

Businesses Should Prepare for Canada's New Anti-Spam Legislation

Canada's anti-spam legislation (CASL) will come into force on July 1, 2014.

Designed to protect Canadian consumers from spam and other online threats, CASL will, among other things, prohibit the:

- sending of "commercial electronic messages" (CEMs) without the recipient's consent
- installation of computer programs without the express consent of the owner of the computer system
- use of false or misleading representations online in the promotion of products or services
- collection of electronic addresses by the use of computer programs or the use of such addresses without permission
- collection of personal information through accessing a computer system in violation of federal law, and
- alteration of transmission data in an electronic message which results in the message being delivered to a different destination without express consent.

Business should pay particular attention to the CASL provisions that apply to CEMs. A CEM is broadly defined as any electronic message (eg. email, text message, social media message) that has as its purpose, or one of its purposes, to encourage participation in a commercial activity. Commercial activity includes any 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 with the expectation of profit. A CEM that offers to sell or that advertises goods or services will therefore be subject to CASL.

CASL's provisions apply to any CEM sent from or accessed by a computer in Canada. As a result, it will impact the electronic marketing practices of

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businesses that have an electronic presence in Canada, whether or not they are physically located in Canada.

CASL prohibits the sending of a CEM to an electronic address unless (a) the person to whom the message is sent has consented to receiving it, and (b) the message complies with prescribed form and content requirements. Certain types of CEMs are exempt from CASL's anti-spam prohibition.

The Consent Requirement

Consent to receive a CEM is generally required to be express. There are instances when an individual's consent may be implied. For example, consent may be implied if there is an "existing business relationship" or an "existing non-business relationship" between the sender and the recipient. The terms "existing business relationship" and "existing non-business relationship" are narrowly defined in CASL. There is an "existing business relationship" if the sender and recipient have engaged in certain specified types of business together in the two years preceding the date on which the CEM is sent (eg. a purchase of goods or services) or if the recipient of the CEM has made an inquiry to the sender in the previous six months.

An "existing non-business relationship" exists where an individual has, in the last two years, made a donation or gift to or performed volunteer work for a registered charity, a political party or other organization.

A transitional period of three years has been included in the legislation. A recipient will be deemed to have provided implied consent, if the sender and recipient have an existing business or non-business relationship at the time the legislation comes into effect and that relationship included the communication between them of CEM's.

It should be noted that an electronic message that is

sent for the purpose of obtaining consent to send CEMs is itself considered a CEM, which may not be sent without consent. This will pose a particular challenge for businesses that have not obtained required consents before July 1, 2014.

The Form of Consent

Where express consent is being obtained, the means by which it is requested must comply with the requirements of CASL. A request for express consent to send CEMs must clearly state:

- the purpose(s) for which the consent is being sought
- prescribed contact information (name, mailing address, email address, *etc.*) of the person requesting consent, and
- a statement that the recipient may withdraw their consent.

Unlike anti-spam regulation in other jurisdictions, CASL takes an "opt-in" approach to consent. This means that a recipient must take an active step to indicate their consent, such as checking a box. An "opt-out" mechanism involving a pre-checked box will not comply with CASL.

A request for consent to receive CEMs must also be clearly and separately identified and cannot be bundled with requests for consent to other terms (*eg.* general terms and conditions of use or sale).

CEM Content Requirements

In addition to the consent requirement, CASL sets out specific form and content requirements for CEMs. In particular, each CEM must identify the sender, provide prescribed contact information for the sender, and set out an "unsubscribe" mechanism. The unsubscribe mechanism must be "able to be readily performed" and must take effect no later than ten business days after the unsubscribe request is sent.

Penalties

A contravention of CASL can result in an administrative monetary penalty ranging up to \$1,000,000 for an individual, and \$10,000,000 for any other person. CASL also creates a private right of action for persons who have been affected by a contravention of its provisions. The provisions relating to private actions will not come into effect until July 1, 2017.

With the coming into force date for CASL only months away, businesses should immediately start considering its potential impact on their activities and implementing steps for compliance.

This publication is for general information only and does not constitute legal or other professional advice. For more information regarding the subject matter of this article please contact:

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