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Canada's Anti-Spam Legislation,

Preparing for the July 1, 2014 Effective Date: Consent Provisions

Canada's Anti-Spam Legislation ("CASL")¹ will be coming into force on July 1, 2014, and businesses should now be preparing to comply with it. Although the government's stated concern has been to combat "spam", the legislation targets all "commercial electronic messages" or "CEMs", and this term is defined to include all e-mails or texts that have, as at least one of their purposes, the encouragement of participation in commercial activity. Commercial activity is defined broadly, as any transaction, act or conduct that is of a "commercial character", whether or not the person who carries it out does so in the expectation of profit. CASL provides for administrative monetary penalties ("AMPs") of up to \$10 million for contraventions by corporations, and up to \$1 million for individuals. As such, all businesses need to be aware of the prohibitions and requirements of CASL and should now be reviewing the CEMs that they send, in order to be able to comply with this legislation by July 1. This article provides an overview of the provisions that relate to a recipient's consent to receive CEMs, and identifies some of the issues that should be considered by many businesses² as they prepare to comply with CASL.

Timing for Compliance with Respect to CEMs and Next Steps

Although some of CASL's provisions will come into force later, July 1 is the coming-into-force date of the provisions that will affect many businesses, namely the prohibition

¹ Although generally referred to as "CASL", the official title is "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*." The legislation, regulations and guidance documents are posted at <http://fightspam.gc.ca/eic/site/030.nsf/eng/home>.

² This article is for general information purposes only. Each business should obtain legal advice that takes account of its particular circumstances and marketing practices.

against sending CEMs to Canadian residents, unless the recipient has consented to receive such messages, or unless the circumstances justify a particular exception or an implied consent. The provisions that mandate certain “form and contents” requirements for all CEMs also come into force on July 1.³ Other provisions that will come into force later include those relating to the installation of computer programs on another person’s system, effective January 15, 2015, and the private right of action provisions, (which will provide for compensation for actual losses or damage caused by a contravention of *CASL*), effective July 1, 2017.

Businesses should be reviewing all of the categories of e-mail that they send, to determine which activities must be adapted or suspended as of July 1, 2014, and to make any necessary changes to e-mail templates, in order to comply with the form and contents requirements of *CASL*. Where prior express consent to receive CEMs is required, steps should be taken now to obtain the consents which can be relied upon after July 1, 2014. It is important to do this now, since after July 1 an e-mail to request consent would itself be a CEM that may only be sent in circumstances where there is an exception or implied consent or if express consent has already been obtained.

Extra-Territorial Application of CASL

CASL is of concern to Canadian businesses, but businesses located outside of Canada that send CEMs to Canada should also be preparing to comply. *CASL* states that a contravention of its prohibition will exist where “a computer system located in Canada is used to send or access the electronic message.”⁴ Since recipients in Canada use computer systems located in Canada, any CEMs sent to them would contravene *CASL* if the necessary consent has not been obtained, or if an exception or implied consent does not exist. Although it may be more difficult for enforcement agencies to obtain an AMP or other remedy with respect to a non-Canadian business, such businesses should understand that compliance is nevertheless required.

Analysis With Respect to Consent

While the practices and requirements of each business will vary, some general

³ A second article will review the form and content requirements of *CASL*.

⁴ *CASL*, s. 12.

comments can be provided with respect to the consent requirements of *CASL*. The general rule is that consent is required before CEMs are sent. However, there are circumstances that provide for an exception to this requirement, or where consent may be implied. Some of these circumstances are described below. It will be important to understand and comply with the detailed requirements of any of these circumstances, since *CASL* contains a “burden of proof” provision,⁵ which means that the sender of a CEM has the burden of proving that consent has been obtained, or that circumstances exist such that it is not required or may be implied, before the CEM is sent.

“CEMs”

The first step is to consider the various categories of e-mails that a business sends to various categories of recipients, and determine whether, in each case, it will be considered to be a “CEM” as defined by *CASL*. As noted above, this term includes all e-mails or texts where at least one of its purposes is to encourage participation in some type of commercial activity. “Commercial activity” includes any transaction or conduct that is of a “commercial character”, whether or not it is carried out with an expectation of profit. For all such “CEMs,” the analysis proceeds as follows.

Exceptions from the Consent Requirement

CASL and its regulations contain detailed requirements and space does not permit a complete discussion of all of the provisions that relate to consent. The following are some of the circumstances that may be relied upon to support an exception to the consent requirement. The exception that is likely to be relied upon most frequently by businesses is the situation in which the CEM is responding to a request, inquiry or complaint. ***CASL’s* s. 6(5) provides that consent is not required (and the “form and content” requirements do not apply) where a CEM is:**

- a) Sent to an individual in a “**family relationship**” or a “**personal relationship**”.⁶
- b) Sent to a person who is engaged in a **commercial activity and where the message consists solely of an inquiry or application** related

⁵ *CASL*, s. 13.

