTC should send reminders to those who have already breached its VCR regulations that their next infraction is likely to result in a penalty with potentially more serious consequences. Taking this step could educate organizations whose staff changes over time, reduce the incidence of repeated non-compliance, and reduce the CRTC's costs of enforcement.

IV Response to CRTC questions

- 69 The Commission has asked for comments about the factors it should consider when determining the appropriate AMP for a breach of the new VCR requirements. It has said that CRTC has asked this:
7. Having regard to the factors that exist under the Unsolicited Telecommunications Rules and under CASL, the Commission invites interested persons to provide comments, including supporting rationale, with respect to what factors it should take into consideration when determining the appropriate amount of an AMP in respect of a contravention of Part 16.1, Division 1.1, of the Canada Elections Act. The Commission considers that any list of possible factors could include
 - o The nature of the violation
 - o The number and frequency of complaints and violations
 - o The relative disincentive of the measure
 - o The potential for future violations
 - o The person or group's previous history with respect to any previous violations

- o Ability to pay the AMP⁴¹

A Q1: Complaints vs violations

Q1. The requirement to register does not apply until 48 hours after voter contact calls begin. As a result, Canadians who file complaints with respect to voter contact calls may not be in a position to determine whether the call violated any requirements of the Registry. To what extent should the number and frequency of complaints, as distinct from the number and frequency of violations, be considered as a factor?

- 70 The number and frequency of complaints should be considered as a factor in the CRTC's choice of administrative enforcement action, and the calculation of a penalty.
- 71 In fact, FRPC suggests that if a violation attracts a *de minimus* number of complaints, no monetary penalties should be imposed whatsoever.
- 72 What would be a *de minimus* number of complaints? The CRTC has published too little information in its determinations about the *Unsolicited Telecommunications Rules* to enable us to provide an informed comment – but surely it is fair to say that a single complaint should not suffice to impose penalties in the thousands of dollars.

B Q2: Relative disincentives

Q2. If the Commission chooses to adopt the relative disincentive of the measure as a factor, how should that disincentive be assessed in situations where the benefit obtained by the person or group may not have been financial in character?

- 73 The CRTC has not defined 'relative disincentive', but in any event appears to be suggesting that the regulations be enforced for punitive, rather than educational purposes. The CRTC's goal should be to use a range of administrative enforcement actions that will move violators to compliance. Fines are not the only useful penalty in administrative enforcement – naming and shaming may be equally effective to deter future non-compliance.

C Q3: Ability to pay

⁴¹ *Administrative monetary penalties under the Voter Contact Registry: Call for comments*, Compliance and Enforcement Notice of Consultation CRTC 2014-598 (Ottawa, 17 November 2014), at para. 7 (CE NoC CRTC 2010-598) at ¶17.

Q3. Ability to pay is expressly identified as a factor under CASL. To what extent should it apply under the Registry, and what steps can be taken to ensure it is assessed in a manner that is objective and consistent?

74 *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,*⁴² or CASL, not only sets a per-day maximum fine for violations of the legislation, but also requires courts to consider nine factors when they do set penalties:

51. (1) If, after hearing the application, the court is satisfied that one or more persons have contravened any of the provisions referred to in the application or engaged in conduct referred to in it that is reviewable under section 74.011 of the Competition Act, the court may order the person or persons, as the case may be, to pay the applicant

(a) compensation in an amount equal to the actual loss or damage suffered or expenses incurred by the applicant; and

(b) a maximum of

(i) in the case of a contravention of section 6, \$200 for each contravention of that provision, not exceeding \$1,000,000 for each day on which a contravention occurred,

(ii) in the case of a contravention of section 7 or 8, \$1,000,000 for each day on which a contravention occurred,

(iii) subject to subparagraphs (iv) and (v), in the case of a contravention of section 9, \$1,000,000 for each contravention of that provision,

(iv) in the case of a contravention of section 9 resulting from aiding, inducing or procuring, or causing to be procured, the doing of an act contrary to section 6, and if a contravention of section 6 has resulted, \$200 for each such contravention of section 6, not exceeding \$1,000,000 for each day on which a contravention of section 6 occurred,

⁴²

S.C. 2010, c. 23.

