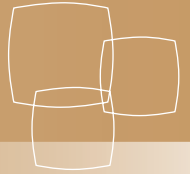




## Enforcement Guidelines



# Telemarketing

**Section 52.1 of the  
*Competition Act***





This publication is not a legal document. It contains general information and is provided for convenience and guidance in applying the *Competition Act*.

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# I. INTRODUCTION

The Competition Bureau is an independent law enforcement agency that contributes to the prosperity of Canadians by protecting and promoting competitive markets and enabling informed consumer choice. Headed by the Commissioner of Competition, the Bureau is responsible for the administration and enforcement of the *Competition Act*, the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act* and the *Precious Metals Marking Act*.

The purpose of the *Competition Act* is to maintain and encourage competition in the Canadian marketplace. Section 52.1 is part of the false or misleading representations and deceptive marketing practices provisions of the Act. These provisions aim to improve the quality and accuracy of marketplace information and discourage deceptive marketing practices. The Act applies to most businesses in Canada, regardless of size.

Telemarketing is defined as the practice of using "interactive telephone communications" for the purpose of promoting directly or indirectly any product or business interest. Telemarketing is made subject to disclosure requirements, and specific offences are created with regard to certain deceptive telemarketing practices.

This publication outlines the approach that the Commissioner of Competition is taking in enforcing the telemarketing provisions of the Act. The guidelines contained in this publication are not law. However, they may be relied upon as reflecting the Commissioner's interpretation of how the law is applied on a consistent basis by Competition Bureau staff.





## 2. THE TELEMARKETING PROVISIONS OF THE COMPETITION ACT

Section 52.1 of the *Competition Act* is a criminal provision. It prohibits the making, or the permitting of the making, of materially false or misleading representations in promoting the supply of a product or a business interest during person-to-person telephone calls. Telemarketers are also prohibited from engaging in certain practices including: requiring payment in advance as a condition for receiving a prize that has been, or supposedly has been, won in a contest or game; failing to provide adequate and fair disclosure of the number and value of the "prizes"; offering a "gift" as an inducement to buy another product, without fairly disclosing the value of the gift; and offering a product at a grossly inflated price and requiring payment in advance. This provision also requires that telemarketers disclose: the name of the company or person they are working for; the type of product or business interest they are promoting; the purpose of the call; the price of any product being sold and any restrictions or conditions that must be met before the product will be delivered. Directors and officers of a corporation may be held liable for offences committed by the corporation under this section. Subsection 52.1(4) directs that the general impression conveyed by a representation, as well as its literal meaning, be taken into account when determining whether or not the representation is false or misleading in a material respect.

Any person who contravenes section 52.1 is guilty of an offence and liable to a fine of up to \$200,000 and/or imprisonment up to one year on summary conviction, or to fines in the discretion of the court and/or imprisonment up to 14 years upon indictment.

Section 52.1 of the Act reads as follows:

### Definition of "telemarketing"

**52.1 (1)** In this section, "telemarketing" means the practice of using interactive telephone communications for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest.

### Required disclosures

- (2) No person shall engage in telemarketing unless
- (a) disclosure is made, in a fair and reasonable manner at the beginning of each telephone communication, of the identity of the person on behalf of whom the communication is made, the nature of the product or business interest being promoted and the purposes of the communication;
  - (b) disclosure is made, in a fair, reasonable and timely manner, of the price of any product whose supply or use is being promoted and any material restrictions, terms or conditions applicable to its delivery; and
  - (c) disclosure is made, in a fair, reasonable and timely manner, of such other information in relation to the product as may be prescribed by the regulations.

### Deceptive telemarketing

- (3) No person who engages in telemarketing shall



- (a) make a representation that is false or misleading in a material respect;
- (b) conduct or purport to conduct a contest, lottery or game of chance, skill or mixed chance and skill, where
  - (i) the delivery of a prize or other benefit to a participant in the contest, lottery or game is, or is represented to be, conditional on the prior payment of any amount by the participant, or
  - (ii) adequate and fair disclosure is not made of the number and approximate value of the prizes, of the area or areas to which they relate and of any fact within the person's knowledge, that affects materially the chances of winning;
- (c) offer a product at no cost, or at a price less than the fair market value of the product, in consideration of the supply or use of another product, unless fair, reasonable and timely disclosure is made of the fair market value of the first product and of any restrictions, terms or conditions applicable to its supply to the purchaser; or
- (d) offer a product for sale at a price grossly in excess of its fair market value, where delivery of the product is, or is represented to be, conditional on prior payment by the purchaser.