⁶ Terms are defined in s. 2 (a) and (b) of the *IC Regulations*. “Family relationship” is defined narrowly, to include only marriage, common law partnerships and any legal parent-child relationship. “Personal relationship” is defined broadly, as a situation involving direct, voluntary, two-way communications, and permits consideration of a variety of factors, such as shared interests and frequency of communication.

to that activity (business to business inquiries initiated by the sender).

c) “Of a **class, or** is sent in **circumstances**, specified in the regulations”. This requires reference to s. 3 (a) to (h) of the *IC Regulations*, which provides for the following exceptions:

- **Two “business to business” exceptions, where a CEM is sent** by an employee, representative, consultant or franchisee of an organization:
 - to another employee, representative, consultant or franchisee of the business and the message concerns the business’ activities.
 - to an employee, representative, consultant or franchisee of another organization and the business and the other organization have a relationship, and the message concerns the activities of the other organization.
- Where the CEM is sent in **response to a request, inquiry or complaint** or is otherwise solicited by the recipient (inquiries initiated by the recipient).
- There are also four categories of exceptions for CEMs that are sent **to satisfy a legal or juridical obligation**, such as to provide notice of an existing or pending right or legal obligation, court order, judgment or tariff.
- There is an exception for CEMs sent using **platforms such as instant messaging where prescribed activities are conspicuously published, and the unsubscribe mechanism** required under subsection 6(2) of *CASL* is readily available on the user interface through which the message is accessed, and the person to whom the message is sent consents to receive it either expressly or by implication.
- There is an exception for CEMs sent using **secure online portals, such as banking web sites**, specifically, CEMs sent to a limited-access secure and confidential account to which messages can only be sent by the person who provides the account to the person who receives the message.

CASL’s s. 6(6) provides that consent is not required (but the “form and content” requirements do apply) where a CEM:

- a) Provides a **quote or estimate** for the supply of a product or service – but only where the quote or estimate was **requested** by the recipient.
- b) **Facilitates, completes or confirms a commercial transaction** that has previously been entered into.
- c) Provides **information about a warranty, product recall, safety or security** about a product or service that the recipient uses, has used or has purchased.
- d) Provides notification of **factual information** about:

- (i) the **ongoing use or purchase by the recipient of a product** or service offered under a subscription, membership, account, loan or similar relationship.
 - (ii) the **ongoing subscription, membership, account, loan** or similar relationship of the recipient.
- e) Provides information directly related to an **employment relationship or related benefit plan** in which the recipient is currently involved, participating or enrolled.
 - f) **Delivers a product or service**, including product updates or upgrades that the recipient is entitled to receive under the terms of a transaction that was previously entered into.

Circumstances for Implied Consent: “Existing Business Relationship”

If none of the circumstances described above exists, such that consent will be required, the next step is to consider whether a person’s consent to receive CEMs may be implied as provided for by **CASL’s ss. 10(9)(a) and 10(10)**, which pertain to situations of an “existing business relationship” between the sender and the recipient. This is the category of implied consent that will likely be relied upon by most businesses. Such a relationship can arise in a number of ways, including from:

- a) A **purchase or lease of a product, goods**, a service, land or an interest in land, within the prior two years;
- b) Acceptance by the recipient of a business, investment or gaming opportunity, within the prior two years;
- c) Bartering anything mentioned in (a);
- d) A **written contract**, in respect of a matter not referred to in (a) to (c), if the contract is currently in existence or has expired within the prior two years; or
- e) **An inquiry or application made by the recipient**, in respect of anything mentioned in (a) to (c), within the prior six months.

[Note: S. 66 of *CASL* contains a transitional provision which states that each of the time periods above is extended to three (3) years from *CASL’s* coming into force date, *i.e.* to July 1, 2017.]

Circumstances for Implied Consent: Business Listings and Business Cards

CASL’s s. 10(9)(b) and (c) describe two other circumstances in which consent to receive CEMs will be implied, namely where the recipient’s contact information has been provided as a specified type of business listing or business card. In the first case, the recipient must have conspicuously published, or caused to be published, the electronic address to which the CEM is sent, e.g. on a business web site. In the second case, the

recipient must have disclosed his/her electronic address to the sender, e.g. on a business card. In each case, the person to whom the CEM is sent must not have indicated a wish not to receive unsolicited CEMs and the CEM must be relevant to the recipient's business role, functions or duties.

Referrals

The *IC Regulations*⁷ create a final exception, with respect to the consent requirement only, which permits a business to send one CEM to a person who has been referred to that business by another individual, where the referring person has an "existing business relationship" or an "existing non-business relationship" (as defined by *CASL*) with the recipient and with the sender. The one CEM that is permitted to be sent under this provision must comply with the "form and content" provisions of *CASL* and its regulations.

If no exception exists and consent is not implied, either as provided for in the examples described above or otherwise, the business must take steps to ensure that all of the recipients to whom CEMs will be sent after July 1 are contacted, to obtain consent in compliance with *CASL*, its regulations and the applicable guideline documents.

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⁷ *IC Regulations*, s.4.