

The Pillsbury logo, featuring the word "pillsbury" in a lowercase, sans-serif font with a red-to-orange gradient.The Gowlings logo, featuring the word "gowlings" in a lowercase, sans-serif font with a blue-to-teal gradient.

# Before You Hit Send, Did You Know ... U.S. and Canada Anti-Spam Laws

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# Agenda

- The Basics
- Statutory Requirements
- Consent
- Installing Computer Programs
- Penalties

# The Basics - Title

- Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (AKA “CAN-SPAM”)
- 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 (AKA “CASL”)

# The Basics - Applicability

- CAN-SPAM:
  - Commercial Emails sent to or from US
  
- CASL:
  - Commercial Emails, Texts, Pre-recorded Voicemails, or other commercial electronic messages sent to or from Canada,
  - Computer programs installed on computer systems in Canada

# The Basics - Regulator

- CAN-SPAM: US Federal Trade Commission
- CASL: Canadian Radio-Television and Telecommunications Commission (in respect of commercial messages and computer programs)

# Key Definitions: “Commercial Electronic Message”

## CAN-SPAM

- Any electronic mail message the **primary purpose** of which is the commercial advertisement or promotion of a commercial product or service, but does not include “transactional or relationship messages.”

# Key Definitions: “Primary Purpose”

## CAN-SPAM

- Primarily commercial purpose:
  - Content is exclusively advertisement or promotion of commercial product or service
  - Recipient reasonably interpreting subject line concludes it is advertisement
  - Transactional or relationship message does NOT appear in whole or part at the beginning of the body of the message.

# Key Definitions: “Primary Purpose”

## CAN-SPAM

- Primarily transactional purpose:
  - Content is exclusively transactional or relationship
  - Transactional or relationship content:
    - to facilitate, complete or confirm commercial transaction with recipient
    - to provide warranty, recall, safety or security information regarding a commercial product or service
    - to give notice of change in terms or status or account balance with regarding to a subscription, membership, account loan, etc.
    - to provide employment or benefit information
    - to deliver goods or services, upgrades or updates in connection with previous commercial transaction.



# Key Definitions: “Primary Purpose”

## CAN-SPAM

- Blended message is “primarily commercial” if:
  - Recipient reasonably interprets the subject line as a commercial message, or
  - Recipient reasonably interprets the body and concludes the primary purpose is commercial based on:
    - placement of advertising content at the beginning of the message;
    - proportion of message dedicated to advertising content;
    - how color, graphics, type size and style are used to highlight commercial content

# Key Definitions: “Commercial Electronic Message”

## CASL

- 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 request for consent to receive future messages is a Commercial Electronic Message and requires consent to send!

# Key Definitions: Existing Business/Non-business Relationship (CASL)

## Existing business relationship

- a) a purchase or lease of a product, good, service, or interest in land, in the 2 years prior to the message,
- b) acceptance of a business, investment, or gaming opportunity in the 2 years prior to the message,
- c) bartering of anything mentioned in a) in the 2 years prior to the message,
- d) a written contract in effect or having expired within 2 years before the date the message is sent, or
- e) an inquiry or application within 6 months before the message is sent respect of anything in a) to c)

# Key Definitions: Existing Business/Non-business Relationship (CASL)

## Existing non-business relationship

- 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 (under the Canadian Income Tax Act), political party/organization or candidate for public office (as defined under Canadian Legislation).

# Excluded Communications

## CAN-SPAM

- Messages whose **primary purpose** is transactional or relationship
- Political emails
- Non-profit emails