### **General impression to be considered**

(4) In a prosecution for a contravention of paragraph (3)(a), the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the representation is false or misleading in a material respect.

### **Exception**

(5) The disclosure of information referred to in paragraph (2)(b) or (c) or (3)(b) or (c) must be made during the course of a telephone communication unless it is established by the accused that the information was disclosed within a reasonable time before the communication, by any means, and the information was not requested during the telephone communication.

### **Due diligence**

(6) No person shall be convicted of an offence under this section who establishes that the person exercised due diligence to prevent the commission of the offence.

### **Offences by employees or agents**

(7) Notwithstanding subsection (6), in the prosecution of a corporation for an offence under this section, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the corporation, whether or not the employee or agent is identified, unless the corporation establishes that the corporation exercised due diligence to prevent the commission of the offence.

### **Liability of officers and directors**

(8) Where a corporation commits an offence under this section, any officer or director of the corporation who is in a position to direct or influence the policies of the corporation in respect of conduct prohibited by this section is a party to and guilty of the offence and is liable to the punishment provided for the offence, whether or not the corporation has been prosecuted or convicted, unless the officer or director establishes that the officer or director exercised due diligence to prevent the commission of the offence.

### **Offence and punishment**

- (9) Any person who contravenes subsection (2) or (3) is guilty of an offence and liable
  - (a) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for a term not exceeding 14 years or to both; or

(b) on summary conviction, to a fine not exceeding \$200,000 or to imprisonment for a term not exceeding one year or to both.

### Sentencing

(10) In sentencing a person convicted of an offence under this section, the court shall consider, among other factors, the following aggravating factors:

- (a) the use of lists of persons previously deceived by means of telemarketing;
- (b) characteristics of the persons to whom the telemarketing was directed, including classes of persons who are especially vulnerable to abusive tactics;
- (c) the amount of the proceeds realized by the person from the telemarketing;
- (d) previous convictions of the person under this section or under section 52 in respect of conduct prohibited by this section; and
- (e) the manner in which information is conveyed, including the use of abusive tactics.





## 3. GENERAL PRINCIPLES

### 3.1 Enforcement

The Bureau will strive for consistency in the approach to enforcement, recognizing that the choice of approach in any particular case will be decided upon according to the facts of that case.

In deciding the appropriate enforcement action to take under the Bureau's conformity continuum, the Bureau will take into account a number of factors, including but not limited to:

- whether the person promoting the product intends to sell the product during the telephone communication;
- whether prior payment is required as a condition of receiving the product; and
- the price of the product being promoted.

### 3.2 Interactive Telephone Communications

"Interactive telephone communications" will be interpreted as live voice communications between two or more persons. The Bureau will not consider "interactive telephone communications" to have occurred with regard to:

- fax communications;
- Internet communications; or
- a customer's interaction with automated prerecorded messages.

Note that fax, Internet and pre-recorded messages are subject to the general provisions concerning false or misleading representations, namely section 52 and paragraph 74.01(1)(a) of the Act.

### 3.3 Price

(a) If a single price for bundled products is disclosed, the nature of each bundled item must be described separately.

(b) While the price of a product being promoted must be disclosed, a price need not be disclosed if only a business interest is promoted.

(c) The requirement to disclose the "price" of any product may be met by disclosing a price by way of reference (such as the price at the end of the trading day; the price in Canadian dollars based on a specified exchange rate applicable at a specified time) provided that:

- the price cannot otherwise reasonably be determined at the time of the telephone call;

- the reference price is reasonably able to be determined;
- the use of a reference price is reasonable in terms of typical similar transactions;
- the terms of the reference price are disclosed as part of the "price";
- the risk and volatility of the reference price are disclosed; and
- the actual price is disclosed within a fair, reasonable and timely manner (not necessarily by way of telephone) once it has been determined.

