



Canada's Anti-Spam Legislation (CASL) *Compliance Primer & Checklist*

April 2014

Introduction

This guide is intended to provide clients with an overview of Canada's Anti-Spam Law (CASL), scheduled to take effect on July 1, 2014.

CASL applies to the sending of commercial electronic messages (CEM) as well as the installation of computer programs. This guide will focus solely on the sending of CEMs, which is most relevant for our clients.

Please note that **this document does not constitute legal advice**. Organizations should consult their counsel with specific legal questions.

What Is CASL?

[CASL](#) is Canada's Anti-Spam Legislation, and provides the most comprehensive and stringent anti-spam regulations in Canada to-date, designed to “...deter the most damaging and deceptive forms of spam, such as identity theft, phishing and spyware, from occurring in Canada...”.

It is enforced by the Canadian Radio-television Telecommunication Commission (CRTC), the Competition Bureau and the Office of the Privacy Commissioner of Canada (OPC).

CASL comes into effect on July 1, 2014.

Key Elements - Definitions

Definition of a Commercial Electronic Message (CEM)

“... an electronic message that, having regard to the content of the message, the hyperlinks in the message to content on a website or other database, or the contact information contained in the message, it would be reasonable to conclude has its purpose, or one of its purposes, to encourage participation in a commercial activity..”

Implication for marketers: If there is any chance that the message could be interpreted as having commercial content, then it likely is a CEM.

Key Elements - Consent

Obtaining Consent

If a CEM is to be sent, the CASL states that consent must be obtained prior to the sending of the message. Consent may be obtained in a variety of methods (orally & in writing) and falls into two categories: express consent and implied consent.

If express consent is obtained, it is valid indefinitely or until consent is revoked. Implied consent has a limited-time duration (discussed below).

Express consent is the Government's preferred type of consent, though both types are valid.

Key Elements – Express Consent

Express Consent

The Act states that express consent can only be obtained by the potential message recipient taking a positive action to indicate that they wish to receive commercial electronic messages. If express consent was obtained before CASL comes into force, it will be recognized as being compliant with CASL.

Implication for marketers: (1) the CRTC indicates that it expects consent to be sought separately from the terms and conditions of a contract; (2) a user must actively “check the box” to opt-in; and (3) marketers will want to be sure that they can document that a positive and separate action has been taken to indicate the desire to receive commercial electronic messages.

Key Elements – Implied Consent

Implied Consent

Unlike express consent, implied consent isn't something that is generally sought, but rather something that is triggered and sustained by a specific set of circumstances. Implied consent is usually based on an existing business or existing non-business relationship between the sender and the recipient

Implication for marketers: (1) Implied consent expires two years after the last transaction (or contract/subscription expiry) or six months after an inquiry; (2) marketers must be able to track the date consent was obtained and subsequently the date that it will expire.

(Note: the exchange of money is not necessary to denote an existing business relationship).

Key Elements - Proof

Proof of Consent

According to CASL, the burden of proof rests with the sending organization to demonstrate that they've met the consent requirements (note: there is currently limited information or specifics from the CRTC as to what constitutes acceptable proof and retention period).

Implication for marketers: Record/log things such as date, time, IP address, copies of web consent forms, the actual business card that has been obtained (for implied consent) and recordings of oral consent.

Key Elements – CEM Requirements

Identification Elements of CASL

In addition to requiring prior consent to send commercial electronic messages, CASL also requires that all messages include certain requirements: name of the business, business mailing address, either a telephone number providing access to an agent or a voice messaging system, business email address or web address, and an unsubscribe mechanism.

Implication for marketers: (1) Review all potential CEM templates and channels to ensure that these prescribed information requirements are included; and (2) ensure that the unsubscribe link is valid for 60 days and that the unsubscribe request be processed without delay (no later than 10 business days after the unsubscribe request is sent).

Provisions & Exemptions

Transitional Provisions

Though action is required for compliance, there may be some relief for organizations through transitional provisions. These imply a person's consent for a period of three years after the day the Act comes into force, provided that the organization has an existing business relationship or existing non-business relationship with those contacts and that the relationship has included the sending of CEMs.

Implication for marketers: During the transitional period, organizations will be required to fulfill the identification and unsubscribe requirements as described previously.

Provisions & Exemptions (cont'd)

Key Exemptions

The following are a list of key exemptions from the CASL:

- Business-to-business: messages sent between organizations that have a relationship provided the message relates to the business affairs of the organizations;
- Messages sent to a limited-access secure and confidential account to which messages can only be sent by the person who provides the account, such as portals operated by financial institutions;
- Messages sent on behalf of a registered charity where the message has as its primary purpose raising funds for the charity;
- Messages sent on behalf of a political organization where the message has as its primary purpose soliciting a contribution.

Special Notice

Watch Outs

The CASL legislation is unclear about whether “service” messages (eg. transaction confirmations, membership notices, quotes, proposals, loan information and statements, warranties, etc.) constitute CEMs. Clarification is currently being sought by the Canadian Marketing Association.

Implication for marketers: Prior to receiving clarification on this, organizations can comply by (1) ensuring that such “service” messages include no unnecessary references to other products or services; and (2) that they include an unsubscribe offer and link that allows recipients “to decline further CEMs, which does not include communications such as this service message.”

Enforcement & Penalties

The CRTC is responsible for CASL violations that deal with the sending of commercial electronic messages (CEMs) without consent.

The consequences for a violation of CASL are significant. The CRTC may issue notices of violation, Administrative Monetary Penalties (AMP), injunctions, undertakings or impose a negotiated settlement.

The maximum AMP for an individual is **\$1 million per violation** and the maximum AMP for an organization is **\$10 million per violation**.

CASL Compliance Checklist

To prepare for CASL compliance, organizations should:

1. Become familiar with CASL's requirements
2. Inventory your current digital marketing programs
3. Review data collection locations
4. Audit existing database and group like consents
5. Update CEM templates with prescribed information requirements and create the capability for an unsubscribe feature (preference centre if necessary)
6. Build programs and database capabilities to update consents and identify types of consents moving forward
7. Develop a standard of proof of consent and retain relevant records
8. Review and, as necessary, put in place contacts with outsource partners and affiliates in cases of "list renting"
9. Develop new policies and procedures around CEM deployment
10. Train all staff re: CASL – even a single CEM sent without consent could be an infraction!

Resources & Contacts

- A complete copy of the CASL legislation:
<http://laws-lois.justice.gc.ca/eng/acts/E-1.6/index.html>
- Government anti-spam website & resources:
<http://fightspam.gc.ca/eic/site/030.nsf/eng/home>
- Canadian Marketing Association (CMA) guide to CASL:
<http://www.the-cma.org/regulatory>
- Distributech CASL compliance expertise and services:
Sarah White – swhite@distributech.ca or 1.800.361.9494 ext. 4804