



CANADA'S ANTI-SPAM LAW FINALIZED- IN FORCE JULY 1, 2014

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On December 4, 2013, The Government of Canada announced that Canada's anti-spam law (the Act) will be coming into force on July 1, 2014. The Electronic Commerce Protection Regulations have also been finalized.

Canada's new anti-spam legislation, unofficially known as "CASL",¹ amends existing legislation and establishes a regulatory framework to prohibit the sending of spam. The introduction of CASL will require organizations doing business in Canada to evaluate and update their practices regarding electronic communications. Organizations should pay special attention to the requirement for *express consent* in many circumstances.

CASL prohibits the sending of unsolicited commercial electronic messages ("CEMs") without prior consent of the recipient and provides rules regarding the manner in which such messages may be sent. The legislation will involve interplay by 3 regulatory bodies—the Competition Bureau, the CRTC (Canada's telecommunications regulatory agency) and the Office of the Privacy Commissioner of Canada. Two sets of regulations established by Industry Canada and the CRTC provide important details regarding application of the law.

What does CASL require?

CASL prohibits the sending of CEMs to an electronic address unless (a) the person to whom the message is sent has consented to receiving it, whether the consent is express or implied; and (b) the message complies with content and other requirements set out in the legislation. This includes prescribed content such as identification of and contact information for the person who sent the message as well as an unsubscribe mechanism.

Are any CEMs excluded?

The requirements in CASL do not apply to CEMs sent by or on behalf of an individual to another individual with whom they have a personal or family relationship. The Industry Canada regulations define "personal relationship" as a relationship between an individual who sends a message and the individual to whom the message is sent, if those individuals have had direct, voluntary, two-way communications and it would be reasonable to conclude that the relationship

¹ Canada's new anti-spam statute is officially titled: *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*, SC 2010, c 23.

is personal taking into account any relevant factors such as the sharing of interests, experiences, opinions and information evidenced in the communications, the frequency of communication, the length of time since the parties communicated or whether the parties have met in person.

The requirements also do not apply to a CEM that is sent to a person who is engaged in a commercial activity and consists solely of an inquiry or application related to that activity.

The Industry Canada regulations also provide for a number of other exemptions for commercial electronic messages (meaning an exemption from both the consent requirements and the email content requirements), including those that are:

- (a) sent within an organization by and among employees, representatives, consultants or franchisees and the messages concern the activities of the organization; or
- (b) are sent between organizations (and their representatives, consultants or franchisees), where the messages concern the activities of the organization to which the messages are sent.

Exemptions have also been created for messages that are solicited or sent in response to complaints and requests. Additional exemptions now exist for messages sent due to a legal obligation or to enforce a legal right.

What is an electronic address?

CASL creates a detailed definition of “electronic address”, which refers to addresses used in connection with the transmission of an electronic message to an e-mail account, an instant messaging account, a telephone account, or any similar account.

What is valid consent and will opt-out consent do?

CASL requires express or implied consent by the recipient of a commercial electronic message. It is the relatively strict requirements for express consent that are a distinguishing feature of the new legislation. The CRTC has previously indicated in Guidelines that opt-out consent or pre-checked boxes do not satisfy the Act’s express consent requirements. The CRTC regulations require that express consent must be sought separately for each act described in sections 6-8 of CASL, including sending a CEM, altering transmission data and installing a computer program on another person’s computer.

Where express consent is required, a person must set out clearly the following information:

- (a) the purpose or purposes for which the consent is being sought;
- (b) prescribed information that identifies the person seeking consent and, if the person is seeking consent on behalf of another person, prescribed information that identifies that other person; and
- (c) any other prescribed information.

Implied consent is permitted in some circumstances, including where there is an existing business relationship or an existing non-business relationship between the parties. Where implied consent is permitted, organizations must still comply with e-mail content requirements.

What are some exceptions to the consent requirement?

CASL and the regulations provide exceptions to the requirement to obtain consent in certain circumstances. These include, among others, where the CEM provides a quote or estimate if the quote or estimate was requested by the person to whom the message is sent. A CEM that facilitates completes or confirms a commercial transaction that the person to whom the message is sent previously agreed to. An important exemption is also provided in the Industry Canada regulations for certain third party referrals.

When will CASL come into force and is a transition period provided?

CASL and its regulations will come into force on July 1, 2014. On January 15, 2015, sections of the Act related to the unsolicited installation of computer programs or software come into force. On July 1, 2017 provisions establishing private rights of action come into force. The legislation provides companies with a critical three-year transition period which will allow them to rely on implied consents obtained under Canada's private sector privacy laws from individuals with whom they have an "existing business relationship" or "non-business relationship". During the transition, organizations can rely on the so-called opt-out consent they have obtained for those individuals until it is explicitly withdrawn or, if not withdrawn, until 3 years after Section 6 comes into force.

What are the penalties?

CASL imposes significant monetary penalties for violations pertaining to the sending of unsolicited electronic messages, the alteration of transmission data, and the unauthorized installation of a computer program. CASL also sets out a list of factors to be considered in determining the amount levied, including the nature and scope of the violation. Financial penalties range up to \$1 million for an individual and up to \$10 million for a business per violation. When the private right of action comes into effect, recipients of messages may be able to sue for \$200 for each individual communication.

What steps should your company take?

1. Review electronic communications practices.
2. Identify across database the basket of electronic communications and the compliance requirements regarding consent (as well as the exemptions) that will apply to each basket.
3. Develop a straightforward strategy that will meet compliance and business requirements as well as best marketing practices.

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