(v) in the case of a contravention of section 9 resulting from aiding, inducing or procuring, or causing to be procured, the doing of an act contrary to section 7 or 8, and if a contravention of either of those sections has resulted, \$1,000,000 for each day on which a contravention of section 7 or 8, as the case may be, occurred,

(vi) in the case of a contravention of section 5 of the Personal Information Protection and Electronic Documents Act that relates to a collection or use described in subsection 7.1(2) or (3) of that Act, \$1,000,000 for each day on which a contravention occurred, and

(vii) in the case of conduct that is reviewable under section 74.011 of the Competition Act, \$200 for each occurrence of the conduct, not exceeding \$1,000,000 for each day on which the conduct occurred.

Marginal note: Purpose of order

(2) The purpose of an order under paragraph (1)(b) is to promote compliance with this Act, the Personal Information Protection and Electronic Documents Act or the Competition Act, as the case may be, and not to punish.

Marginal note: Factors to be considered

(3) The court must consider the following factors when it determines the amount payable under paragraph (1)(b) for each contravention or each occurrence of the reviewable conduct:

(a) the purpose of the order;

(b) the nature and scope of the contravention or reviewable conduct;

(c) the person's history, or each person's history, as the case may be, with respect to any previous contravention of this Act and of section 5 of the Personal Information Protection and Electronic Documents Act that relates to a collection or use described in subsection 7.1(2) or (3) of that Act and with respect to any previous conduct that is reviewable under section 74.011 of the Competition Act;

(d) the person's history, or each person's history, as the case may be, with respect to any previous undertaking entered into under subsection 21(1) and any previous consent agreement signed under subsection 74.12(1) of the Competition Act that relates to acts or omissions that constitute conduct that is reviewable under section 74.011 of that Act;

(e) any financial benefit that the person or persons obtained from the commission of the contravention or from engaging in the reviewable conduct;

(f) the person's or persons' ability to pay the total amount payable;

(g) whether the applicant has received compensation in connection with the contravention or the reviewable conduct;

(h) the factors established by the regulations; and

(i) any other relevant factor.

- 75 We note that *CASL* specifically states that the purpose of penalties imposed by the courts for violations of this legislation “is to promote compliance” with the law and its related statutes, and not to punish violators.
- 76 In our view, the CRTC should adopt the same approach for violations of the VCR regulations. Ability to pay should only have to be considered rarely – since AMPs should only be imposed in the most exceptional circumstances where the Commission has (for instance) received many complaints, or a violator has wilfully repeated the same infractions despite repeated and published warnings. The CRTC should also define ‘ability to pay’, and set out examples of how it will apply this term.
- 77 A decision to use non-financial penalties for the majority or most common breaches (failure to provide exact identification required, although identification of another type was provided), should be used for the first several election periods to enable the CRTC to determine whether these penalties have the desired deterrent effect. After that determination, the CRTC may choose to impose penalties on repeat violators, on a growing scale, with very low initial penalties. The CRTC should exercise its discretion even in very serious cases, if parties are (for instance) unable to pay total penalties of \$500 without financial distress – except in the case of wilful disregard for repeated prior warnings.
- 78 Even in the most egregious cases the temptation to maximize financial penalties should be avoided, since maximizing penalties indicates a propensity towards punishment, rather than education, deterrence and reform. It is noteworthy that the *Telecommunications Act* currently sets maximum penalties for certain violations –in the order of \$100,000 to \$500,000 for corporations’ first offences (sections 73(2), and 73(1)(b)). Short of deliberate fraud, what type of non-compliance with the VCR would ever attract penalties of this magnitude? If fraud were being committed, moreover, the appropriate approach would be prosecution under Canada’s election laws.

79 As for the questions related to objectivity and consistency, FRPC respectfully notes that the best way to achieve each of these goals is complete transparency. All contacts between the CRTC and/or its staff and alleged violators should be in writing, and the Commission's determinations should set out complete reasons and the facts relevant to those reasons. Parties' submissions should also be made available, through a link in the determination.

D Q4: Impact of compliance

Q4. If the Commission chooses to adopt the potential for future violations as a factor, to what extent should a person's efforts toward compliance with the Registry, including implementing training of employees and volunteers, responding in a timely manner to inquiries from the Commission, and self-reporting of potential violations, be taken into consideration?

