

Canada's Anti-Spam Legislation Comes Into Force July 1, 2014

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Guest Article from Gowlings

On December 4, 2013, July 1, 2014 was fixed as the date on which Canada's new Anti-Spam legislation (CASL) will come into force, and Industry Canada published the final version of its Electronic Commerce Protection Regulations. The final Industry Canada Regulations define several broad exceptions to the application of the new law, and together with the final regulations previously published by the Canadian Radio-television and Telecommunications Commission (CRTC), provide the requirements for complying with CASL.

With the long anticipated coming into force date for CASL now known, it is imperative that organizations that send commercial electronic messages consider their compliance options now.

To What Messages does CASL Apply?

CASL creates a requirement for express consent for most forms of "commercial electronic message" that are sent by means of telecommunication to an "electronic address" (CEM). Implied consent will exist only in narrower circumstances, primarily in the case of "existing business relationships" or "existing non-business relationships," both of which are defined terms under the Act and are subject to statutory expiry timelines (for example, two years following a purchase, or six months following an inquiry or application). Due to the organizational challenges in managing the expiry of consent on an individual basis, and as many organizations (in particular, manufacturers who would not typically directly sell their products to the ultimate consumer) may have difficulty establishing an "existing business relationship" with their target market, in many cases, express consent to send CEMs will need to be sought.

It is not difficult to establish whether a message is "electronic." For example, CASL will not apply to traditional direct mailings; however, it should be noted that a person's address would be their "personal information" under the existing privacy legislation. A message will be "commercial" when it has as one of its purposes encouraging participation in "commercial activity," regardless of whether there is an expectation of profit. This will include advertising a product, service or person, offers of sale, and even some forms of charitable activity.

The consent requirements apply to sending (including causing or permitting sending) a CEM to an “electronic address.” Many of the intricacies of the potential application of CASL, particularly in emerging media, will depend on interpretation of “electronic address.” Under the law, electronic addresses include electronic mail accounts, instant messaging accounts, telephone accounts, and “any similar account.” The application of the law to accounts “similar” to other electronic address may apply the law to new communications platforms, and in particular to social media platforms. It is important to understand that CASL is not targeted solely to email!

Organizations will need to consider whether the electronic communications platforms they intend to use are analogous to an “electronic address.” There is no certainty on this point in respect of many popular social media platforms; however, in the regulatory impact statement, Industry Canada recognized that CASL would not apply where the message was not sent to an electronic address. As examples, it offered the publication of blog posts, or other “publications” on social media sites.

What Messages are Exempt?

The final Regulations provide the final version of the exceptions that will be available for businesses when CASL comes into force. Industry Canada has indicated that these exceptions are primarily in areas where “broad application of the Act would otherwise impede business activities that are not within the intended scope of the legislation.” The majority of the exceptions in the final regulations are revisions of the exceptions first introduced in the January 2013 draft regulations; however, we note several additions.

The Regulations create a series of message categories that will be excluded from both the consent and disclosure requirements under CASL. The final regulations exclude internal business communications sent between employees, representatives, contractors or franchisees of an organization where the message relates to the activities of the organization. Similarly, external communications between the employees, representatives, contractors or franchisees of separate organizations that have a relationship will be excluded, provided the message relates to the affairs of the organization to whom the message is sent.

The Regulations also provide a broad exception for messages that are sent in response to a “request, inquiry, complaint” or another “solicitation” from the recipient of the message. This exception will relieve some of the difficulties in relying on an “existing business relationship” established from an “inquiry or application,” in particular the narrow wording “inquiry or application,” the requirement that the inquiry or application be related to the purchase, bartering, or lease of products, goods, services, or land, or the acceptance of a business investment or gaming opportunity, and the limitation of the response window to six months. This exception will provide some comfort to manufacturers and other organizations that may not have a narrowly defined “existing business relationship” with their customers, that responses sent to consumers in the ordinary course of business are not technically in violation of the law. While we note the Regulations do not limit responses to a particular time frame, we would nevertheless encourage organizations to respond to inquiries and complaints more promptly than six months.

While CASL will apply to messages that are either sent from, or accessed on a computer system in Canada, the Regulations provide that a CEM that is sent by a person who “reasonably believes the message will be accessed in a foreign state” listed in a schedule to the Regulation will not be subject to CASL - provided that the CEM conforms to the law of the state that addresses conduct similar to CASL. Listed countries include commercially important nations including the United States, the members of the European Union, Japan and China. This exception will apply to foreign organizations who send commercial messages that are received in Canada only inadvertently. For example, organizations operating solely in the United States would be excluded from the application of the Act in the case of an American customer who receives a commercial electronic message while travelling in Canada.

This exception will also be essential in avoiding a requirement for CASL compliance for Canadian service providers that only send messages to foreign recipients on behalf of a foreign client. Previously, such messages would have been subject to CASL requirements, notwithstanding that the message was sent to a foreign resident, on behalf of a foreign entity, and in compliance with applicable foreign law. We would note that if such a message was not sent in compliance with the foreign law, this exception would not apply, potentially creating a situation where the sender of the message could be subject to penalties under both CASL and the applicable foreign law.

There are several exceptions in the final Regulations that were not present in the draft regulations. Of particular note, messages sent by or on behalf of a registered charity for fundraising purposes are exempt, as are messages that are sent to a limited access, secure account to which messages may only be sent to the recipient by the person who provided the account. The exception for closed, secure accounts will most likely be of use to organizations such as financial institutions or banks that have developed private secure platforms to address security concerns in their industry.