# Excluded Communications

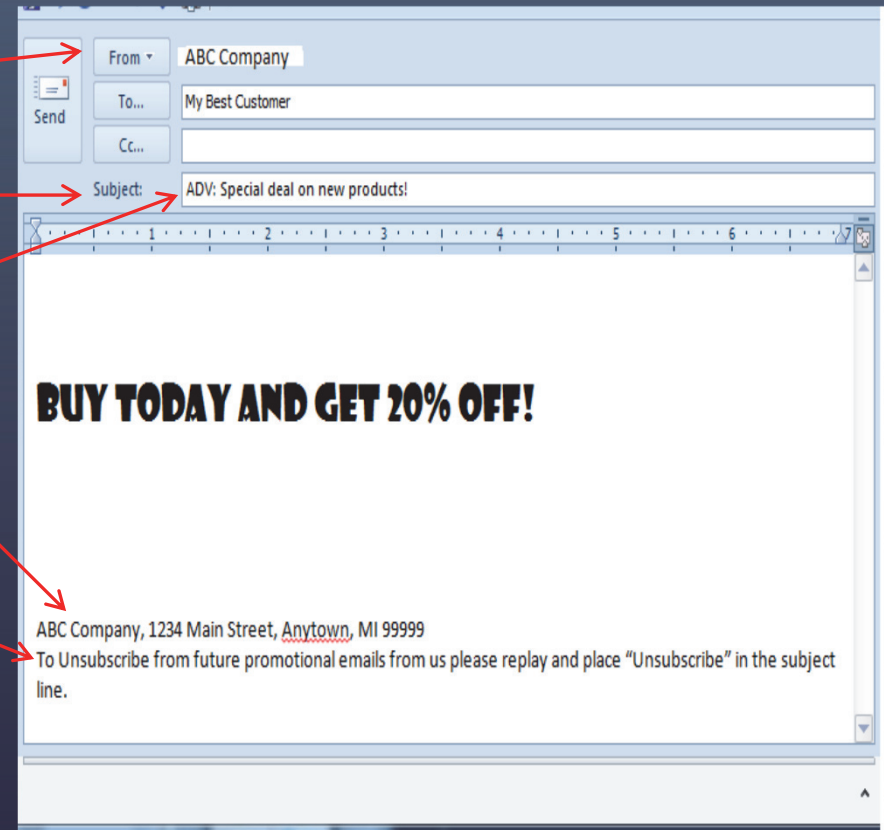
## CASL

- *Purely* transactional messages, including quotes or estimates sent in response to a request without any advertising or promotion are exempt from the consent requirement but not the in message disclosure
- Intra-company messages and messages between organizations with a relationship concerning the activities of the recipient organization
- Responses to a “request, inquiry or complaint” or other solicitation from the recipient
- Messages between those with a personal or family relationship (as defined)
- Messages where the sender reasonably believes they will be received in the U.S. and the message complies with CAN-SPAM
- Two-way voice communications
- Law enforcement, public safety, national and international defense/security messages

# Requirements for Commercial Communications

## CAN-SPAM

- Accurate header
- Accurate subject line
  - Sexually Explicit Content label
- Message identified as an ad
- Valid postal address of sender
- Opt-out opportunity
- Non-deceptive content
- Prompt honoring of opt-out requests
- Control of others handling one's e-mails