### 3.4 Customer Relations Lines and Secondary Communications

(a) A customer initiated call to a customer relations line will not generally be considered as telemarketing, when that call is incidental and insignificant in relation to the primary marketing drive.

(b) Responses to unprompted customer questions in a customer initiated call will not generally be considered telemarketing unless there is a pattern of representations made to numerous customers.

### 3.5 Contests

Subparagraph 52.1(3)(b)(i) prohibits contests or games where the delivery of a prize or benefit is, or is represented to be, conditional on the prior payment of any amount by a participant.

(a) Contests in which the prize is a percentage off of the price of a product or is a "free" product if another is purchased (i.e. "buy one get one free") are generally considered to contain a condition of prior payment in order to receive the prize.

(b) The initial cost of entering a contest or game (such as the cost of a postage stamp in order to send in an entry) will not generally be considered by the Bureau to be a condition for the delivery of the prize or benefit.

(c) The cost of long distance telephone charges on 1-900 type lines may be considered as a prior payment which needs to be made before receiving delivery of the prize or benefit.

(d) A payment to a person other than the telemarketer or the promoter or a related person of an amount that is nominal in relation to the fair market value of the prize or benefit actually received by the contestant will not generally be considered by the Bureau to be a condition for the delivery of the prize or benefit. For example, auto insurance premiums paid to an insurance company would not be considered a condition of delivery.

(e) Subparagraphs 52.1(3)(c) and (d) refer to the fair market value of product. Fair market value may be determined by the price at which same or like products are ordinarily sold in the relevant market, or by the value assigned to the product by an independent appraisal.

(f) In determining whether a product is offered for sale at a price grossly in excess of its fair market value, the Bureau may consider the nature of the product, the relevant market and the difference between the price offered and the fair market value, expressed in dollars or as a percentage of the fair market value.

### **3.6 Disclosure Regulations**

Clear disclosure obligations facilitate compliance for business by specifying what has to be disclosed. They also provide relevant information to consumers, and facilitate public education.

#### **3.6.1 Imposing disclosure obligations by way of regulation**

The purpose of paragraph 52.1(2)(c) is to allow some measure of flexibility to react efficiently and quickly to deceptive telemarketing trends since these can develop with great speed.

#### **3.6.2 Limitations on the regulation making power**

The Governor in Council, not the Bureau, has the power to make regulations, and that power is circumscribed by the fact that any regulations made under this paragraph will have to be:

- necessary for carrying out the Act;
- necessary for the efficient administration of the Act; and
- limited to the disclosure of information in relation to the product.

Any regulations would have to be prepublished and an opportunity for public comment provided.

#### **3.6.3 No creation of any new substantive offence by way of regulation**

No new substantive offence will be created by regulation. The offence of failure to disclose information is contained in the statute itself. Any regulation would merely stipulate further the type of information about a product which must be provided. The type of disclosure in relation to the product that could be required may include information as to the age or quality of the product, and whether the product is new, used or made in Canada.



## 4. WRITTEN OPINIONS

The Competition Bureau facilitates compliance with the law by providing various types of written opinions subject to fees. Company officials, lawyers and others are encouraged to request an opinion on whether the implementation of a proposed business plan or practice would raise an issue under the *Competition Act*. These written opinions are binding on the Commissioner of Competition when all the material facts have been submitted by or on behalf of an applicant for an opinion and when they are accurate. A specific written opinion will be based on information provided by the requestor and will take into account previous case law, prior opinions and the stated policies of the Bureau.





## 5. HOW TO CONTACT THE COMPETITION BUREAU

Anyone wishing to obtain additional information about the *Competition Act*, the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act*, the *Precious Metals Marking Act*, or the program of written opinions, or to file a complaint under any of these acts should contact the Competition Bureau's Information Centre:

### Web site

[ [www.competitionbureau.gc.ca](http://www.competitionbureau.gc.ca)

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