The regulations also introduce a new exception for messages sent via a messaging service if the information and unsubscribe mechanism required by CASL are conspicuously published on the user interface through which the message is accessed. While this exception may reduce the need for in message disclosure and unsubscribe mechanisms in limited cases where the sender of the message is able to establish that the interface contains compliant disclosure and unsubscribe functionality, we note that this exception does not avoid the requirement to obtain either express or implied consent to send the message initially.

Finally, more narrow exceptions to the consent and disclosure requirements will exist in cases where a commercial electronic message is sent to satisfy a legal obligation, or to enforce or provide notice of a legal right.

Refer-a-Friend Promotions

The final Regulations and the Industry Canada regulatory impact statement, confirm that organizations will continue to be able to conduct referral promotions- provided they exercise due diligence to help ensure they comply with CASL. There are two manners in which it appears this may take place.

First, the final regulations create an exception to the requirement for consent to send a CEM following a referral. This exception would apply only to the first CEM sent to an individual following a referral by an individual who has an “existing business relationship,” “existing non-business relationship,” “family relationship” or “personal relationship” with both the person who sends the CEM, and the individual who receives it. The referral CEM would need to state the full name of the referrer and that the message was sent as a result of the referral. Importantly, the final regulations broaden this exception over the version in the draft regulations by permitting such “referral” messages to be sent by organizations, as well as individuals.

In addition to this exception, messages that are sent “by or on behalf” of an individual with a “personal” or “family” relationship with the recipient are not subject to the requirement for consent. The final Regulations include the definitions for “family” and “personal relationships.” Interestingly, the final regulations narrow the definition of “family,” tying it only to family through marriage, common-law partnership, or legal parent-child relationships where the individuals have had direct, voluntary two way communications. The previously proposed exception for siblings and “blood relationships” descending from a common grandparent has been removed without comment.

While brothers, sisters, and cousins may no longer be “family” for the purposes of CASL, in some cases those relationships may fall under the definition of “personal relationship,” provided the individuals are on speaking terms and share interests. The final definition of “personal relationship” will apply only to persons who have had “direct voluntary two-way communications,” and it is reasonable to believe the relationship is personal considering any relevant factors, such as shared interests, experiences, and frequency of communication.

While the regulatory impact statement expressly contemplated the use of these exceptions for referral marketing, businesses should note that these exceptions rely wholly on factors outside of their direct knowledge (i.e. the relationship of the individuals). Particular attention to the language used to solicit referrals will be necessary to help promote compliance and establish a due diligence defence.

Whither PIPEDA valid consent?

The regulatory impact statement for the new draft Regulations expressly confirms that Industry Canada takes the position that valid **express** consent obtained in compliance with the existing privacy law **before** CASL comes into force “will be recognized as being compliant with CASL.” This recognition is of key interest to organizations looking to maintain their existing lists. However, Industry Canada also expressly notes that some organizations that may be compliant with the existing law “may no longer be able to contact those addresses under CASL.” Given that the

regulatory impact statement recognizes the continued validity of existing “express consent” it is likely that this refers to situations in which an organization is relying on “implied” consent under the privacy legislation that would not fall under the much more narrow categories of implied consent under CASL.

Prior to July 1, 2014, organizations will have an opportunity to seek valid express consent in cases where they may be currently relying on implied consent. Unfortunately, non-responses to such attempts may be expected to lead to a loss of a significant portion of existing implied consent lists obtained in compliance with the current law. It will be central to such compliance efforts to audit existing consent lists and practices to establish where an organization can evidence existing valid “express consent,” and where it may be relying on implied consent.

While we note CASL provides a three-year “transition period” in cases where an organization has an “existing business relationship” with the CEM recipient, this transition period is tied to the definitions of “existing business relationship” and “existing non-business relationship” as defined in CASL and will not extend to implied consent established under the current law in other cases.

Compliance Guidelines

It is expected that Industry Canada and the CRTC will publish compliance guidelines providing further information regarding their interpretation of CASL. The regulatory impact statement indicated several topics which may be addressed in such guidelines, including:

- That the requirement to provide sender information in CEMs applies to persons who play a material role in message content and the delivery lists. Where the message is sent on behalf of several affiliates they would all need to be identified; however, where this is not practicable to include in the body of the message, a link to a website with the information may be used.

The scope of this position is not fully addressed in the Regulations or the text of CASL, and organizations should be alert for further guidance from Industry Canada and the CRTC.

Coming into Force

The majority of the requirements under CASL, and in particular, the new requirements for seeking consent to send CEM's and for disclosure in CEM's, will come into force on July 1, 2014. However, several provisions of the act will come into force on latter dates. The private right of action, which provides persons who allege they have been affected by a contravention of the act to bring an action for damages, and a statutory penalty of \$200, (not to exceed \$1,000,000 for each day on which an offence occurred), has been postponed and will not come into force until July 1, 2017. The regulatory impact statement indicates that this three year postponement is intended to allow the development of better understanding of how CASL will be interpreted and enforced, given the potential for the private right of action to lead to class action lawsuits.

Organizations should note that in the period between July 1, 2014, and the coming into force of the private right of action, CASL will be enforced by the CRTC, and the maximum available penalty for an offence by an organization will be \$10,000,000.

In addition to this, the provisions of CASL that require express consent to the installation of computer programs will come into force until January 15, 2015.

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Related Capabilities

Privacy & Data Security

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