# Requirements for Commercial Communications

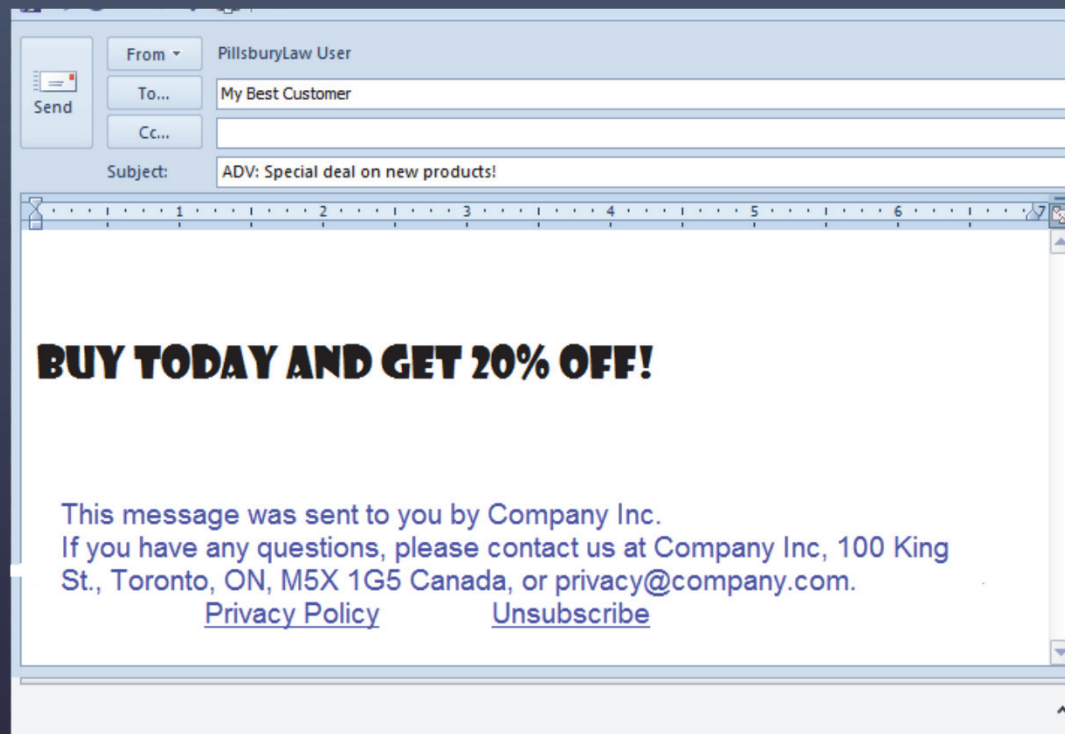
## CASL

- Prior express or implied consent as defined in CASL
- Disclose sender and person on whose behalf the message is sent
- Mailing address, and either a telephone number providing access to an agent or voice messaging system, an email address or a web address for the sender or person on whose behalf the message is sent
- Provide an unsubscribe mechanism
- Prompt honoring of opt-out requests
- Neither subject line or message content may be false or misleading



# Requirements for Commercial Communications

## CASL Message Disclosure Template:



The screenshot shows an email client interface with the following fields:

- From:** PillsburyLaw User
- To:** My Best Customer
- Cc:** (empty)
- Subject:** ADV: Special deal on new products!

The main body of the email contains the following text:

**BUY TODAY AND GET 20% OFF!**

This message was sent to you by Company Inc.  
If you have any questions, please contact us at Company Inc, 100 King St., Toronto, ON, M5X 1G5 Canada, or [privacy@company.com](mailto:privacy@company.com).  
[Privacy Policy](#)      [Unsubscribe](#)

