

November, 2012

## **Preparing to Comply with the Anti-Spam Legislation:**

### **Updated Guidance from the CRTC**

Although the federal government has delayed the implementation of “Canada’s Anti-Spam Legislation<sup>1</sup>” or the “CASL”, (it was enacted in 2010), it is now expected to be brought into force in early 2013.<sup>2</sup> In October, the Canadian Radio-television and Telecommunications Commission (“CRTC”) issued two information bulletins to provide guidance for businesses that are preparing to comply with CASL. These documents expand on its previously-issued “Electronic Commerce Protection Regulations (CRTC)” (the “*CRTC Regulations*”). Industry Canada has circulated draft “Electronic Commerce Protection Regulations” (the “*ECP Regulations*”)<sup>3</sup> but these remain to be finalized.

The two CRTC Information Bulletins address the central requirement of CASL, namely that before any “commercial electronic message” (“CEM”) is sent to Canadian residents each recipient must have provided his or her consent to receive such messages. There are a number of exceptions in which consent need not be obtained, and some circumstances in which consent may be implied,<sup>4</sup> but where express consent is

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<sup>1</sup> The full title is long and awkward: “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*.” In a very unusual circumstance, the short title provision was removed during Parliamentary Committee review. Government agencies and lawyers generally refer to it as “Canada’s Anti-Spam Legislation” or “CASL”.

<sup>2</sup> Links to the legislation, regulations (including draft regulations), “fast facts” and an FAQ document are posted on Industry Canada’s CASL web site at: <http://www.ic.gc.ca/eic/site/030.nsf/eng/home>.

<sup>3</sup> **JANUARY 2013 UPDATE: REVISED DRAFT REGULATIONS HAVE NOW BEEN ISSUED.** See <http://www.gazette.gc.ca/rp-pr/p1/2013/2013-01-05/html/reg1-eng.html>.

<sup>4</sup> For a discussion of the requirements of CASL, see “Prepare Now, to Comply with Federal Anti-Spam Legislation”, April 2011, at: <http://www.caobrienlaw.com/resources/>.

required, the issue for compliance is how to obtain consent so that it can be relied upon to support sending CEMs to those individuals.

### Consents Separate from Terms of Use or Sale

In CRTC Bulletin 2012-548, “Guidelines on the Interpretation of the Electronic Commerce Protection Regulations (CRTC)”<sup>5</sup> the CRTC addresses the specific issue of how a business may request the consents it requires before sending CEMs. Consents should not be obtained through generally applicable terms and conditions. Specifically, consent

“must not be subsumed in, or bundled with, requests for consent to the general terms and conditions of use or sale. The underlying objective is that the specific requests for consent in question must be clearly identified to the persons from whom the consent is being sought. For example, persons must be able to grant their consent to the terms and conditions of sale while, for instance, refusing to grant their consent for receiving CEMs”.<sup>6</sup>

### Consents Obtained Orally or in Writing

CRTC Bulletin 2012-548 addresses the requirement, in s. 4 of the *CRTC Regulations*, that consent may be provided orally or in writing, or a combination thereof. The Bulletin repeats the requirement in s. 13 of CASL that anyone seeking to rely on consent has the onus of proving that consent was provided.

### Oral Consents

At paragraph 22 of 2012-548, the CRTC states that it will consider the following sufficient to discharge the onus of demonstrating oral consent:

- where the consent that can be verified by an independent third party; or
- where a complete and unedited audio recording of the consent is retained by the person seeking consent or a client of the person seeking consent.

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<sup>5</sup> CRTC Compliance and Enforcement Bulletin CRTC 2012-548, October 10, 2012 (“CRTC Bulletin 2012-548”). Available at: <http://www.crtc.gc.ca/eng/archive/2012/2012-548.htm>.

<sup>6</sup> CRTC Bulletin 2012-548 at paragraph 16.

