

May, 2014

Canada's Anti-Spam Legislation,

Preparing for the July 1, 2014 Effective Date: Form and Content Provisions

As noted in an earlier article¹, the provisions of *Canada's Anti-Spam Legislation* ("CASL") that govern "commercial electronic messages" ("CEMs") come into force on July 1, 2014, and organizations should now be preparing to comply. The previous article discussed the consent provisions of CASL. This article provides information about the required form and content of all CEMs, and of requests for consent, and describes the enforcement approach that regulators are expected to follow.

Analysis of CEMs for Consent

As noted in the previous article, CASL will apply to a wide range of CEMs, due to the breadth of the legislation's definitions of "electronic message," "CEM" and "commercial activity". A CEM will be subject to CASL if it would be reasonable to conclude that one of its purposes is to encourage participation in commercial activity. "Commercial activity" is 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". Once an organization has completed its analysis to determine which categories of e-mails and texts should be brought into compliance, it should review whether, for each of those categories, the circumstances justify either an exception (e.g. CEMs sent where there is a personal or family relationship², in response to a request, inquiry, compliant or is otherwise solicited by the recipient, or by a registered charity for the purpose of raising funds for the charity)

¹ April, 2014, "Canada's Anti-Spam Legislation, Preparing for the July 1 Effective Date: Consent Provisions" posted at <http://caobrienlaw.com/resources/>. These articles are provided for general information purposes only. Readers should obtain legal advice that takes account of their organization's particular circumstances.

² These terms are defined in the "IC Regulations", which, along with the text of CASL, the "CRTC Regulations" and various guidance documents, are posted on the federal government's web site at <http://fightspam.gc.ca/eic/site/030.nsf/eng/home>. As of May 12, 2014, the updated CRTC FAQs are only available on the CRTC web site: <http://www.crtc.gc.ca/eng/home-accueil.htm>.

or implied consent (e.g. where there is an “existing business relationship” or an “existing non-business relationship” as defined by *CASL*). If express consent is required, it should be obtained now, so that CEMs can be sent to those recipients after July 1, 2014. In the event of a complaint and an investigation by the CRTC³ the sender of the CEM will have the burden of proving that consent has been obtained. For this reason, it is important that systems be updated to ensure that evidence is retained, to show that consent was provided, or that the particular circumstances justify an exception or implied consent. There are no time limits on express consent, which remains in effect until an unsubscribe request is received. As noted in the previous article, a number of the implied consent provisions do include time limits, which means that the organization’s systems must be capable of recording and calculating the length of time an implied consent will remain in effect.

Once an organization has completed its consideration of the *CASL*’s consent provisions, it should turn its attention to the “form and content” requirements, which also come into effect on July 1, 2014.

Form and Content Requirements: All CEMs⁴

For all CEMs *CASL* and the *CRTC Regulations* require that:

- The required contact information and statements must be set out “clearly and prominently”.
- The name of the sender and the name under which it carries on its activities if different.
- If the CEM is sent on behalf of another person, the name of that person and the name under which it carries on its activities, if different. If the CEM is sent on behalf of multiple organizations (e.g. affiliates, partner organizations), all of them must be identified.
- If the CEM is sent on behalf of one or more other persons or entities, a statement indicating which person is the sender and which is the person on whose behalf the message is being sent.
- The mailing address and

³ The Canadian Radio-television and Telecommunications Commission (“CRTC”) is the agency that will have primary responsibility for enforcing *CASL*, although the Competition Bureau and the Privacy Commissioner of Canada also have enforcement responsibilities.

⁴ *CASL* s.6(2), the *CRTC Regulations* s. 2 and CRTC Compliance and Enforcement Bulletin 2012-548, “Guidelines on the interpretation of the Electronic Commerce Protection Regulations (CRTC)”.

- Either a telephone number that provides access to an agent or a voicemail system, OR
 - An email address or website address of the person sending the message or the person on whose behalf the message is sent. (The e-mail address may be for a specific person, or a general delivery address, such as “info@website.com”).
- An unsubscribe mechanism (described below).

Form and Content Requirements: Requests for Consent⁵

Where requests for consent are to be sent by e-mail or text, these may only be sent after July 1 if the circumstances justify an exception or implied consent. Under *CASL*, consent to receive CEMs in the future may be requested and provided orally, but problems of proof may arise where this is done. Since enforcement will be complaint-based, the level of risk of complaints and enforcement action will vary depending on the subject matter of the CEM and on the sender’s relationship with recipients. Whether consent is given orally or in writing, it is recommended that organizations retain a record of recipients’ consents to receive CEMs in a database that is capable of identifying the date of consent and any limitations (e.g. to receive CEMs that relate only to a particular category of products or services) or in paper records that are retrievable and retained for as long as CEMs might be sent to the person.