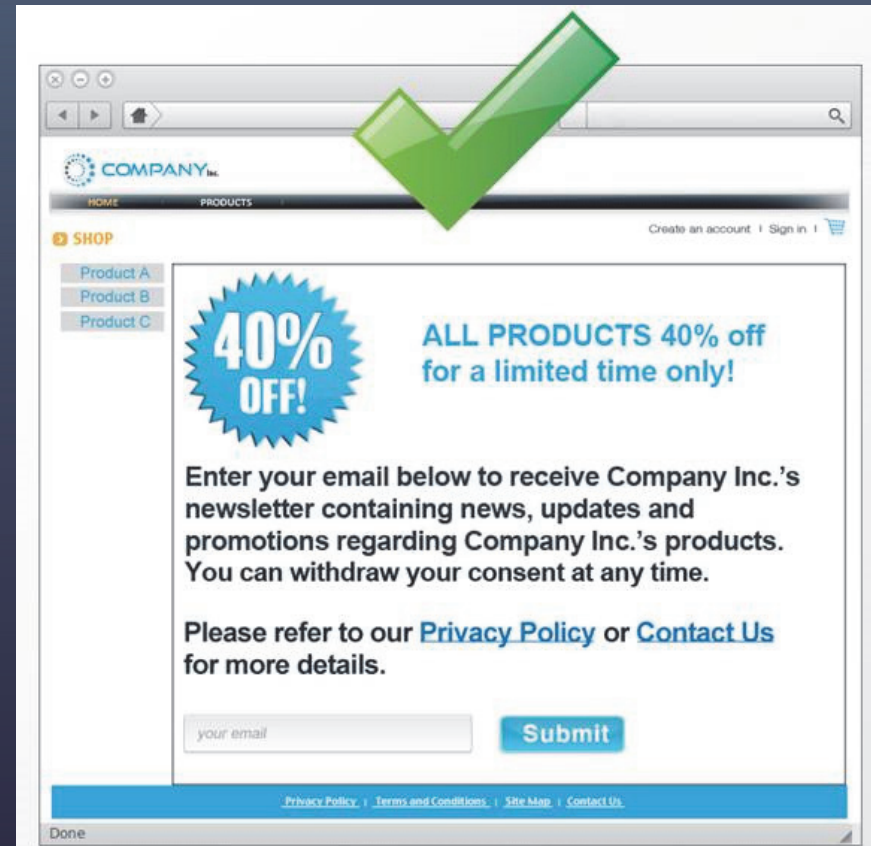
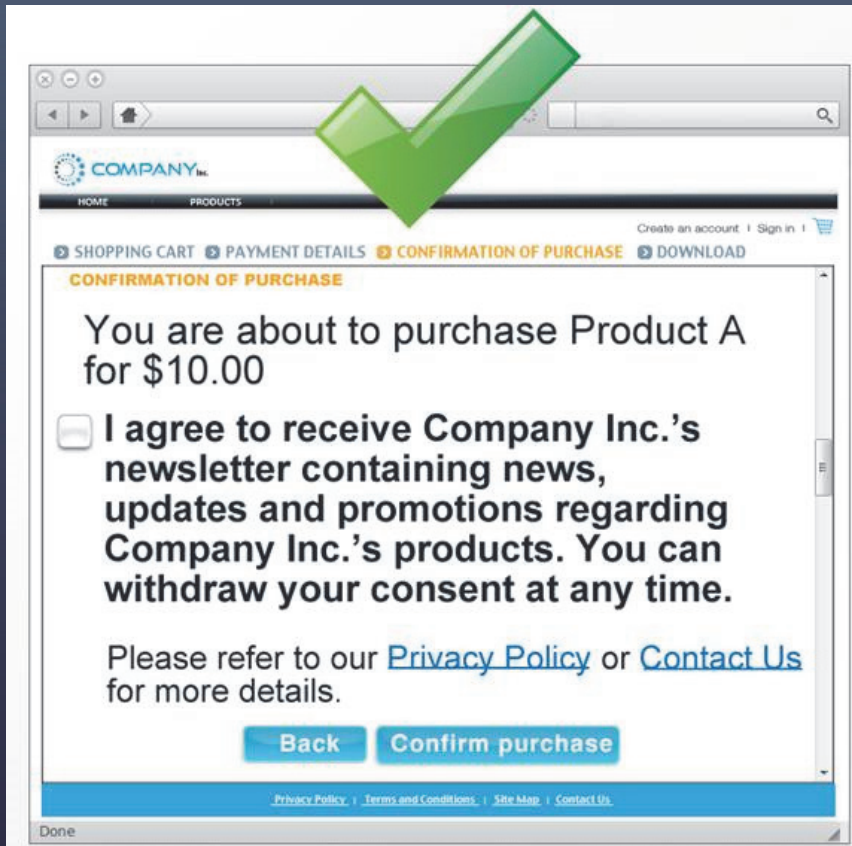
# CASL Consent

## Express Consent

- Affirmative expression of consent (no pre-checked boxes)
- Request for express consent must:
  - State the purpose for requesting consent
  - Identify who's asking for consent
    - If different identify the person on whose behalf the consent is sought and indicate who is asking for whom
  - Provide the mailing address, and either a telephone number providing access to an agent or voice messaging system, an email address or a web address for the person requesting consent or the person on whose behalf consent is sought
  - Explain right to withdraw consent

**Practice Tip:** While CASL is very prescriptive in relation to required disclosure, provided the above requirements are met, there is flexibility to craft the request to be appropriate to your brand voice.