The CRTC refers to specific examples that would comply, including call centres where consent is provided by phone, or point of sale purchases, where consent may be given in person at the time of a purchase.<sup>7</sup>

### Written Consents

The CRTC notes that consents provided “in writing” will include both paper and electronic forms of writing. Written consents in electronic form will be sufficient so long as the information can subsequently be verified. Examples that would comply include a printed consent form, such as would be completed at a point of purchase, and checking a box on a web page to indicate consent, where this information is stored in a database.<sup>8</sup>

### “Toggling” a Check Box

Since issues of proof are more likely to arise with electronic consents, these are addressed more extensively. In Bulletin 2012-548, the CRTC states that it would consider the use of “an icon or an empty toggle box”, separate from a license agreement of other requests for consent, “that would be actively clicked on or checked, to be appropriate to indicate consent, provided that the date, time purpose and manner of that consent is stored in a database.”<sup>9</sup>

In CRTC Bulletin 2012-549, “Guidelines on the use of toggling as a means of obtaining express consent under Canada’s anti-spam legislation”<sup>10</sup>, the CRTC provides more detailed guidance with respect to electronic written consents. Specifically addressing “toggling” (a means of switching from one state to another, such as a pre-checked box on a web site) the Commission states that a pre-checked box or other mechanism where consent is assumed cannot be used as a mean of obtaining express consent under CASL. Where there is a pre-checked box, inaction on the part of the person whose consent is required would be considered equivalent to consent. The CRTC considers that to comply with the express consent provisions of CASL, a positive act or explicit indication of consent is required. Accordingly, express consent cannot be obtained

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<sup>7</sup> CRTC Bulletin 2012-548, paragraph 23.

<sup>8</sup> CRTC Bulletin 2012-548, paragraphs 24 – 26.

<sup>9</sup> CRTC Bulletin 2012-548, paragraph 31.

<sup>10</sup> CRTC Compliance and Enforcement Bulletin CRTC 2012-549, October 10, 2012 (“CRTC Bulletin 2012-549”). Available at: <http://www.crtc.gc.ca/eng/archive/2012/2012-549.htm>.

through opt-out consent mechanisms.<sup>11</sup> Instead, requests for express consents that use toggling must begin with a non-checked box, such that the user has to take the positive step of clicking on or inserting a check mark to provide the necessary consent.

### Unsubscribe Mechanism

After the necessary consent has been obtained and CEMs are sent, CASL requires that that each CEM must include an “unsubscribe” mechanism, which enables the recipient “to indicate, at no cost to them, the wish to no longer receive any [CEMs], or any specified class of such messages”.<sup>12</sup> The *CRTC Regulations*, provide, at s. 3(2), that the unsubscribe mechanism “must be able to be readily performed”. CASL further requires that the unsubscribe mechanism must provide an electronic address or link to a web page, to which the indication may be sent, and that the address or web page must be valid for at least 60 days after the message is sent. Once an unsubscribe request is sent, it must be given effect within ten business days.<sup>13</sup>

In Bulletin 2012-548, the CRTC further expands upon the requirements for the unsubscribe mechanism. The CRTC considers that “it must be accessed without difficulty or delay, and should be simple, quick and easy for the consumer to use.”<sup>14</sup> A “link in an email that takes the user to a web page where he or she can unsubscribe from receiving all or some types of CEMs from the sender” is provided as an example of an unsubscribe mechanism that would be found to comply.<sup>15</sup>

Please address any questions about Canada’s anti-spam legislation or the CRTC’s guidance, to Carol Anne O’Brien at [caob@caobrienlaw.com](mailto:caob@caobrienlaw.com), or (416) 640-7270.

Carol Anne O’Brien’s law practice is focused on regulatory matters including communications law (broadcasting and telecommunications), competition law, advertising and marketing, Internet domain names and privacy.

<sup>11</sup> CRTC Bulletin 2012-549, paragraphs 5 - 7.

<sup>12</sup> CASL, sections 6 and 11.

<sup>13</sup> CASL, s.11(2) and (3).

<sup>14</sup> CRTC Bulletin 2012-548, paragraph 11.

<sup>15</sup> CRTC Bulletin 2012-548, paragraph 12.