June 11, 1999

Ms. Susan Whelan, M.P.
Chair, Standing Committee on
Industry
House of Commons
Parliament Buildings
Wellington Street
Ottawa ON K1A 0A6

Dear Ms. Whelan,

Re: Bill C-393, *Competition Act* Amendments (Negative Option Marketing)

I am writing on behalf of the National Competition Law Section (the Section) of the Canadian Bar Association concerning the above-noted Bill.

The object of Bill C-393 is to prevent what is commonly known as negative option billing by businesses governed by listed federal legislation, including the *Bank Act, Trust and Loan Companies Act*, and others. Bill C-393 would prohibit these businesses from charging customers for new service unless the business had complied with minimum notice requirements and received the customer's express written consent to purchase or receive the new service. A violation of this prohibition would be either an indictable or summary conviction offence. Officers or directors of corporations in a position to direct or influence the policies of the corporation would also be liable, unless they could show that they exercised due diligence to prevent the commission of the offence.

Without commenting on whether the practice of negative option billing should be permitted in those industries already subject to federal regulation, the Section is opposed to the inclusion of these provisions in the *Competition Act*. The fundamental philosophy of the *Competition Act* is to promote economic efficiency through the process of competition, as opposed to regulation of particular businesses or industries. The businesses covered by Bill C-393 are already subject to federal regulation under the statutes expressly mentioned in clause 1 of the Bill. We believe that it would be more appropriate to consider the issue of negative option billing in the context of the regulatory scheme under each of those statutes and, if appropriate, to amend those particular Acts. In our view, industry specific issues should not be addressed by *ad hoc* amendments to the *Competition Act*.

However, if the Industry Committee is of the view that these matters are appropriately dealt with in the *Competition Act*, the Section is concerned that the Bill may have a negative effect on competition.

The strict requirements for notice and consent may provide a disincentive for companies to compete by offering new products and services and to respond quickly to changes in the marketplace. The Bill's requirements of three months' notice and use of a business reply card to effect written consent before the business can charge for a new service are too onerous. One of the consequences would be that businesses

would in effect be giving three months' advance notice to their competitors of the introduction of new products and services. Further, the Bill would preclude a business from marketing a service and obtaining the customer's consent in a manner that is not misleading, in a shorter time period and by means other than a written notice. For example, the Bill would prevent businesses from advertising the new service and inviting existing customers to subscribe for it. We believe that no minimum waiting period should be necessary and no specific form of consent should be required, as long as a customer exhibits some form of affirmative consent to subscribe for a new product or service and is not misled.

In addition, the uncertainty arising from the Bill would be reduced if the phrase "negative option billing" were defined and if acceptable forms of consent were specified. The Bill may also have the effect of discouraging new and innovative forms of marketing, such as electronic commerce, which have the potential to reduce distribution costs and therefore improve value for consumers.

The Section also disagrees that the behaviour targeted in the Bill warrants using the criminal law. Criminal law penalties represent the most serious sanctions in our legal system. They should be used sparingly and then only where there is a serious impact on the welfare of Canadians, not in infrequent instances of alleged business misconduct which are of a relatively minor nature.

In conclusion, while the Section opposes the inclusion of this type of regulatory prohibition in the *Competition Act*, we believe that the merits of negative option billing should be considered in the context of specific industries and the existing regulatory scheme governing the businesses to which Bill C-393 is intended to apply. Any such law should be clear and should not impose onerous restrictions on businesses striving to compete by offering new or better services. A three-month notice period may be too long and may discourage businesses from making the investment necessary to develop and offer new and innovative services. Further, the use of criminal law sanctions is out of proportion with the alleged misconduct.

We thank you for the opportunity to express our Section's views.

Yours truly,

Jo'anne Strekaf
Chair, National Competition Law Section

cc. Members, House Standing
Committee on Industry