# CASL Consent



# CASL Consent

Implied Consent exists only where:

- There is an “existing business” or “non-business relationship” between the sender and recipient of the message,
- The recipient has conspicuously published their email address, and the message is relevant to the recipient’s business, role or official function and no indication of opt-out, or
- The recipient has provided their email address to sender and message is relevant to the recipient’s business, role or official function and no indication of opt-out

# Unsubscribe Mechanisms

## CAN-SPAM

- Easy and free opt out
  - by reply email
  - by link to opt-out webpage
- Honored within 3 business days.

# Unsubscribe Mechanisms

## CASL

- Use the same electronic means as the message, or if not practicable, other electronic means;
- Give an electronic address or a web link for unsubscribe requests;
- Be set out clearly, and be able to be “readily” performed at no cost to the user;
- Be effective “without delay”, and no later than 10 business days

# Managing Opt-Outs

## CAN-SPAM

- Opt-outs must be honored within three business days
- Opt-out mechanism must be operational for 30 days after message is sent
- Sender is liable for emails sent to opt-outs, whether sent by sender or its service providers
- Affirmative consent by recipient overrides opt-out

**Practice Tip:** Because the burden of proof is on the sender, keep accurate records of your opt-outs and of those giving consent after having opted out!

# Managing Opt-Outs

## CASL:

- It is necessary to provide a means to opt-out from all commercial electronic messages from the message sender; however, it is permitted to also give the recipient the option to unsubscribe from specified classes of message. Companies may use this to seek to retain subscribers in cases where they are sending several classes of message.
  - e.g.
    - Unsubscribe from Brand X promotions
    - Unsubscribe from promotional email from Company X.
- Opt-out mechanism must be operational for 60 days after message is sent
- Sender is liable for emails sent to opt-outs, whether sent by sender or its service providers
- Subsequent affirmative consent by recipient overrides prior opt-out
- Retain records documenting the functionality of your opt-out process, in addition to your opt-out list, for example, recording when a request was received and when it was given effect.
  - CASL includes a “Due Diligence” defense, and retaining records establishing both one’s corporate compliance program, and the manner in which it functions, is helpful in this regard.



# CASL: Installation of Computer Programs

Similar to requests for consent to send messages, a request for consent to install a computer program must state:

- The purpose for which the consent is sought including providing a simple description of the of the function and purpose of the program;
- The name under which the person seeking consent carries on business, and if different, the name under which the person on whose behalf consent is sought carries on business;
- If applicable, which person is seeking consent, and on whose behalf consent is sought;
- The mailing address, and one (or more) of a telephone number, website, or email address of either the person seeking consent, or if different, the person on whose behalf consent is sought;
- That consent may be withdrawn.

# CASL: Installation of Computer Programs

If the program performs one of the following functions, then they must be brought to the person's attention separately from any other information provided, and the person must acknowledge in writing they understand and agree to them:

- collecting personal information stored on the computer;
- interfering with the owner's control of the computer;
- changing the settings, preferences or commands already installed or stored on the computer without the knowledge of the owner;
- changing the data stored on the computer in a manner that obstructs lawful access to or use of the data by the owner of the computer;
- causing the computer to communicate with another computer without the authorization of the owner;
- installing a computer program that may be activated by a third party without the knowledge of the owner

# Penalties for Violation

## CAN-SPAM

- Fines and injunctions for violations (up to \$16,000 per email)
- Criminal penalties for aggravated acts
- Enforced by FTC, other agencies, states
- Internet Service Providers enforce through “Black Lists”

# Penalties for Violation

## CASL

- Fines for violations (up to \$1 Million for individuals; up to \$10 Million for others)
- Enforced by the CRTC
- Private right of enforcement beginning 7/1/17, with a right to seek actual damages, plus statutory damages of \$200 per violation, not to exceed \$1 Million for any day on which a violation occurred.

# Questions?



# Thank You for Participating!



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