
New Canadian Anti-Spam Rules to Take Effect July 1, 2014

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Businesses that use “commercial electronic messages” to market to customers and prospective customers in Canada should be aware of Canada’s new anti-spam rules, which require, among other things, the sender to obtain consent from the recipient before sending the message and the message itself to identify the sender and provide instructions enabling the recipient of the message to withdraw consent to receive such messages.

Canada’s anti-spam law, which was originally passed in 2010 and is unofficially called “CASL,”¹ will begin to go into effect on July 1, 2014. Those doing business in Canada should review and update their electronic communication practices ahead of the effective date to ensure that they have the consent required by the new law from individuals and businesses before sending emails, text messages, or instant messages to those “persons.” The law applies to messages sent or accessed using a computer system located in Canada, and penalties include administrative fines up to \$1 million for individuals and \$10 million for other persons. A private right of action lies to recover actual damages up to \$200 for each violation (not exceeding \$1 million for each day on which a violation occurred) provided the action is brought within three years.

Covered Communications

CASL applies to any “commercial electronic message” (CEM), which includes any communication that has as its purpose (or one of its purposes) to encourage participation in a commercial activity, including advertising or offering to purchase, sell, lease or barter goods or services or to provide a business, investment or gaming opportunity, regardless of whether there is an expectation of profit. A message that requests consent to send a message offering to provide a business, investment or gaming opportunity is also a CEM. The law covers more than just emails, extending to any communication transmitted to an instant messaging account, telephone account or other similar account.

¹ The official title of the statute 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 (S.C. 2010, c. 23).”

Prohibited Conduct

CASL prohibits sending any CEM unless (1) the recipient has expressly or impliedly consented to receive it, (2) it contains an acceptable unsubscribe mechanism, and (3) it contains the following information about the sender: (a) name and mailing address, and (b) either (i) a telephone number providing access to an agent or voice messaging systems, (ii) an email address or (iii) a web address. If the CEM is sent on behalf of another, then the information should identify the person on whose behalf the message is sent and the message must include a statement identifying the message's sender and the person on whose behalf the message is being sent.

Excluded Communications

The law applies to "commercial" communications. The following communications are excluded from the prohibitions of the statute:

- *Purely* transactional messages, including quotes or estimates sent in response to a request. Unlike U.S. anti-spam rules that permit some "blended" transactional/advertising messages, CASL limits this exclusion to messages without any advertising or promotion.
- Intra-company messages and messages between organizations concerning the activities of the recipient organization
- Messages between those with a personal or family relationship
- Messages from telecommunication service providers
- Two-way voice communications
- Law enforcement, public safety, national and international defense/security messages

Consent

Consent to receive CEMs can be express or implied. A request for express consent may be delivered orally or in writing, but the sender will need to be able to establish that consent was obtained for each type of CEM being sent. In order to obtain valid, express consent from an individual, the sender must clearly disclose:

- The name, mailing address, and either (1) a telephone number providing access to an agent or voice messaging system, (2) an email address or (3) a web address of the sender or that of the person on whose behalf the message will be sent
- If consent is being sought for another, then the name of the entity seeking consent must also be included, as well as who is seeking the consent and on whose behalf consent is sought (e.g., Company ABC is asking for your consent to receive electronic communications from Company XYZ).
- The purpose or purposes for which the consent is being sought (e.g., to receive promotional offers, newsletters, or coupons)
- A statement that the person consenting can withdraw that consent

Consent to receive CEMs is implied in the following limited circumstances:

- The sender has an existing business or non-business relationship with the recipient. An "existing business relationship" (EBR) means (1) a purchase or lease of a product, good, service or interest in

land, (2) acceptance of a business investment or gaming opportunity, (3) bartering of anything, or (4) a written contract in effect or having expired, each within 2 years before the date the message is sent; or an inquiry or application within 6 months before the message is sent. For ongoing accounts or subscriptions, the two-year EBR period begins on the day the subscription or account terminates. An “existing non-business relationship” means a donation, gift, membership, meeting attended or volunteer work performed by the recipient within 2 years before the date the message is sent where the sender is a registered charity, political party/organization or candidate for public office.

- The recipient has conspicuously published his, her or its email address without an attending statement indicating a desire not to receive CEMs, and the message is relevant to the person’s business, role, functions or duties in a business or official capacity.
- The recipient has disclosed the email address to the sender without indicating a desire not to receive CEMs, and the message is relevant to the person’s business, role, functions or duties in a business or official capacity.

Unsubscribe Mechanisms

CASL requires that the CEM must include an unsubscribe mechanism that enables the recipient to indicate—at no cost to the recipient—the wish not to receive any further CEMs from the sender or the person on whose behalf the message is sent. The unsubscribe mechanism must use the same electronic means by which the message was sent (*i.e.*, email, text, etc.) or, if that is impractical, any other means that enables the recipient to opt out and specifies an electronic address or link to a web page to which the opt-out can be sent. The unsubscribe mechanism must remain valid and operable for at least 60 days after the message is sent. Opt-outs must be processed and given effect within 10 business days after the opt-out is sent. When an entity has received express consent, the sender must provide an electronic address to which the recipient can send notice of withdrawal of consent and must process and give effect to the withdrawal of consent within 10 business days after receipt of the withdrawal notice.

Click [here](#) to read a copy of CASL.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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