CASL and the *CRTC Regulations* impose the following requirements for all requests for consent. Prior to July 1, it is not necessary to comply with these, or any other provisions of *CASL*, but since updating e-mail templates now will save having to do so for July 1, many organizations will include the required information now, as follows:

- The request for consent must clearly identify the purpose for which the consent is sought: e.g., “I consent to receive e-mails from [*the XYZ organization*] about any of its products and services” or “I consent to receive e-mails from [*the XYZ organization and its affiliate/partner ABC*] about [*specified products/services, e.g. with a series of choices, tick-boxes to identify them*]”.
- The recipient must take a positive step to indicate his/her consent, e.g., to tick an empty box in an online form. As explained in a CRTC bulletin,⁶ “opt-out” consent, or the use of a pre-ticked box where inaction is taken to indicate consent, is not permitted.

⁵ *CASL*, s. 10 and the *CRTC Regulations*, s. 4.

⁶ CRTC Compliance and Enforcement Bulletin 2012-549, “Guidelines on the use of toggling as a means of obtaining express consent under Canada’s anti-spam legislation”.

- All requests for consent, either orally or in writing, must include the following prescribed information:
 - The name of the person seeking consent, and if different, the name of the person on whose behalf consent is sought, including the respective names under which they carry on their activities.
 - If consent is being requested on behalf of another person, include a statement identifying which person is the sender and which person will benefit from the consent.
 - The mailing address of the above person(s) and
 - Either the telephone number, providing access to an agent or a voicemail system, OR
 - An email address or web site address of the person seeking consent, or if different, the person on whose behalf consent is sought.
 - A statement to indicate that consent may be withdrawn at any time, using the contact information provided.
- An unsubscribe mechanism (described below).

Unsubscribe Mechanism⁷

CASL and the *CRTC Regulations* include detailed requirements for an unsubscribe mechanism, which must be included in all CEMs that are subject to the legislation.

- The unsubscribe mechanism must enable the recipient to indicate, at no cost to the person, that s/he no longer wishes to receive CEMs from the sender or another person or organization.
- The unsubscribe mechanism must be capable of being “readily performed”. It should be “accessed without difficulty or delay, and should be simple, quick, and easy for the consumer to use.”
- Where the sender is acting on behalf of another person or organization, the unsubscribe direction may relate to CEMs sent by both or only one of them. The specifics of that arrangement and the unsubscribe request must be made clear to the recipient.
- Only if it is not practicable to include the required unsubscribe information in the CEM itself (e.g. in an SMS text message), the unsubscribe mechanism may be posted on a web page that is readily accessible by the person, at no cost to them, by means of a link that is clearly and prominently set out in the CEM.

⁷ *CASL*, s. 6(2)(c), *CRTC Regulations*, s. 3 and *CRTC Bulletin* 2012-548.

Once an unsubscribe request is sent, it must be given effect “without delay”, and within no later than ten (10) business days.

Anticipated Enforcement Approach

The availability of AMPs of up to \$1 million (for individuals) and \$10 million (for corporations) underlines the government’s serious concern about the harmful effects of unwanted spam. We expect that enforcement will involve a number of options and a range of AMPs, reflecting a variety of circumstances. *CASL*⁸ identifies the following as the factors to be considered in determining the amount of an AMP, when a violation has been established:

- the purpose of an AMP is to promote compliance with *CASL* and not to punish;⁹
- the nature and scope of the particular violation;
- the person’s history with respect to any previous violations or undertakings provided under *CASL* or certain sections of the *Competition Act* or federal privacy legislation;
- any financial benefit obtained from the commission of the violation;
- the person’s ability to pay the AMP;
- whether any voluntary payments have been made to compensate persons affected by the violation; and
- other factors that may be established by regulations or are otherwise relevant.

In addition to considering these factors, the enforcement agencies are expected to follow an “enforcement continuum” that begins with an emphasis on education to promote compliance. Based on comments from CRTC staff and on the existing enforcement activities of the CRTC, the federal Privacy Commissioner and Competition Bureau, we expect education to be the initial focus of these agencies, rather than obtaining significant AMPs. CRTC representatives have stated that its first enforcement targets will be “nefarious or egregious” offenders, and we would expect this to include senders of CEMs that are fraudulent, or where misleading information could be harmful (e.g. designed to collect and misuse personal information or that contain misleading health claims). For legitimate businesses’ use of CEMs, we expect that the agencies’ priority will be to provide education in order to promote compliance and only to seek to have

⁸ *CASL*, s. 20(3).

⁹ *CASL*, s. 20(2).

AMPs imposed where this is necessary to ensure compliance. This is the same enforcement approach that is used by the CRTC in connection with the “Do Not Call” regime and telemarketing rules under the *Telecommunications Act*, and by the Competition Bureau in its enforcement of the misleading representation provisions of the *Competition Act*.

Please address any questions about *CASL* to Carol Anne O’Brien at 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.