

Canada's new Anti-Spam Law by Steven Weiss

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All businesses that send out electronic messages to or from Canada need to prepare for Canada's Anti-Spam Law (CASL) which will become effective as at July 1, 2014. In a nutshell, the law will require that a sender of commercial electronic messages (CEMs) obtain the prior express consent or implied consent of the recipient and that the CEM contain certain required content information. Certain CEMs will be exempted from both the consent and content requirements, while others will be exempted from only the consent requirement but will still need to include the required content. Commercial electronic messages include traditional email as well as text messages.

Businesses will need to first determine which of their electronic messages are indeed commercial electronic messages. The definition of commercial electronic messages is quite broad. The new law will consider an electronic message to be a commercial electronic message, and thus under the regime of CASL, if, having regard to the content of the message, the hyperlinks on the message and the contact information within the message, it would be reasonable to conclude that a purpose of the message is to encourage participation in a commercial activity, including offers to sell goods or services, or to promote or advertise a business activity. Note that the definition of commercial electronic messages does not require that the primary purpose of the electronic message be to promote business activity, etc., it merely requires that a purpose be to promote business activity, etc.

As noted above, certain CEMs are totally exempted from compliance with CASL. Examples include electronic messages between individuals with personal or family relationships (which are narrowly defined), messages sent to businesses that are only for the purpose of inquiring about such business, messages within the sender's organization or to employees of another organization that has a relationship with the sender's business (with the message to relate only to the recipient's business), a response to a request or an inquiry, or where there is an existing legal right or obligation to send the message.

Other types of CEMs will not require the prior consent of the recipient, but will still require that the actual electronic message complies with the content requirements of CASL. Examples include a CEM that provides a quote or estimate in response to a request, a CEM in order to facilitate, complete or confirm a transaction that was already agreed upon, a CEM that provides warranty or recall or safety information on a product that was purchased or used by the recipient, or a CEM to provide factual information about the ongoing use of a purchased product or a membership or subscription.

Where an organization wishes to send a CEM that is not otherwise exempted, it will first have to obtain express consent of the recipient, or will need to rely on having the implied consent of the recipient. In order to obtain express consent of a proposed recipient, the sender will need to clearly and simply set out the purposes for which the consent is sought, provide certain mandatory contact information about the sender and of those parties on whose behalf the consent is sought (if any), and also include a statement that consent can be withdrawn. The consent must not be bundled with a request for consent or confirmation as to other matters. A critical aspect of CASL is that express consent will require an opt-in mechanism, which will exclude a pre-checked box that could otherwise have signified consent.

CASL defines the situations where a sender of a CEM can rely on the 'implied consent' of the recipient. Consent would be deemed to be implied where the sender has an 'existing business relationship' with the recipient. An example of this would be where the recipient has purchased goods or services from the sender within the two years prior to the sending of the CEM. Consent is also implied where the parties have an 'existing non-business relationship'. For example, this would allow a club to send a CEM to someone who has been a member of the club within the prior two years. Where someone has published his email address without any prohibiting words (for example, on a website), it is implied that that person has consented to receipt of CEMs that are relevant to the business connected to that publication. Finally, handing out of a business card (or similar disclosure of an email address) without expressing any prohibition, will constitute implied consent to the receipt of CEMs that are relevant to that person's business.

The sending of any CEM, unless totally exempted from the requirements of CASL in the limited circumstances described earlier, will need to comply with certain content requirements. The CEM will need to identify and provide specific contact information as to the sender of the CEM and any parties on whose behalf the CEM is being sent, and needs to contain an 'unsubscribe' mechanism that is effective and free. Also, the CEM must provide an electronic address or a link to a website that would allow an 'unsubscribe' to be made effective. Any exercise of an 'unsubscribe' right will need to be implemented within 10 days. Consent does not need to be re-obtained from anyone who provided express consent to

the receipt of CEMs prior to July 1, 2014- even where the form of consent would not be sufficient if obtained after CASL has become effective.

Furthermore, under the transitional provisions of CASL, consent will be implied for a period of 3 years from July 1, 2014, where the sender and the recipient have an 'existing business relationship' or an 'existing non-business relationship' that included the sending of CEMs. The intention of this grace period is to allow businesses an opportunity to obtain express consents of their current customer base, while still being able to send CEMs to those individuals with whom the business has either an 'existing business relationship' or an 'existing non-business relationship'. Examples of these types of relationships are listed above. Remember though that, despite this grace period, all CEMs sent after July 1, 2014 will need to comply with the 'content' requirement, unless otherwise exempted.

It is important to note that the legislation contains quite tough enforcement provisions that could include substantial fines for violations, including the possibility of prison in the case of false or misleading messages. Liability could also flow to directors and officers of a corporation. Starting in January, 2017, it will be possible for individuals to commence legal proceedings directly against a sender of CEMs who is in breach of CASL. Once private rights of action are allowed, class actions also become a distinct possibility. The onus of proving that no breach of CASL has occurred is on the sender of the CEM. Of course, once an enforcement proceeding is made public, the resulting bad press to a company can be quite damaging, apart from any fines that may be imposed!

In addition to the anti-spam rules in CASL, the new law also contains restrictions on installing computer programs on someone's computer system or to cause an electronic message to be sent from such system (malware, spyware, phishing) without express consent and compliance with statutory requirements. These restrictions will become law on January 1, 2015.

Businesses that send CEMs will need to utilize the next few months before July 1 in order to prepare for CASL. Preparation will include a thorough review of contact databases to determine situations when express consents will be needed, when implied consent has been obtained (and when consent can no longer be considered as being 'implied', such as when a contact is no longer within the meaning of an 'existing business relationship'), and when CEMs are exempted from either or both of the consent and/content requirements. Businesses will need to analyze which of their electronic messages would be caught within the broad definition of 'CEM'. CASL-compliant consent forms will need to be prepared when express consent is sought. CEMs will need to be revamped to comply with the mandatory content requirements. Businesses will need to be able to give effect to 'unsubscribe' and may need to be able to keep track of those 'unsubscribe' who have requested to no longer receive certain types of CEMs but haven't requested to be unsubscribed from all CEMs (for instance, when contacts have elected to no longer receive information about new products, but would still be willing to receive company newsletters, etc.). Finally, staff will need to be trained in order that the organization be able to comply with CASL seamlessly.

If you wish to contact me to discuss any of the foregoing in more detail, please contact me at 416-665-5555 or at SWeiss@DZlaw.com. Steven Weiss Disclaimer: This Article is for general information purposes only. Nothing stated in this Article constitutes legal advice and should not be relied upon as such. No one should act, or refrain from acting, based solely upon on this Article without first seeking appropriate legal or other professional advice.

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