80 Parties' efforts to be compliant should be the major consideration in all cases, not just cases in which the CRTC purports to assess "the potential for future violations".

81 The CRTC should consider the efforts that parties make before being contacted about possible violations, as well as the changes they make after being contacted. These efforts should be given significant credit when AMPs are set (lower penalties for those who have made efforts, before or after CRTC contact).

82 The proposal to reduce penalties because of self-reporting appears attractive – but is likely to work only if parties can be sure that the CRTC will not use self-reported information against them in future proceedings, in any way. Self-reporting should be public, and the CRTC should establish an easy-to-use, and easy-to-find, website and toll-free telephone number, for this purpose. This information should be provided in all outreach initiatives. Parties that repeatedly self-report the same or very similar breaches should, upon the third occasion, be warned that additional instances of non-compliance will be sanctioned.

83 Parties that agree to make changes to ensure compliance should not be sanctioned for their first violation. Parties that agreed to undertake changes but re-offend should face additional sanctions, except that in the case AMPs, they should be provided with an opportunity to clarify their commitment to implement the new measures by sending in notarized reports on their progress in implementing the new measures.

84 Repeated non-compliance can be addressed through a published continuum of sanctions based on the number of prior offences, and their gravity.

V Conclusions and recommendations: fair and effective enforcement serves the public interest

85 The Forum has appreciated this opportunity to respond to the Commission's questions about its approach to enforcing the VCR framework.

A Conclusions: fondly bidding farewell to Kafka

86 Applying the CRTC's current approach to enforcing unsolicited telecommunications requirements, to a voter contact registry, will not serve the public interest as that approach is not transparent. Contacts between the Commission, its staff and violators are sometimes undocumented, citations and negotiated settlements are not published, and determinations generally lack reasons. That system is Kafkaesque, not quasi-judicial.

87 Even if the CRTC's current approach to implementing the *Unsolicited Telecommunications Rules* were transparent, it should not be used for the VCR regime, because determinations issued about unsolicited telecommunications breaches appear far more focussed on punishment than education.

B Recommendations: only transparency will serve the public interest

1 Complete and transparent reporting

88 When the CRTC issues determinations about violations of the VCCS, it should state all relevant facts in the determination. Relevant facts must include the number of times a breach happened, the penalties assessed in total and per breach and the number of times the violator was advised about these potential breaches. The CRTC should include facts about the violator's attempts to enter into compliance.

89 Each determination of the CRTC's staff and Commission members should be signed, in the interests of transparency. Determinations should be signed by staff and Commissioners (at the level of CRTC decisions) because the public is entitled to know who is exercising discretion on their behalf, and whether this discretion is being exercised properly:

... there is discretion in the officer's judgment with regard to what constitutes a significant violation, for instance. But the factors are listed

in the decision without removing the flexibility and the judgment of the officer, given the circumstances of the case.⁴³

90 Dissents should also be signed.

91 If the CRTC sets out specific factors for evaluating penalties levied about violations of the VCCS requirements, it should set out each of these factors in its determinations and the evidence it has accepted about the factors whether or not it relies on those factors. Publishing this information will enable the public to understand how the facts of each case are considered.

2 ***Frequently updated, frequently asked questions***

92 The CRTC should maintain a webpage on which it presents the questions it is receiving about the VCCS, and its answers to those questions.

93 The CRTC should also prepare a consolidated information bulletin, for the different industry groups – i.e., survey research companies – that explain not just the VCR regime, but also other rules, such as the *Unsolicited Telecommunications Rules*. Circulating a complete document will enable those affected to be educated, and may reduce overall CRTC enforcement costs over time.

3 ***Retain documentation online***

94 CRTC determinations issued regarding the *Unsolicited Telecommunications Rules* appear to be removed when these are reviewed or reconsidered by the CRTC.

95 All determinations made by the CRTC or its staff about the VCCS should be retained on the CRTC's website.

4 ***Review in 2016***

96 The CRTC should prepare to review its approach to the VCR immediately after the next election, and to that end, develop a framework for collecting data that will be relevant to that review.

⁴³ Standing Committee on Procedure and House Affairs, House of Commons, *Evidence*, 40th Parl., 2d sess., No. 024 (1 April 2014).

*** * * End of document * * ***